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THE CUBAN CLAIMS ACT: PROGRESS IN THE DEVELOPMENT OF A VIABLE VALUATION PROCESS IN THE FCSC

Michael W. Gordon*

INTRODUCTION

Foreign corporations face a continuing threat of intervention through inter- and intra-national conflict. The experience of the Foreign Claims Settlement Commission in dealing with the claims of United States nationals for property expropriated by the Cuban government may be helpful to attorneys whose clients face similar problems in future foreign nationalizations or whose properties are involved in foreign wars.

Claimants whose property was expropriated by Cuba have had three primary alternatives to pursue: litigation, sharing in a lump sum settlement with Cuba to be negotiated by the government, or satisfaction from a national fund created by Congress.

Litigation requires reliance upon the unforeseen discovery of properties of the Cuban government in the United States, followed by attachment and adjudication in one of many possible forums, with subsequent execution and sale. As a means of satisfying a claim arising from Cuban nationalizations, this method is often prohibitively expensive for the individual claimant and, at best, highly speculative. Compounded by the problems of sovereign immunity and the act of state doctrine, litigation is clearly an inadequate method for obtaining even a modicum of compensation for any significant number of claimants. Additionally, court actions favor those few banking institutions in which Cuba possessed creditor interests. For the vast majority of claimants, no such deposits or potentially attachable assets exist.

A Congressional compensation fund is unlikely. While several proposals were introduced in the Congress to reimburse

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United States claimants for losses in Cuba, none met with success.\(^2\)

Satisfaction of the greater number of individual claims, in the absence of a viable adjudicatory structure within Cuba, combined with a willingness to settle the claims, must evolve from some form of nationally administered claims settlement program in the United States. The claims legislation ultimately approved by Congress was considerably more conservative than several of the original proposals. The final progeny of the initial proposals was the addition of Title V, commonly referred to as the Cuban Claims Act, to the International Claims Settlement Act of 1949.\(^3\) The new Title utilized existing procedures and structures for the settlement of claims, encompassing the adjudicatory capacities of the Foreign Claims Settlement Commission.\(^4\) The FCSC was not created as a regulatory agency in the same context as the other administrative agencies in the government. Its essential function is one of adjudication of those claims defined in the enabling legislation: claims essentially arising from the taking of property of United States nationals by a foreign nation. Formation of the FCSC brought a semblance of continuity to the area of settlements, since the plan was prospectively designed to carry out the adjudication of all future lump sum settlements.\(^5\)

**THE HISTORY OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION**

The Foreign Claims Settlement Commission is the most recent version of a long history of changing organizational strata

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2. H.R. 10327, submitted to the House on March 10, 1964, sought to provide for the determination and payment of Cuban claims, with that portion of uncompensated claims accepted as collateral for federal loans to the claimants. The payment of the immediately compensable portion of the claims would have been made from assets found in the United States and blocked under the Cuban Assets Control Regulations of July 8, 1963. See 31 C.F.R. Pt. 515 (1966). It was estimated in 1964 that such fund might total $60 million, a sum even then known to be but a fraction of the expected total claims of $1.52 to $2 billion. See Hearings on Claims of U.S. Nationals Against the Government of Cuba Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, 88th Cong., 2d Sess., 144 (1964).


4. Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (1954). The President of the United States, on April 29, 1954, indicated that the Plan: 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.

14 FCSC SEMIANN. REP. 89 (Jan.-June 1961).

for the resolution of foreign property disputes. The impelling factor leading to the establishment of claims commissions has been the severe international conflicts of the first half of this century. World Wars I and II were the impetus for the major claims programs in the United States until the initiation of the Cuban and Communist China programs, although the nation had experience in foreign claims which dates to shortly after independence. The Jay Treaty of 1794, between the United States and Great Britain, utilized mixed claims commissions composed of representatives of the United States, the foreign nation which was involved in the claim and a third neutral nation. The mixed claims commission established by the Jay Treaty proved unable to cope with nationalist sensitivities and soon was discarded in favor of a national claims commission. A lump sum settlement with France in 1803 resulted in the United States establishing its first national claims commission. This initial commission, established informally without legislation, was followed during the next century by a series of national claims commissions to distribute funds received under treaties with Great Britain, Brazil, China, Denmark, France, Mexico, Peru, the Two Sicilies, and Spain. Subsequent to World War I, mixed claims commissions were again utilized in an attempt to resolve claims of United States nationals for property lost or damaged during the conflict.

The Relative Merits of National and Mixed Claims Commissions

The decisions evolving from these mixed claims commissions


7. See R. Lillich, International Claims: Their Adjudication by National Commissions 7 (1962) [hereinafter cited as Lillich, Claims Adjudication].


10. See Agreement for a Mixed Commission with Germany, Aug. 10, 1922, [1922] T.S. No. 665. See generally Griffin, International Claims of Nationals of both the Claimant and Respondent States—The Case History of a Myth, 1 Int'l Lawyer 400, 420 (1967). Other mixed arbitral tribunals evolved following World War I, essentially the outgrowth of various treaties allowing nationals to file claims with the commissions created by the treaties. Commissions were established by, inter alia, Britain-Germany, France-Germany, France-Turkey and Bulgaria-Greece. See Recueil des Decisions des Tribunaux Arbitraux Mixtes (1920-25). The use of mixed claims commissions following an international military engagement is obviously substantially dominated by the victor with its ability to impress upon the defeated nation the justice of providing for war reparations. It differs significantly from the Cuban experience, where international pressures have reduced the ability of the more powerful nation whose claimants await compensation, to resort to effective arm twisting to encourage settlement.
were marred by frequent disagreement. Commission members were often inexperienced in the operation of such a sensitive adjudicatory body and the national bias of the participants frequently clashed.\textsuperscript{11} Decisions occasionally had to be rendered by an umpire when the United States and German commissioners were deadlocked in their deliberation.\textsuperscript{12} Even when an agreement was reached, there was no assurance of payment. The agreement providing for the mixed commission contained no provision for the satisfaction of claims.\textsuperscript{13} Consequently, while the establishment of a commission avoided problems associated with the utilization of diplomatic channels to resolve the dispute, those channels were in fact exhumed for the enforcement of decisions and awards. Indeed, without an effective enforcement mechanism, the most efficient of claims adjudicatory machinery is rendered valueless to the claimant.

The difficulties made apparent by the ineffectiveness of the mixed claims commissions were evaluated in developing a more effective procedure for the resolution of subsequent international claims. The nationality conflicts which had reduced the effectiveness of the mixed claims commissions were eliminated, or perhaps more accurately transferred to a different stage, by the creation of national claims commissions composed entirely of members of the claimant nation. These members would hear and adjudicate claims subsequent to a lump sum settlement, at which time national sensitivities would appear. A crucial distinction between the forms of commissions is that the mixed claims commissions had to hear each individual claim, while the negotiation for a lump sum settlement to be distributed involved solely the discussion of an amount which would then be distributed as the collecting nation's national claims commission determined.

A further deficiency of the mixed claims commissions is that they were neither organized nor staffed to handle the volume of claims generated by such situations as the Cuban nationalizations. Under the Cuban Claims Act, 5,911 awards were made as of


\textsuperscript{12} \textit{Id.} citing the initial decision of the Mixed Claims Commission, which stated, "\textit{PARKER, Umpire, rendered the decision of the Commission, the American Commissioner and the German Commissioner being unable to agree. . . .}"

\textsuperscript{13} See \textit{Agreement}, note 10 \textsuperscript{10} supra. The German government, under the Dawes Plan in 1924, did agree to make annual installments for the reparations agreed upon by the Mixed Claims Commission. See \textit{Hearings on War Claims and Enemy Property Legislation Before a Subcomm. of the Comm. on Interstate and Foreign Commerce}, 87th Cong., 1st Sess. 78 (1961) (Statement of Dr. Edward D. Re, Chairman, FCSC).
June 30, 1972. It is unlikely that a mixed claims commission could adequately have adjudicated this volume of claims in the period of time required by the Foreign Claims Settlement Act. The aggregate amount of the claims allowed by the FCSC in the Cuban case of June 30, 1972, was $1,760,124,172.08. This figure obviously far exceeds any conceivable future settlement.

As international claims necessarily involve the interplay of two legal systems, a commission composed solely of nationals of either nation, particularly nationals of the country whose investors were subjected to the nationalization, may be unable to effectively determine the fair value of their nationals' property. Undoubtedly, the ultimate pro rata disbursement of whatever funds become available will favor some claimants over others because of inherent inconsistencies in adjudication. Moreover, if it is assumed that a mixed claims commission would have weighed facts in evidence and resolved the various claims in a substantive manner different from a national commission, further inconsistencies become apparent. Members of mixed claims commissions who are representatives of the nationalizing country will naturally tend to have a subconscious bias on the side of conservative methods of evaluation, while members from the country whose citizens were expropriated may be expected to lean toward liberality. Where difficult claims cause normally latent nationalistic sensitivities to become more overt, the subconscious bias may become a conscious adversary-like attitude.

The result of a national commission will most assuredly be a yield of higher total amount than the aggregate likely to emanate from a mixed commission. The main concern is whether certain elements of valuation would significantly differ in the two commissions. For example, a mixed claims commission might consider land to be of greater value than would the national claims commission, while both might use similar criteria for choses in action. Thus, where the final distribution is a pro-rata apportionment, those claimants with choses in action claims will fare better under the national claims commission than those with real property claims.

In the case of Cuba, however, it was not so much a matter of choosing the best form, but of utilizing the only form available. Where there is a breach of diplomatic relations between the two countries, the possibility of a mixed claims commission is

15. Id. at 25.
predictably exiguous. If political issues, such as existed in the Romanian settlement of 1960, become paramount, it is impossible to establish a judicial atmosphere in which the commissioners may operate. The result is an adversary proceeding between the representatives of the two nations with the third party member in the role of an arbitrator. When the case is as extreme as that in Cuba, even the utilization of a national claims commission becomes questionable, since no suggestions of a lump sum settlement have been forthcoming from Cuba. The benefits of the pre-adjudication aspects of the national commission, however, are evidenced by the determination of claims while parties and data are available and fresh.\textsuperscript{16}

Members of a national claims commission may well have an easier role in utilizing fairness as a standard. One's continued service as a commission member is not threatened by a national asset-conservation approach. A member on a mixed claim commission from the nationalizing country, however, may view his security as a commission member as directly proportional to his ability to reject claims.

The temporary nature of the national claims commissions subjects this format to the same complaints addressed to mixed claims commissions. Their transitory nature and inability to establish procedures lends a degree of ineffectiveness. During the last decade, however, significant attempts have been made at documenting past experience and suggesting improvements to procedures for the settlement of international claims.\textsuperscript{17}

During the interim between World War I and World War II, both national claims commissions and mixed claims commissions were utilized by the United States to resolve property disputes.\textsuperscript{18}

\textsuperscript{16} See text accompanying note 27 infra.


\textsuperscript{18} See also Lillich, \textit{Claims Adjudication} 8-11; Griffin, \textit{supra} note 10 at 421-22. Professor Lillich suggests that the failure of the mixed commissions with Mexico to resolve disputes was the significant factor leading to the ultimate adoption by the United States of the National Claims Commission as the primary method of claims determination. \textit{Id.} at 11.
While the lump sum settlement format might suggest less than complete indemnification, the advantages of the procedures of national claims commissions had become apparent by World War II, and claims following that war were resolved primarily by national claims commissions. Indeed, the national claims commission was almost uniformly to replace the mixed claims commission as the prevailing format for the settlement of international claims involving United States claimants. Certainly, the difficulties of the mixed claims commissions in overriding national interest would have been aggravated had that procedure been followed in post-World War II adjudications. In Latin America, as well as other Third World nations, increasing nationalism has effectively ruled out the utilization of international forums for the adjudication of property disputes. Arbitration as a method of resolving major disputes between the Third World and developed nations has failed to achieve a significant role. The increasing bi-polarization of the Third World and the capital exporting world does stress the need for an international adjudication process, but also evidences the extreme difficulty in establishing adjudicatory processes acceptable to the Third World nations.

The lump sum settlement and national claims commissions seem to have found a firm foothold. The politics and sensitivities of only one nation are involved in the determination of individual claims. As Lillich illustrates, countries have indicated a preference for a lump sum to be disbursed as the recipient nation deems best.

19. Approximate percentages of awards paid under the International Claims Settlement Act programs have varied. The percentages include the following: Yugoslavia, 91 percent (1st program), 36.1 percent (2nd program); Panama, 90 percent; Poland, 36 percent (estimated); Bulgaria, $1,000 plus 6.71 percent; Hungary, $1,000 plus 1.5 percent; Rumania, $1,000 plus 37.84 percent; Italy, 100 percent plus interest; Soviet Union, 8.5 percent; Czechoslovakia, $1,000 plus 5.30 percent. 1971 FCSC Ann. Rep. 33-35.

20. Some use of mixed commissions ensued, however, such as the American-Italian Conciliation Commission, evolving from the Treaty of Peace with Italy in 1947. This Commission was created to resolve disputes regarding property in Italy claimed by United States nationals. When the two national representatives disagreed, a third party neutral nation was added to resolve the issue.

21. LILICH, CLAIMS ADJUDICATION 11.

22. The experience of Peru in rejecting at various times prior to 1968 the 1924 international arbitration of the La Brea y Pariñas oil field controversy, clearly illustrates not only the reason for current reluctance to utilize arbitration, but the more serious possibility that arbitration, if accepted, may subsequently be rejected as a political reaction to nationalism. See Summers, Arbitration and Latin America, 3 Calif. West. Int'l L.J. 1 (1972).

23. LILICH, CLAIMS ADJUDICATION 14. Were two similar claimants to plead their cases before a mixed commission, one of whom had unsuccessfully attempted to obtain compensation before the local courts of the expropriating nation, the commission member from that nation might be hesitant in granting
This preference found recognition in the United States in
the formation of the Foreign Claims Settlement Commission. 
Upon this Commission devolved the responsibility for adjudicat-
ing the claims of United States nationals against the government
of Cuba.

THE ADMINISTRATION OF THE CUBAN CLAIMS ACT 

At the close of 1960 it was apparent that the direction to-
ward total nationalization which the Government of Cuba had
taken would result in an immense number of United States claims. 
The situation was further complicated by the doubtfulness of any
reconciliation of the political differences between Cuba and the
United States in the foreseeable future. Consequently, although
some procedures through the Department of State for receiving
claims were available, the prospect of an early and successful res-
olution of the claims was minimal.24 The magnitude and politics
of the situation strongly suggested some form of pre-adjudication.
Additionally, while the witnesses were available and claims were
fresh, documentation and adjudication of the claims would pro-
vide some basis for future distributions of any lump sum settle-
ment. A further beneficial aspect of the lump sum settlement
form was that the Cuban Government would be precluded from
paying only those claimants which it needed for future dealings.
Cuba might still, of course, be required to make private arrange-
ments with a company with which it desired to resume business,
including perhaps the payment of whatever portion of the com-
pany's claim remained unsettled. However, a lump sum settle-
ment agreed to between the governments would be distributed
pro rata among all the granted claims, not those selected by
Cuba.

The framework of the FCSC was available and it was pre-
dictable that the Commission would be used for the Cuban claims.
Members of Congress, aware that the pre-adjudication might never
achieve its ultimate goal, settlement of the claims, nevertheless
appeared in favor of an early adjudication utilizing available or-
ganizations,25 and, in 1964, the Cuban Claims Act was passed,

\footnotesize
the claim solely because of the possible offense to the jurist of his nation who
denied the claim on entirely distinct and inapplicable grounds. Brazil, in a
settlement of a dispute during the 1840's with the United States, ultimately
agreed to pay a lump sum to avoid the problems associated with the litigation of
claims within Brazil, and the undesirable prospect of relitigation of claims by a
mixed claims commission, a practice unappealing to the judiciary within Brazil.

24. LILICH & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARA-
TION AND PRESENTATION 93-94 (1962).

25. Re, The Foreign Claims Settlement Commission and the Cuban Claims
Program, 1 INT'L LAWYER 81, 82 (1966).
amending the international Claims Settlement Act of 1949 by authorizing the FCSC to determine claims of nationals of the United States against the Cuban government. The Act clearly denoted its adjudicatory rather than compensatory nature, stating "this title shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims."

The Cuban Claims Act, with the earlier created FCSC, provided the necessary organizational structure to commence the work of hearing and deciding claims arising from the Cuban expropriation. A brief look at the FCSC and the Cuban Claims Act structures is useful before considering specific claims.

**The Foreign Claims Settlement Commission**

The FCSC is a three member body whose members are appointed for staggered terms of three years by the President with the advice and consent of the Senate. Since the Commission's function is, as the Supreme Court has stated, intrinsically judicial, rather than regulatory, its functions could have been performed by either the United States Court of Claims or one of the District Courts. The benefit of the Commission, however, lies in its ability to gain expertise in the narrow area of adjudication of foreign claims, a sphere in which evidence of the form usually present in a legal controversy is likely to be unavailable. Furthermore, since the claims adjudicated in any one program will predictably have to share on a pro rata basis a lump sum settlement amounting to a small fraction of the total, it is sound policy to have those claims adjudicated by a single body, rather than a variety of Federal District Courts. To place the entire workload of the Commission upon a single District Court or the Court of Claims, contrastingly, would add a workload which would unfairly tax the ability of that court to continue its traditional work.

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26. 22 U.S.C. §§ 1643-43k (Supp. 1970). While it was apparent that the claims would be sizable, it was not predicted that they would reach the nearly $2 billion finally granted. President Johnson stated, upon signing the Act into law, that:

> The Castro regime has expropriated over $1 billion worth of property of United States nationals in total disregard for their rights. These unlawful seizures violated every standard by which the nations of the free world conduct their affairs. ... This bill will provide for the adjudication of these claims of American nationals. I have signed it because of the importance of making such a permanent record while evidence and witnesses are still available. 51 DEP'T STATE BULL. 674 (1964).


much less develop the new skills required to adjudicate the foreign claims.

The enabling statute prescribes that the Commission may establish its own rules and regulations, and it has adopted a set of basic guidelines for the presentation of claims. While the Commission has a judicial function, its organization and task necessitate deviations from more traditional judicial procedures. The adjudication of claims pertaining to acts occurring in a foreign nation raises obvious problems of proof. When hostilities persist between that nation and the United States, the difficulties are compounded. A past Chairman of the Commission has indicated that "[t]he Commission is not unaware of the fact that many claims are difficult to substantiate . . . [I]t . . . attempts to assist claimants in securing necessary documentation." The documentation most often needed, however, is that left behind in Cuba by claimants and beyond the reach of the Commission. The atmosphere of assistance which prevails in the Commission has been criticized as the Commission may too easily become a mere conduit for the applicant's view of his claim, which is accepted without serious challenge for possible later settlement.

While the Commission procedures provide for the appointment of counsel to represent the public interest, there is little evidence of any serious utilization of this non-mandatory provision.

The filing period was initially November 1, 1965, to May 1, 1967. The program was scheduled to be completed by May 1, 1970. Budget reductions, with a consequent decline in the number of the Commission's staff, resulted in a Commission request to extend the period. Congress complied and set the completion date for July 6, 1972. Although the terminal filing date remained May 1, 1967, the Commission continued to accept claims "so long as the consideration thereof does not impede the determination of those claims which were timely filed." Death and disability claims could be filed after the final filing date, if within six months of the date the claim arose.

32. Re, supra note 11 at 1091. Under the Polish Claims Program and the General War Claims Program the Commission maintained offices in Warsaw and Munich, respectively, to assist in the collection of needed data. 21 FCSC Semiann. Rep. 10, 15 [July-Dec. 1964]. This has obviously been impossible in the case of Cuba.
33. See LILICH, CLAIMS ADJUDICATION 51-52.
34. FCSC Regs., 45 C.F.R. §§ 531.6(c) (1972).
FOREIGN CLAIMS

The claims are filed on an official form, supported, where possible, by exhibits and documents. An FCSC staff attorney then examines and develops each filed claim. After the claim is receive and reviewed, the Commission issues a proposed decision, unless it has ordered a hearing on its own motion. If the claimant objects to the proposed decision, he may file his objections and, if he desires, request an oral hearing. FCSC experience indicates that the oral hearings have indeed been an important part of the claims procedures, particularly in the Commission's adoption of capitalization multipliers in establishing a going concern value.

The final decisions of the Commission, either the proposed decisions without opposition or the Commission's final conclusions after objections from the claimant, are usually certified to the Secretary of the Treasury for payment under whatever settlement agreement may be negotiated. In the case of Cuba, however, the Commission certifies to the Secretary of State the adjudicated amount.

The decisions of the Commission bear interest at the rate of 6% from the established date of taking. Title V has no provision for interest, but the Commission has stated that the Act's mandate determining the loss "in accordance with applicable substantive law, including international law," when read in conjunction with earlier provisions of the International Claims Settlement Act may be interpreted as allowing interest. The Commission further stated that interest on national claims was indeed recognized under international law. The amount of interest, which had

37. Form 666 for claims against the Government of Cuba. FCSC Regs., 45 C.F.R. § 531.2(e) (1972).
38. Id. at § 531.3.
39. Id. at § 531.5(b).
40. Id. at § 531.5(a).
41. Id. at § 531.5(e). Other claimants may additionally file objections to a proposed decision since their share of whatever fund is ultimately made available may be affected by each decision of the Commission. Re, supra note 11 at 1092.
42. The Commission's increasing acceptance of multipliers is discussed in detail in the text accompanying note 158, et seq., infra.
44. 22 U.S.C. § 1643f(a) (1970). The decision is not subject to review.
46. See id. at 51.
47. Id. citing 6 J. Moore, A DIGEST OF INTERNATIONAL LAW 1029 (1906);
varied in previous claims programs, was set at 6% for Cuban claims as "appropriate, equitable and just . . . under all the circumstances."\(^{48}\)

**Decisions Under the Cuban Claims Act**

**Property**

The FCSC is granted authority under the Cuban Claims Act to adjudicate claims in two broad classes:

-[for losses] arising since January 1, 1959 . . . out of nationalization, expropriation, intervention, or other takings of, or special measures directed against, property of nationals of the United States, and claims for disability or death of nationals of the United States arising out of violation of international law by the Government of Cuba.\(^{49}\)

The category which has accounted for the vast bulk of claims filed to date is the former, claims arising from nationalization, expropriation, intervention and other takings of property. Definitional provisions of the Act include debts within the meaning of property:

-[debts] owed by the Government of Cuba or . . . by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba . . . and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba . . . \(^{50}\)

Both the debt claims allowed under the above interpretation of property and the claims due to disability or death were new to FCSC programs.\(^{51}\)

The breadth of the interpretative concept of property is illustrated by several decisions of the Commission. Quite obviously, tangible real and personal property interests are included, as well as such substantial interests in property as leases. As might be expected, the less tangible the interest, the greater reluctance to allow the claim. The Commission has often been liberal in its interpretation of property. In the claim of *Wallace Tabor and Catherine Tabor,*\(^{52}\) the Commission allowed a claim for real prop-

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C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 203-04 (1928).

48. *Id.* at 52.


52. 25 FCSC SEMIANN. REP. 53 [July-Dec. 1966].
property where title had not been registered nor had the full purchase price been paid. The decision was based on an interpretation of Cuban real property law that a sale is considered consummated and binding on the parties even in the absence of delivery and payment of the purchase price.\textsuperscript{53} Real property has generally presented little interpretative difficulty for the Commission.\textsuperscript{54} The Commission has found a more difficult task in the area of personal property. Tangible belongings create problems of proof of existence and valuation, rather than issues of whether they constitute property.\textsuperscript{55}

Merchandise which was shipped to Cuba but not paid for is clearly property.\textsuperscript{56} The Commission has additionally allowed costs of freight, shipping and insurance where they were part of the original invoice submitted with the goods.\textsuperscript{57} In the Claim of Pilgrim Plastics Corp.,\textsuperscript{58} where the property shipped to Cuba was productive, \textit{i.e.}, a mold for manufacturing plastic heels, the Commission allowed both the contractual amount owed for the machinery and royalty payments for the nearly ten year balance of the contract period after the determined date of nationalization. All royalties had become due in the Pilgrim claim by the time of the decision. Royalty payments had been authorized earlier in

\textsuperscript{53} Id. at 55, citing J. Lanzas, \textit{Statement of the Law of Cuba in Matters Affecting Business} 78 (2nd ed. 1958).

\textsuperscript{54} See 25 FCSC Semiann. Rep. 55. Where the property is subject to a life estate interest of a third party, the Commission has used mortality tables and the Treasury Department’s prevailing interest rate for the collection of gift and estate taxes to determine the amount by which the claim should be reduced. Claim of Richard Franchi Alfaro and Anna Alfaro, 1967 FCSC Ann. Rep. 71.

\textsuperscript{55} Household belongings left in Cuba and confiscated by the Cuban Government have been the subject of valid claims. The main concern of the Commission is to obtain an accurate listing of the property and an estimate of replacement cost. At best the Commission has been able to scrutinize the list to determine whether it appears to be reasonable for the claimant’s income and status and then adjust individual items which may appear to be improperly valued. See generally Claim of Jack Moss, 25 FCSC Semiann. Rep. 52 [July-Dec. 1966] (detailed personal property list accepted); Claim of Richard G. Milk and Juliet C. Milk, 1967 FCSC Ann. Rep. 63 (detailed personal property list accepted with single change, reducing value of a freezer; additional reduction made for employer reimbursement of part of property loss); Claim of Linden Stanley Blue, 1968 FCSC Ann. Rep. 30 (aircraft valuation, less insurance settlement, and list of personal property accepted); Claim of Estrella Vaughn, 1971 FCSC Ann. Rep. 76 (furniture, fixtures and tools accepted; five year old automobile claim reduced from $2,500 to $625 and $23,546 claim for “Old Cuban Currency” denied for lack of substantiating evidence).

\textsuperscript{56} The burden of proving the debt for merchandise shipped is clearly on the claimant, including the production of appropriate invoices. Claim of Steel Heddle Manufacturing Co., 25 FCSC Semiann. Rep. 58 [July-Dec. 1966] (claim denied for failure to provide adequate documentation).


the Claim of Jantzen, Inc., but were not claimed in that case for the full, unexpired contract term, which would have run for three years after the expropriation. In a third royalty case, the Claim of Schiaparelli, Inc., the claimant, as in the Pilgrim claim, waited until the expiration of the contract period to file its claim and the Commission allowed royalty for the entire contract period. The results suggest that the claimant in Jantzen should have requested royalties to the expiration date of the contract, August, 1963, rather than to October, 1960. The latter date was apparently the last date of any documentation of net sales of the Cuban licensee. The difficulty in Jantzen was that the royalties determined by sales were impossible to predict for the balance of the contract, although some estimate based on averaging the completed years might have been applied.

Debts owed United States nationals and property designated by the Act may take several forms. In the Claim of Kramer, Marx, Greenlee and Backus, the court allowed a claim by a law firm for legal services rendered to nationalized Cuban clients. In the Kramer claim the debt was owed by Cuban entities. Where the debt is owed by a United States corporation which qualifies as a national under the Act, however, the claim will only be allowed when the debt is a charge on property which has been taken by the Government of Cuba.

A variety of miscellaneous claims have been presented to the Commission. A claim based upon a judgment against the Government of Cuba rendered in a Pennsylvania court was held to be proper under the Act, as were vested retirement benefits owing from the Government of Cuba, damages sustained during wrongful detention to personal property illegally detained in

59. 1968 FCSC ANN. REP. 66.
60. 1970 FCSC ANN. REP. 55.
61. There was, however, only a month and a half remaining on the three year contract at the time of nationalization.
62. 25 FCSC SEMIANN. REP. 62 [July-Dec. 1966]. In the Claim of John Korenda, 1971 FCSC ANN. REP. 36, the FCSC allowed a claim based on a debt acknowledged by the Cuban Government for the accidental killing of a United States tourist in March, 1957, during a raid on the Presidential Palace, one of the more noteworthy, although poorly executed and unsuccessful challenges to President Batista's rule before Castro came to power.
Cuba,67 and bond obligation of the Cuban Government.68

The Commission has rejected portions of claims representing items for legal and other fees related to perfecting claims,69 expenses incurred in moving property out of Cuba and opening new offices,70 and the moving or resettlement of employees and separation payments.71 The Commission has additionally generally rejected specific claims for goodwill, organizational expenses and future profits as not compensable under the Act,72 although these elements, as part of a going concern value, have been recognized in later decision. Several of the rejected items, such as relocation expenses of a business, are obviously incurred because of the nationalization. They do not, however, meet a property definition. The Act was not meant to allow recovery of all costs which might flow reasonably from the nationalization, but rather to determine the value of property directly affected by the Cuban Government’s actions.

Claims based on the second main classification, personal injuries or disability, come within the meaning of property only when the claimant establishes that the injury or disability was proximately caused by the Government of Cuba in violation of international law.73 Consequently, in a case where the injury was caused by incarceration for criminal acts not shown to be a violation of international law, the Commission rejected the claim as failing to constitute property.74

Standing

In addition to establishing that the subject of the claim is property, the claimant bears the additional burden of establishing

69. Claim of Mary Pauline Seal, 1967 FCSC ANN. REP. 57 (translation fees); Claim of Linden Stanley Blue, 1968 FCSC ANN. REP. 30 (legal fees). Attorney’s fees for attempting to recover property prior to utilizing FCSC procedures have also been denied. Claims of Berlanti Construction Co., 1971 FCSC ANN. REP. 83.
72. See, e.g., Claims of Berlanti Construction Co., 1971 FCSC ANN. REP. 83. Goodwill, organizational expenses, future profits and the general area of corporate asset valuation are discussed in greater detail below. See text accompanying notes 102 et. seq., infra.
73. Proof of such violation is naturally difficult for the Commission to obtain. For an interesting and successful attempt, see Claim of Jennie M. Fuller, 1971 FCSC ANN. REP. 53, 56-59.
his status as a national of the United States. The Act defines a national of the United States as:

(A) a natural person who is a citizen of the United States, or

(B) a corporation or other legal entity which is organized under the laws of the United States, or of 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. The term does not include aliens.\(^7\)

The Commission is not a forum for the adjudication of claims of Cubans who have been exiled to the United States. The individual or corporation must have been a national of the United States at the time of the taking.\(^6\) Consequently, those Cubans who fled to the United States subsequent to the taking of their property cannot qualify even if they have since become citizens. Those Cubans who fled before the date of nationalization, knowing that their property would be taken, are unlikely to have been able to establish citizenship prior to the actual taking. Furthermore, their departure might well be held to have constituted an abandonment of the property, subjecting the property to immediate confiscation by the Cuban government.

The status of the claimant as a national must be maintained from the date of the taking to the date of filing.\(^7\) When a party who satisfied the national status requirement died, a subsequent


\(^6\) The time of the taking has also caused some difficulty, essentially for claims filed for takings occurring prior to January 1, 1959, the statutory date beginning the period of expropriations to be covered by the Cuban Claims Act. 22 U.S.C. § 1643(b) (1970). In the Claim of Emilio J. Pasarell, 1967 FCSC ANN. REP. 56, the Commission denied claimant's theory that he owned a mortgage interest dating from 1926, but partially unpaid. The Commission interpreted Cuban law to require foreclosure of mortgages within 20 years, citing J. Lanzas, Statement of the Laws of Cuba in Matters Affecting Business, 317 (2d ed. 1958). In another claim, the Commission held that the sale of parcels of real property at auction, between 1954 and 1958, for unpaid taxes was neither an act of nationalization disguised as a tax sale nor could the claim be accepted because the acts took place prior to January, 1959. Claim of Louis P. Zink, 1967 FCSC ANN. REP. 65.

\(^7\) 22 U.S.C. § 1643c(a) (1970). Claim of Michael Vasti, 1967 FCSC ANN. REP. 62 (claim denied because claimant assigned it prior to filing). See also Claims of AOFC, Inc., 1971 FCSC ANN. REP. 70, 72 (interpreting section 504(a) and 505 of the Cuban Claims Act; Claim of Harry Mitgang and Anna Mitgang, 1967 FCSC ANN. REP. 66; Claim of John A. Stiehler, 1967 FCSC ANN. REP. 70. United States citizens remaining in Cuba and known to the Commission, had claims filed in their behalf. The Commission has attempted to document such claims and has certified them when satisfied of their validity. See Claim of Placido Navas Costa, 1971 FCSC ANN. REP. 42.
claim filed by the decedent's mother, a citizen of Iceland, was denied. The Commission was lenient, however, in allowing a claim in which it was impossible to determine the ownership of bonds for a short period subsequent to the time of the nationalization. The claimant, a United States national, filed his claim for the bonds which he had purchased 13 days after the issuer's property was nationalized.

The more difficult problem of standing involves corporations. As allowed by the Act quoted above, a claim may be presented individually by shareholders of a corporation only when less than 50 per cent of the stock of the corporation is owned by nationals. Where 50 per cent or more of the stock is owned by United States nationals, the corporation itself must file the claim. The Commission has consequently denied a claim in which a Delaware corporation was wholly owned by a Danish corporation, none of whose shareholders were believed to be United States nationals, while it allowed the claim of a United States corporation which was the parent of a wholly owned Panamanian corporation, which, in turn, was the sole owner of the expropriated Cuban corporation. When a corporation, otherwise qualifying as a national, became defunct after the loss, the Commission allowed a claim by the trustee for the benefit of non-claimant shareholders and creditors, thus avoiding the necessity

78. Claim of Sigridur Einarsdottir, 25 FCSC SEMIANN. REP. 45 [July-Dec. 1966]. Where the claim is filed by the national, however, the claimant's death does not prevent a non-national heir from pursuing the adjudication of the claim. Claim of Ampar Rodriguez, 1970 FCSC ANN. REP. 69. See also Claim of the Florida Nat'l Bank and Trust Co., 1970 FCSC ANN. REP. 67 (claim denied for inability of United States national administrator to establish United States nationality of beneficial owner of property); accord, Claim of Efrim Golodetz, 1971 FCSC ANN. REP. 60.

79. Claim of Samuel J. Wikler, 1968 FCSC ANN. REP. 47. The Commission utilized information submitted by the trustee on the bonds, which evidenced that the bonds had almost entirely been purchased and owned by persons with United States addresses. The Commission drew an inference that the bonds were continually owned by nationals of the United States, following the practice used by the Commission in the Soviet Claims Program. Id. at 49, citing Claim of Theodore Francis Green, 10 FCSC SEMIANN. REP. 205 [Jan.-June 1959].


81. Claim of Mary F. Sonnenberg, 25 FCSC SEMIANN. REP. 48 [July-Dec. 1966] (individual claim denied where the corporation stipulated that more than 50 percent of the stock was owned by United States nationals).


of numerous individual claims by minority shareholders. The members or trustees of a nonstock corporation, when 50 per cent or more of its members qualify as nationals, may bring a claim on behalf of the corporation.

Although no "foreign" owners were involved, a claim for the loss due to the expropriation of a Cuban corporation wholly owned by the United States government was denied by the Commission. The United States government owned a large investment in the Cuban Nickel Company located at Moa Bay. While the International Claims Settlement Act of 1945 provided that its jurisdiction was to determine "claims of the Government of the United States and of nationals of the United States," the addition of Title V to the Act clearly evidenced a specific Congressional intent to exclude claims by the United States Government for expropriation by the Government of Cuba.

Taking

In addition to the claimant's burden of proving that he qualifies as a national and owned property in Cuba on January 1, 1959, the proof of a "taking" has created a few hurdles. Because of the lack of more than fringe communications between Cuba and the United States during the two years of intensive nationalization, the Commission has of necessity established certain accepted dates applicable to various categories of property. While a number of claims have been supported by evidence of cited Cuban legislation or resolutions taking over the claimant's property specifically, other claims have relied upon several of the broader Cuban laws, which ultimately nationalized all remaining property.

84. Claim of Int'l Tel. & Tel. Corp., 1970 FCSC ANN. REP. 44.
87. Id.
89. The report of the Committee on Foreign Affairs of the House of Representatives stated that "U.S. government claims against Cuba are not governed by this Act and will be handled separately from the U.S. private claims to adjudicated under the legislation." H.R. REP. No. 706, 89th Cong., 1st Sess. 4 (1965). Presumably the United States would not have expected to have its claims paid in full prior to applying a lump sum settlement to other private claims under the act, a practice certain to cause justifiable objection, particularly for those governmental activities commercial in nature, including the claim rejected by the Commission. Since any ultimate lump-sum settlement will be the result of governmental negotiations, the United States Government would appear to be better off not utilizing the Cuban Claims Act, thereby allowing it to negotiate both a lump-sum settlement to be applied to claims adjudicated under the Act, and a separate settlement of governmental claims, albeit commercial in nature. Such a settlement would be no less subject to objections than the priority commented upon above.
United States property on the Island. The final nationalization acts have undoubtedly simplified the task of the Commission by the rather clear result that no foreign private property remains in Cuba—allowing the conclusion that property proven to have been owned at the required time had in fact been taken. Such encompassing Cuban legislation as Law 568, precluding transfers to all creditors abroad as well as within Cuba, has provided a useful base to ease the proof of the taking. When there is an added resolution by the government of Cuba specifically intervening the claimant, the combination of the two acts is even greater justification for finding a taking to have occurred.

Where a claimant company has been able to establish both dates of intervention and nationalization, the Commission has dated the taking from the former, since the claimant was effectively deprived of the full use of his property as of the date of intervention, rather than the date of nationalization. Proof of intervention alone, without the claimant's introduction of evidence of a further confiscatory act, should be sufficient to establish a taking, in light of the fact that all United States property was eventually taken. The Commission has even allowed a claim on the basis of a constructive taking where the claimant could find no decree, law or resolution specifically referring to his property in the Cuban Official Gazette. The decision was based on the general nationalization of the shipping industry, the seriatim Cuban passage of laws which "reinforced the control which the Government of Cuba already exercised," and the restrictions on currency flow.

The proof of the taking of real property has often been based on the Cuban Law of Urban Reform, passed in October, 1960. This law, affecting residential, commercial, industrial and

90. Law 851, July 6, 1960, Gaceta Oficial, July 6, 1960, implementing resolutions nationalizing remaining United States corporations. See Claim of West Indies Sugar Corp., 1970 FCSC ANN. REP. 78, relying generally on Resolution No. 1 of August 6, 1960. Several claims have relied on the broad nationalization laws with the Commission accepting the claim without actual knowledge of physical possession of the property by the government of Cuba. The Act indeed does not make physical possession of the property by the expropriating nation a condition of allowing a claim; it rather reflects the view that the claimant need only prove that he was deprived of the use of his property. See the Claim of Perkins Marine Lamp and Hardware Corp., 1967 FCSC ANN. REP. 42 (court accepted notice of Law 1076 of Dec. 5, 1962, Official Gazette, which nationalized all private enterprise engaged in clothing, weaving, and hardware business, as satisfying the proof of a "taking" requirement).

94. Id. at 32.
business office properties, terminated leases with private owners, ordered rents to be paid to the government and essentially sealed up many properties. The Commission has generally accepted this Law as resulting in the total takeover of subject properties, without need of convincing substantiating evidence.96

Obligations owing from banks in particular, and other debtors in general, have been the subject of numerous claims. The Commission decided that the series of Cuban laws relating to monetary reform meant that debts could not be paid to creditors outside Cuba.97 The Commission, noting the principle expressed by Wortley that a simple depreciation of currency or restrictions regarding transfer would not necessarily be a violation of international law, held that the Government of Cuba had not legitimately exercised its authority to regulate foreign exchange, but had confiscated the funds in violation of international law.98

The Commission, while liberal in determining whether a taking has occurred, has evidenced a limit to its leniency in rejecting the Cuban “Revolution” itself as proof of a taking. In the Claim of the Estate of Edward Borowy, Deceased,99 the Commission denied a claim for a package of jewelry which had allegedly been placed in a private depository in Cuba. Concerned that the package was not in a bank, and therefore subject to the laws of the government of Cuba, the Commission stated, “There is no evidence of record that this property has been taken by the Government of Cuba nor has any Cuban law been cited as affecting this property.”100 It seems reasonable to assume that the Commission was not so much saying that property remained in Cuba which was still privately owned by non-deprived United States nationals, but rather felt that small and valuable items which could possibly be removed from the Country clandestinely should be shown to have actually come into the custody of the Government of Cuba before a claim is allowed.

96. Claim of Jack Moss, 25 FCSC SEMIANN. REP. 52 [July-Dec. 1966] (actual date of taking held to be three months later, when Cuban official sealed claimant’s vacated apartment); Claim of Henry Lewis Slade, 1967 FCSC ANN. REP. 39; Claim of Placido Navas Costa, 1971 FCSC ANN. REP. 42; Claim of Estrella Vaughn, 1971 FCSC ANN. REP. 76.


100. Id. See also Claim of Estrella Vaughn, 1971 FCSC ANN. REP. 76, where Commission denied unsupported claim for $23,546 of “Old Cuban currency.”
While issues of defining "property," "national" and a "taking" have given rise to some difficulties, clearly the most controversial and yet unrefined area is that of determining the value of nationalized property.\textsuperscript{101}

The Cuban Claims Act requires the Commission, in determining value of nationalized property, to take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement.\textsuperscript{102}

The approach to valuation differs depending on the nature of the claimant. The claims basically fit into one of two categories. In the first category, specific, identifiable property, whether real or personal, is the subject of the claim. Valuation depends on the Commission's satisfaction with the description of the property and the utilization of some means of identifying its worth. With some variations, the Commission has essentially attempted to determine a market value whether the item be a parcel of land or a refrigerator. There are, of course, some problems in valuation of these items, and several claims will be discussed below to illustrate the Commission's approach to this type of valuation.

\textit{Real Property}

The Commission uses similar appraisal methods whether real property interests were owned by individuals or corporations. The purchase price of property is usually the starting point for consideration. Higher valuations appear as increases from the original price at which the land was purchased. When a claimant

\textsuperscript{101. See generally \textit{The Valuation of Nationalized Property in International Law} (R. Lillich ed. 1972).}

\textsuperscript{102. 22 U.S.C. § 1643b(a) (1970). Prior implementing legislation of national claims commissions, with the exception of the Czechoslovakian Claims Act of 1958, omitted any reference to methods of property valuation. The Commission adopted the rather broad definition of the "value" of the property at the time of the loss, applying concepts of market value. While the Commission accepted the introduction of proof of market value under a variety of standards, the Cuban Claims Act codified this willingness to admit proof based upon theories of book value, going concern value, cost of replacement, as well as fair market value. \textit{See Lillich, The Valuation of Nationalized Property by the Federal Claims Settlement Commission, The Valuation of Nationalized Property in International Law} 96-100 (R. Lillich ed. 1972). For legislative history regarding the adoption of alternative valuation methods, see Hearings on Claims of U.S. Nationals Against the Government of Cuba Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, 88th Cong., 2d Sess. 53 (1964).}
believes the value of his land based on purchase price is too low, he may seek appraisal services to establish a more realistic market value. In the absence of acceptable additional evidence, the Commission has little alternative but to rely upon book value as the best measure of asset valuation. Where the land was purchased shortly before the date of nationalization, the book value is likely to be the acceptable valuation.103

The use of appraisers has raised the serious obstacle of retaining persons with a legitimate knowledge of real estate values in Cuba at the time of the Revolution. The Commission has justifiably been concerned with the qualifications of preferred appraisers. The reported claims decisions evidence the successful retention by a number of claimants of one appraiser, Luis Parajon. In the Claim of Berwind Corp.,104 the Commission accepted Sr. Parajon's appraisal of land which increased the valuation $600,271.69 over the book value.105 Successive claimants utilized, with seemingly consistent advantage, Sr. Parajon's expertise to increase book value figures.106 Sr. Parajon had long experience in Cuba as an appraiser of real estate, including sugar properties. The Commission has been less reliant upon those persons used as appraisers who were exiled from Cuba but who were not formerly professional appraisers. That reluctance extends to accepting former Cuban lawyers as appraisers.107

Productive land adds an additional dimension to valuation, correctly recognized by the FCSC. The Commission accepted an appraisal of sugar cane fields and grazing lands based on yield in the Claim of Ruth Anna Haskaw.108

104. 1968 FCSC ANN. REP. 28.
105. For a comment by the attorney for Berwind regarding Sr. Parajon's expertise, see Laylin, Panel Discussion, The Taking of Property: Evaluation of Damages, 62 AM. SOC'Y INT'L L. PROCEEDINGS 35 (1968). The annual report of the FCSC suggests a valuation increase of $600,311.69, noted as an error from the actual decision in Friedberg & Lockwood, THE MEASURE OF DAMAGES IN CLAIMS AGAINST CUBA, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 117, note 19 at 120 (R. Lillich ed. 1972) [hereinafter cited as Friedberg].
108. 1968 FCSC ANN. REP. 31, 37. Also the result of an appraisal of Sr. Parajon. The same method of appraisal was later used by the Commission in other sugar and grazing land valuations. See Claim of Albert E. Wadsworth, Dec. No. CU-3381 (May 2, 1969).
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As indicated above, purchase price is a useful valuation criterion where the purchase was consummated near the time of expropriation. Purchase price was also the accepted valuation method in the Claim of Mary Paulin Seal,110 where the individual claimant had completed a four year installment purchase plan on a lot twenty-one months prior to its nationalization, in the Claim of Wallace Tabor and Catherine Tabor,111 where claimants had suspended the last few payments when nationalization seemed imminent, and in the Claim of Ebasco Industries, Inc.,112 where the property had been purchased only five and one-half years before nationalization, although not on an installment basis.

Less persuasive to the Commission, but allowed when convincingly documented, are offers to purchase which support a claimant's assertion that the real property value is higher than book value or purchase price. In the Claim of International Harvester Co.,113 the Commission accepted a valuation of certain real property of $173,000, approximately that offered for the property as documented by company correspondence. The Commission additionally allowed a substantially larger than book value claim for other real property owned by the same claimant, although the decision does not indicate that any offer was made on that property. Former Cuban employees had measured its value, notwithstanding a book value which totaled only $187,099.71 for both of the parcels.114

Where the land of a claimant was purchased long before the nationalization, and there are no recent documented offers nor available professional appraisals, the Commission expectedly has greater difficulty deviating from a purchase price/book value so-

110. 1967 FCSC ANN. REP. 57 (claimant did not request a higher valuation). One cannot help but suspect that for small parcels of land the Commission will not require the detailed proof required for commercial properties. Sympathy for individual claimants who have lost all of their belongings is understandable. Furthermore, the reduction of a claim by a few thousand dollars will have little effect on the ultimate outcome. If there ever is a lump sum settlement, the claimants will be fortunate to receive ten percent of their claim. Consequently, the reduction of a few thousand dollars may mean only a few hundred at payment time. For a claim determined toward the end of the program, where total claims had reached about $2 billion, with little question to valuation of property in which the claimants owned partial interests, see Claim of Placido Navas Costa, 1971 FCSC ANN. REP. 42.
111. 25 FCSC SEMIANN. REP. 53 [July-Dec. 1966] (claimants did not request a higher valuation).
113. 1970 FCSC ANN. REP. 71. The company had additionally authorized its employees to sell the property for slightly more than the offered amount and the final allowed claims value.
114. Id. at 73, 74.
lution. However, other valuation methods may help the claimant to achieve a fair valuation. In the Claim of Henry Lewis Slade, the Commission accepted company valuations endorsed by an Internal Revenue Service loss allowance. Further instances of the Commission's partial reliance on a claimant's valuation with an external organization were the Claim of Richard Franchi Alfaro and Anna Alfaro, where the accepted value was that given by the claimant for posting to the Registration Books in Havana, and the Claim of Jennie M. Fuller, where the claimant had filed an inventory, with fair market values, with the National Institute of Agrarian Reform, the revolutionary organization set up to administer the land reform program.

Improvements to land increase the complexity of valuations, although the general principles expressed above apply. Where buildings have been constructed, a claim by an individual will include the value added to the land in its undeveloped state. Recent purchase prices of similar properties, or firm offers to purchase the property in question, are persuasive. Less impressive, but in some cases sufficient, proof would be IRS loss allowances or Registration Book values as in the Slade and Alfaro claims mentioned above. Personal residences may create greater valuation problems than business properties. A former Commissioner of the FCSC has indicated that, in the absence of appraisal, acquisition costs, or sales of comparable residential buildings, the Commission will utilize cost of construction rather than replacement cost. Where the improved land is part of a claim by a corporation, however, the Commission will consider its productive value, as it has in the cases dealing with sugar and grazing lands. Thus, a going concern value may be the best valuation method for productive land, whether the developed land is appraised sep-

115. 1967 FCSC ANN. REP. 39. The claimant stated that his property was worth $25,000, but he had carried it on his corporate books at $44,000 since its purchase in 1929 ($12,000 purchase price, $32,000 in improvements), with depreciation at $24,800. The balance, or $19,200 was allowed by the Internal Revenue Service and also accepted by the Commission. There had been recent, and rejected, offers to buy about two-thirds of the property for $8,500, which the Commission did not seem to believe were significant. The decision is actually close to one based on book value, since the improvements were legitimate entries which increased the book value above the purchase price, subject to periodic depreciation.


117. 1971 FCSC ANN. REP. 53. The fair market value so listed, higher than assessed values, nevertheless had substantial documented support. Id. at 55.

118. See notes 115 and 116 supra.

119. Freidberg at 122. Improvements made to a leasehold interest have also been valued at cost, less depreciation. Claim of PPG Industries, Inc., 1970 FCSC ANN. REP. 51, 53.

120. See text accompanying and note 108 supra.
arately from other assets or is part of the total asset structure of a corporation, particularly if, in conjunction with other asset inputs, the result is the adoption of a capitalization multiplier.\textsuperscript{121}

**Extractive Industry Property**

The problems attendant to valuing petroleum and mining operations are compounded both because of the high initial risks and costs and, in the case of Cuba, the lack of success of extractive industries in locating substantial petroleum or mineral deposits, with perhaps the exception of nickel and sulphur.\textsuperscript{122} There have been no significant petroleum discoveries in Cuba. Consequently, the nationalization process resulted in the takeover of companies which had highly questionable assets. Extraction oriented companies which are in production have income statements which allow valuation by capitalization. There is no effective method for determining a value to a company, however, whose success has been solely in its consistency of drilling dry wells. Adding the high cost of exploration and the corporate propensity (and affirmation by accepted accounting principles) to list exploration costs as assets, claims of non-productive companies have expectedly provided the Commission with some moments of truly complex decision making.

One of the first reported FCSC decisions involving petroleum interests was the *Claim of Felix Heyman*.\textsuperscript{123} The valuation of several oil drilling and exploration companies was at issue, entities whose not atypical experience in drilling led either to dry wells or ones which at best could be described as “damp,” but which were certainly not of commercially productive levels. The investment was nevertheless a legitimate venture; the entities possessed concession rights in substantial acreage.\textsuperscript{124} The Commission’s task was to consider an expenditure of $1,574,267.86 which the corporation carried as an asset described as “unrecovered promotional, exploratory and development costs.”\textsuperscript{125} The value was rejected by the Commission in that it was “not fairly indicative of net disposable unit value,”\textsuperscript{126} preferring rather a book value with adjustment to the assets. The Commission allowed $886,615.03 of the broad category above, however, limited to those elements

\textsuperscript{121} Where developed property is leased the rental income may be capitalized to determine asset value. Claim of Sarkis K. Ayoob, Dec. No. CU-1989 (July 22, 1968).

\textsuperscript{122} See text accompanying and notes 128-30 infra.

\textsuperscript{123} 1968 FCSC ANN. REP. 51.

\textsuperscript{124} The concession rights either acquired or expected covered about 6.5 million hectares, or 16 million acres. *Id.* at 54.

\textsuperscript{125} *Id.* at 54.

\textsuperscript{126} *Id.*
of payments relating to the filing and transfer of claims; maps, plans, and geological and other reports; exploration expenses and tangible property such as machinery and equipment. While the Commission did disallow such expenses as salaries, office rent and travel costs as not properly constituting assets, the decision evidences substantial acceptance of the intangible and speculative value of a mining venture. What might be criticized is the Commission's failure to realize the inverse relationship which the value of mining stock would have as time transpired and the venture evidenced a distinct lack of success in discovering productive deposits. The distinction which the Commission is apparently trying to make in extractive industry claims is that those expenses which could have been directly the progenitor of productive wells should be allowed to retain some element of "asset" status, while those which clearly could not have been transferred into acceptable assets must be eliminated. The definition, as well as the Commission's decision, is at best an attempt to give some value to a legitimate industry so that those investors who are willing to risk capital in a highly speculative venture may obtain some compensation if nationalization occurs at an inappropriate stage in the development of the venture.

The Commission has rejected market value of speculative petroleum or mining securities where the actual prospects of the company were poor. In the Claim of D.R. Wimberly,127 the Commission rejected any valuation of stock on the basis of a speculative and fluctuating market, which ranged from $.25 to $1.125 per share, and substituted instead a value of $.1198 per share. The latter valuation was derived from the book value of the company after deducting nearly two-thirds of a book value asset designated "unrecovered promotional, exploratory and development costs."

In contrast to the claims before the Commission where little success had been achieved in discovering commercially productive oil or minerals, the Claim of Nicaro Nickel Company, evidences an enterprise which had yet to commence full mining operations at the time of nationalization, but convinced the FCSC that it was entitled to nickel which was not likely to be depleted for some time. The Commission first allowed a claim based on a right to proven ore at a discounted value over a period from 1961 to 1979, but rejected claims for probable ore and possible ore.128 However, the Commission, after oral hearing, reversed its earlier position and allowed decreasing discounted net value

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amounts for probable ore from 1979 to 1984 and possible ore from 1985 to 1992. The expert witness, a geologist, convinced the Commission that much of the probable ore was in fact proven, and much of the possible ore was probable. The decision represents another aspect of the more liberal approach taken by the Commission during the later stages of hearings under the Cuban Claims Act, paralleling its increasing openness to going concern value methods of appraising commercial entities, discussed at length below.

Where a claimant attempted to include as property the expectation of improved mining processes, however, the Commission was less amenable to the claim. In the Claim of Freeport Sulphur Co., the claimant assigned valuations to several of its mining concessions which had never been exploited. A mining official attempted to support the claims by asserting that higher metal prices and improved processing methods would render the deposits commercially exploitable. The Commission denied the entire claim for failing to establish any value to the mines on the date of loss.

Personal Property

It is often difficult for individuals who have fled an expropriating nation to reconstruct an accurate listing of their personal belongings. The Commission has been cognizant of this problem and, utilizing retail catalogs and advertisements, it has generally been liberal in allowing reasonable claimant estimates, less depreciation. In the Claim of Richard G. Milk and Julian C. Milk, the Commission accepted the stated total of $5,670.00 for personal belongings left in Cuba by comparing the claimants’ list with “similar items listed in material available to the Commission,” with a minor deduction for an over-valued freezer.

Personal property of corporations is readily identifiable with book value, less depreciation. The appreciation attributes of real property are generally absent. Consequently, the Commission has found little difficulty in determining value of corporate per-

129. 1971 FCSC ANN. REP. 38.
130. 1971 FCSC ANN. REP. 89.
132. 1967 FCSC ANN. REP. 63, 64. Accord, Claim of Jack Moss, 25 FCSC Semiann. Rep. 52 [July-Dec. 1966], where the entire detailed list offered by the claimant, totalling $6,229.00, was allowed. The Commission found the list to be “fair and reasonable” after a consideration of the value given to each item, although no reference was made to the Commission’s use of comparison data.
sonal property, rejecting requests based on cost or replacement, as in the *Claim of M & M Dredging & Construction Co.* \(^{133}\)

Where business property has been fully depreciated but remains productive a different valuation problem is presented. In the *Claim of IBM World Trade Corp.*, \(^{134}\) the claimant had utilized a rapid depreciation schedule for data processing rental machinery, which resulted in its possession of equipment producing rental income but which had been completely depreciated. The Commission lowered the depreciation rate for some machinery, rejecting any value for machinery produced prior to 1948. While the claimant did not so request, a valuation based on capitalizing rental income derived from the machines might have been preferable. \(^{135}\)

*Business Valuation: The Going Concern*

A piecemeal valuation of real or personal property may suffice to provide a resolution of most claims. But it is the second category that is the core of the valuation problem, and of far greater complexity. That is the valuation of an operating business. The Cuban nationalizations reached every form of business entity and activity. It was not the case of one industry or sector being expropriated, as has occurred in other developing nations such as Mexico and Peru, but rather a total elimination of private ownership of the means of production and distribution. Consequently, included among the properties nationalized were failing as well as prospering companies, companies engaged in the production of capital goods as well as goods for consumption, companies involved in a variety of distribution methods, utilities, transportation industries and every other sector where private ownership had gained a foothold over the past half-century. Although the first years of the Commission’s experience with the Cuban Claims Act suggest a hesitancy to vary from a strict book value approach, with an occasional reevaluation of particular assets, the Commission later adopted methodologies more in keeping with the broader view of valuation desired by Congress and expressed in the Act.

The essential difference in the concept of valuation between the Cuban Claims Program and earlier FCSC programs is the

\(^{133}\) 1969 FCSC ANN. REP. 28.

\(^{134}\) 1968 FCSC ANN. REP. 69.

\(^{135}\) Rental income would seemingly have been important to the valuation of motion picture prints produced by United States companies and distributed by nationalized Cuban businesses. The Commission has rejected using rental income in decisions, however, based on the Commission’s objection to valuations based on projected earnings. The general area of valuation of motion picture prints is not distinguished for its clarity. *See* Friedberg at 127-28.
allowance of a going concern value, which introduces such difficult determinants as goodwill and loss of profits. The addition of the going concern value category places an increased burden on the Commission. Considering the probability that full payment of all claims will never be forthcoming, and that claimants will have to accept pro rata amounts of whatever lump sum may ultimately be agreed to, those claimant business entities which are successful in including significant elements of goodwill and future profits may profit at the expense of those claimants unable to establish a going concern value or whose claims were processed prior to the Commission's acceptance of the going concern concept. Supplemented by the difficulty of proof of claims because of the frequent absence of adequate records in many cases, the task of the Commission becomes even more difficult.

The Commission has frequently indicated that unless other convincing evidence is introduced by the claimant, the book value is the most appropriate determinant. This approach should not be surprising. Written evidence is likely to be available only in the form of the production of certain of the financial records of the corporation. Such records may offer little in the way of documentary evidence suggesting a going concern or replacement value, although income statements are useful to calculate earnings for capitalization purposes. The book value itself, without any adjustment, is rarely an accurate reflection of the value of a corporation to a willing buyer. Since the balance sheet of a corporation does not often reflect a continuing reevaluation of a corporation's assets to reflect market value, book value will usually provide an artificial indication of the value of the corporation.136

The valuation pattern of the FCSC throughout the Cuban Claims Program suggests a substantial imbalance in the decisional pattern in favor of those corporations filing claims subsequent to 1968. The view which the Commission followed prior to the Cuban Claims Program, that of disallowing any valuation other than book value, persisted with the Commission in its early experience under the Cuban Claims Act, notwithstanding the clear enunciation in the Act broadening valuation methods.137 By 1969, the Commission had begun to accept evidence of replacement cost and going concern values, and by the following year, the Commission had largely discarded its over-reliance on book value. Had the Commission rigidly retained a book value

136. There is comparatively less likelihood that the book value will exceed the market value since assets are or should normally be devalued when they have suffered a predictably permanent loss of value.

137. See text accompanying note 102 supra.
concept throughout the period of filing of claims, the final results might be more equitable. However, the Commission's progressive modification of its approach ultimately admitted claims based on increasingly higher capitalization rates which amount to multiples of book value.138 Even within the Commission's period of acceptance of capitalization multipliers, the progression toward a higher allowable figure is apparent.139 Later claimants will therefore receive a larger pro rata share in any ultimate settlement. This change in the Commission's willingness to accept going concern values will be illustrated in the discussion below of the evaluation of corporate entities.

While the early claims decisions under the Cuban Claims Act do indeed reflect a Commission reliance on book value, some claimants offered only balance sheets as evidence, with no attempt to suggest the adoption of an alternative approach to measure the losses. The Commission should not be criticized for accepting a book value when it is requested by the claimant, and it does not appear to overvalue the assets. Criticism is fair, however, for the Commission's early insistence that book value was the only proper method of evaluation.

In the Claim of Parke, Davis & Co.,140 the claimant's reliance on the balance sheet was accepted by the Commission with a decision based on a book valuation of the capital stock. The Commission stated that "an examination of the balance sheet reveals that it accurately enumerated the assets, tangible or intangible, and all the liabilities of the enterprise."141 Since the corporation had operated only since 1955, there was some justification for believing the assets had not significantly changed in value in the seven years prior to nationalization. The decision does illustrate, however, as do decisions of the FCSC prior to the Cuban Claims Act, the Commission's overwilling acceptance of a balance sheet test on the rather curious grounds that the balance sheet accurately reflects a "true" picture of the assets and liabilities of a company. Such a position ignores the likelihood that the assets would reflect market value, since the firm presumably has utilized standard accounting procedures in preparing its annual statement, which, for example, do not normally consider appreciation of assets. The early pattern of the Commission in accepting book value as a true value resulted in a disturbingly consistent overreliance on book

138. See text accompanying notes 177 et. seq. infra.
139. In 1969 and 1970, the accepted rate was ten. By 1971 the Commission had increased the multiplier to 15, see text accompanying note 188 infra.
140. 1967 FCSC ANN. REP. 32.
141. Id. at 33.
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value, accepted as a crutch to avoid facing the difficult methods of substantiating going concern value or replacement cost, even where these methods more accurately reflect the market value of the corporation. The more recent experience has been a welcome relief from this static approach to valuation.

The burden of proof in establishing the market value is clearly placed on the claimant. Although the reported decisions may suggest an over-reliance on book value by the Commission, this cannot be affirmed in the absence of proof of a history of unsuccessful attempts by claimants to establish a value greater than that reflected in the books. While the initial decisions do indeed hint at a failure on the part of the claimant corporations to urge alternative methods, as much as they suggest an unwillingness of the Commission to accept alternative evidence, subsequent decisions of the Commission evince the increasing use and acceptance of evidence of going concern value. It is difficult to conclude, from a reading of the reported decisions, whether this change is attributable to an evolving change in philosophy by the Commission toward a more sophisticated approach, or to the presentation of the cases by the claimants themselves. Several decisions suggest that it was a little of both.

The Parke, Davis decision, based on book valuation of stock, was used by the Commission as a standard in subsequent decisions, such as the Claim of Avon Products, Inc., rendered shortly after the Parke, Davis decision.\(^{142}\) In the Avon claim, the documentation presented to establish the amount of the claim again focused on the most recent balance sheet. No apparent attempt was made to convince the Commission either that any of the assets were undervalued or that there was a going concern value. The Commission once again relied on the balance sheet to determine the book value of the corporation.

Both the Parke, Davis and the Avon claims suggest that the Commission was accepting the book value method proffered by the claimant, rather than refusing to adopt a going concern approach. However, one claim during this early period does support a conclusion that the Commission was itself initially reluctant to accept methods of valuation other than book value. In the Claim of General Milk Co., an attempt by the claimant to urge the adoption of a capitalization multiplier was rejected as insufficiently supported by evidence.\(^{143}\) The Commission did, however, begin in 1968 to respond to requests to value particular as-

sets by alternative methods of valuation. In early 1967, in the *Claim of Sherwin-Williams*, the Commission rejected such a plea.\(^{144}\) The claimant had introduced an insurance appraisal of buildings and equipment, pleading that the book value figures for these assets were based on tax considerations rather than replacement costs. The Commission held that there was insufficient justification for using the replacement figure since the company had “to within thirteen days of nationalization, relied on figures utilized in tax considerations and which have permitted profits to the claimants, some of which still appear on the balance sheet.”\(^{145}\) The *Sherwin-Williams* reasoning of the Commission was adopted in the proposed decision in the *Claim of the Berwind-White Coal Mining Co.*, also in early 1967.\(^{146}\) The Commission stated that there was no reason to alter the value of several of the assets, whose figures had been relied upon by the claimant's predecessor within 24 days of the nationalization. While consistent with the Commission's previous decisions, it is to the Commission's credit that it acted upon a convincing plea to lessen its reliance on book value and, in its final decision in 1968, allowed an upward evaluation of several parcels of land.\(^{147}\)

The initial movement away from book value as the sole determinant of valuation predictably occurred in the valuation of that asset which is most frequently undervalued, real estate. Carried on the books of a corporation at its purchase price, land is consistently undervalued on a balance sheet. Convincing the Commission to accept a different valuation for land was far more likely to meet with success than for such intangible assets as goodwill, however legitimate. Furthermore, in the case of the Cuban claims, professional real estate appraisers who had fled Cuba were available. As indicated above, their appraisals received substantial weight in the valuation of real estate, particularly urban land in the Havana area and sugar and grazing properties in the country. It is not surprising, therefore, that the final decision in *Berwind-White* allowed appreciated values for real estate. The claimant appeared at an oral hearing subsequent to the proposed decision and, with the addition of witnesses, documents, appraisals, corporation correspondence and third party estimates, estab-

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145. *Id.* While an insurance appraisal valuation based on replacement cost less depreciation should be more reflective of a fair value of the equipment than book value, the insurance valuation may also reflect a desire on the part of a company to value its equipment at more than its market or replacement value. The idea of over-valuation of assets for insurance purposes is not unknown.
lished to the satisfaction of the Commission an increased value of several parcels of land. The result was an increase in the valuation of some land by 50 percent and in other land by nearly double the original book value.\footnote{148. \textit{Id.} at 29. The Commission rejected additional claims involving other property and adopted book value amounts included in the proposed decision.}

The final \textit{Berwind-White} decision established, at a minimum, the willingness of the Commission to consider substantial evidence showing an appreciated value of particular assets included in the balance sheet. It did not represent any breakthrough in terms of a willingness to reject the balance sheet for a capitalization of earnings method, utilizing recent income statements. Indeed, in the above mentioned \textit{Claim of General Milk Co.}, decided only a month before the final \textit{Berwind White} decision, the Commission rejected the claimant’s request that after-tax income and average royalty income for three years preceding the loss be multiplied by a factor of 15 in order to arrive at a fair shareholder value.\footnote{149. Dec. No. CU-1043 (Jan. 24, 1968).} The Commission declined to act favorably on claimant’s plea on the basis that there was no evidence supporting the claimant’s method of valuation and that book value represented a more accurate form of valuation.

The continued reliance on a balance sheet test by the Commission was not an attempt to determine the claim at less than fair value, but rather a reluctance to accept less convincing evidence than the Commission believed a balance sheet test provided. Where the Commission could be persuaded that particular items in the balance sheet had been undervalued, it increased their valuation even though the final decree resulted in an amount in excess of that which the claimant had requested. In the \textit{Claim of Ruth Anna Haskew},\footnote{150. 1968 FCSC \textit{ANN. REP.} 31. The claim was presented by a shareholder of Cia. Azucarera Vertientes-Camaguey, a Cuban corporation. The corporation filed its own claim which was denied for failure to establish itself as a national of the United States. \textit{Claim of Vertientes-Camaguey Sugar Co.}, 1968 FCSC \textit{ANN. REP.} 84. For other results where claimant received more than requested, \textit{see Claim of Raymond S. Lupse}, 1970 FCSC \textit{ANN. REP.} 62.} the Commission dealt with the unusual situation where the claimant was a shareholder, but the Commission possessed substantial financial documentation from the company, which had also submitted a claim in behalf of certain other shareholders. Company information available to the Commission included a report for the year ending September 30, 1960, which had been filed with the Securities and Exchange Commission and listed net assets as $19,441,408. The company asserted, however, that the gross assets were $93,746,321.54, and, deducting the liabilities contained in the SEC report of $2,357,811, the
net asset valuation should be $91,388,510.54. While the Commission might well have accepted the report filed by the SEC as conclusively designating net assets, particularly since the accepted date of the expropriation was August 6, 1960, it instead allowed the asset listing as asserted by the company, with the exception of a substantial figure for property, plant and equipment. The September 30, 1960 statement listed property, plant and equipment at $15,161,039, approximately one-sixth of the $84,427,311.89 value assigned to property, plant and equipment by the company. The company asserted that the September 30, 1960 report listed those items at a 1937 reorganization plan value, and that they were consequently considerably lower than the actual value even at the time of the report. The company's proposed figures were substantially based on two appraisals by Parajon, but the company failed to deduct depreciation of manufacturing properties which reduced the total by $23,897,253. The Commission's final decision adopted nearly all of the figures proffered by the company, less the above mentioned depreciation for manufacturing properties. The individual shareholder claimant had submitted a claim based on less substantial information and requesting a lower amount for her 37 shares. The Commission utilized the higher figure for the determination of the claimant's loss. The Haskew claim is unique in that, although the company did not itself qualify as a national, it did in fact file a claim and therefore present its records to the Commission. Shareholders who must bring individual claims usually find it impossible to obtain corporate documents other than an annual balance sheet. The Haskew claim illustrates the benefit that may accrue to a shareholder where additional information is available. The company's unsuccessful claim bore fruit for the claim of its individual shareholder.

While the Commission may appear to have expanded its approach to evaluating assets by 1968, in August of that year it had an opportunity to clarify its position on the inclusion of such assets as goodwill. In the Claim of Bartlett-Collins Co., the claimant submitted balance sheets and income statements for two Cuban corporations for the year 1960, including as assets goodwill and organizational expenses. The Commission stated that "in the absence of other evidence, the Commission concludes that the book value is the most appropriate basis for valuation." The Commission was particularly concerned with the inclusion of an asset of goodwill in one corporation at $110,000.00. The concern was not without reason; that company's income state-

151. 1968 FCSC ANN. REP. 39.
152. Id. at 41.
ments disclosed that the company was operating at a loss. The Commission stated that "except as a bookkeeping entry, there is no basis in the record for finding that the subject company had any 'good will' value."153 The Commission also rejected the item of organizational expenses, which it stated was merely a bookkeeping expense item and, therefore, should not be considered an asset for the purpose of certification of a loss.154 The goodwill item was apparently not purchased goodwill, but an attempt by the claimant to provide for the goodwill acquired during its years of operation. In the former case, where goodwill is purchased, standard accounting procedures allow its inclusion as an asset. Accounting procedures do not, however, allow either an upward reappraisal or the creation of goodwill. Where goodwill is in fact evidenced by substantial profits, recognizing that for accounting procedures it may be inappropriate to consider it an asset, the determination of the value of the stock by a going concern method will result in the effective inclusion of goodwill as an asset. The Commission's rejection of goodwill based on losses of the corporation correctly suggests that the alleged goodwill asset, if it ever existed, should have been reappraised and reduced, possibly to the point of its total elimination.

The Claim of the First National Bank of Boston155 finally brought to the Commission a case where a going concern value was both requested, and, after much persuasion, ultimately recognized by the FCSC. The adoption by the Commission of a multiplier represented a major success for claimants; the means was established for future claimants who were able and willing to expend the effort to clearly present convincing evidence of going concern value to the Commission, and thereby to obtain a valuation far more representative of market value than the FCSC's history suggested was possible.

The claimant bank, supporting the claim for loss of its six branches in Cuba by showing a book loss value of $6,703,300.26, amplified the loss by providing a "Statement of Condition" of the branches which included substantial details of resources and liabilities. The claimant indicated, however, that it was not basing its claim on book value but rather on a going concern value. The bank acknowledged that the branch banks were difficult to appraise precisely on a going concern basis but stated that there could be no doubt that the value of the branches was far in excess of their book values. The bank then suggested that the going concern value could be determined by alternate methods, either a

153. Id. at 44.
154. Id.
direct earnings method (using a multiple of the average earnings of the bank for several years—the common capitalization multiplier) or by the rate of return/net worth method (calculating the relationship of the bank's rate of return on its invested capital and the price of stock in relation to its net worth). The claimant urged a comparison between their own branch banks in the United States and a representative sampling of other foreign banks operating in similar circumstances. A critical factor was that other Cuban banks could not be analyzed; no stock of Cuban banks was publicly traded during the period in question, and, therefore, it appeared necessary to look at other United States and/or foreign bank stock prices, particularly those of Latin American banks. Claimant indicated that utilization of one of the suggested procedures would justify a going concern value of the branches in the amount of $12.2 to $12.6 million, depending, respectively, upon the adoption of the direct earnings method or rate of return/net worth method.

The bank reached these figures by clear and easily comprehended calculations. For the direct earnings method the bank introduced evidence of earnings of its branches over a five year period between 1955 and 1959. The earnings established a 24.5 percent return on the Cuban investment. Claimant then suggested consideration of averaging the earnings multiples of 9.9 for three Latin American banks, 12.7 for a composite of 46 United States banks and 15.9 for four growth banks in the United States. On this basis it arrived at a value of the branch banks of $12,603,096. Using the rate of return/net worth method, the claimant indicated that there was a direct relationship between the return on invested equity capital (net worth) and the price at which stock was sold in relation to net worth. Claimant urged, calculating the average computed value for the same comparison bank, a figure of $12,222,126 for the Cuban branches. Stating only that it was not convinced that the proposed methods afforded "a valid and equitable evaluation," the Commission rejected the valuation and found the $5,651,384.36 book value the more appropriate value determiner.

The bank objected to the Proposed Decision, and particularly to the value placed upon the six Cuban branches by the Commission. Additional parties filed briefs as amicus curiae and oral testimony was presented by both counsel for the plaintiff and amicus curiae. The Commission, which had been vague in its reason

156. 1968 FCSC ANN. REP. at 62.
157. Counsel for International Telephone and Telegraph Corporation, yet to have its claim adjudicated, filed an amicus curiae brief and appeared at the hearing. An additional amicus curiae brief was later filed by counsel for Colgate-Palmolive Co. Claim of First Nat'l Bank, 1969 FCSC ANN. REP. 33, 34.
for rejecting the going concern theory, revealed that its reluctance had evolved from the difficulty in determining the proper multiple, as well as the inability of the bank to make a comparison with other Cuban banks. The admission of concern regarding a "proper multiple" at least suggested a willingness of the Commission to use multipliers, although it did not suggest what form of proof would have been necessary, nor how high a multiple might have been allowed. The Commission's concern regarding the inability of the claimant to compare its banks with other Cuban banks is understandable although unintentionally destructive. If all competitive industrial claimants were required to introduce comparisons with other similar businesses to convince the Commission to accept a going concern value, in those most complete nationalizations, such as Cuba's, there would be no hope of success. No business would remain to serve as a comparison. If the Commission were to allow the use of a multiplier by comparison data only, then banks outside of Cuba would have to be used.

The multiplier requested by the claimant bank evolved from data from growth banks and United States banks, where the multipliers were higher than for the three proposed sample Latin American banks. The Commission might well have accepted the average of the Latin American banks, without rejecting the multiplier concept entirely, although a sample of only three is certainly not an exact projection. Such a limited sample should be more reliable, nevertheless, than the book value figures resorted to by the Commission in the Proposed Decision.

At the oral hearing subsequent to the Proposed Decision, one expert witness suggested using the capitalization of earnings method with a lower multiplier, basing his view on the risk in conducting a banking business in a foreign country, the subjection of the enterprise to close governmental regulation, currency controls, and possible fluctuations in the currency of the foreign nation. Suggesting a multiple of ten, the witness indicated that the Cuban branches had in fact yielded a greater return on investment than the total international operation of the claimant bank, and that the use of a multiple of ten concededly represented a "crude and arbitrary adjustment, and was entirely a matter of judgment." The multiple of ten provided a going concern value of $9,336,810 applied to the average annual earnings during the five year period from 1955 to 1959, or $9,948,550 if applied only to the branches' 1959 earnings.

158. Id. at 35.
159. Id. The higher risk would suggest a need for a higher rate of return and therefore a lower total capital than with a low return.
The alternative method proposed for calculating the value, rate of return/net worth, had been rejected by the Commission for similar reasons in its Proposed Decision. That method determined the fair market value of the branches from a fair market value of the entire enterprise on the basis of comparison of net income. Claimant recalculated this value for the oral hearing, reducing the net amount because its original figure failed to show the effect of 1959 United States income taxes on the net income of the branches. The adjusted fair market value for the branches was determined by this method to be $7,999,320.

The Final Decision of the Commission recognized the inapplicability of the book value in this particular case, and adopted the second offered alternative, rate of return/net worth. The Commission used an adjusted value of the Cuban branches by determining the fair market value of the enterprises from its entire net income, and allocating the same amount of market value to the Cuban branches as their income bore to the total income of the enterprises. While the decision is clearly important and the Commission should be credited with its willingness to consider alternative methods to book value, it distinctly is not an adoption of a multiplier applied to a capitalization of earnings method of valuation.

In the interval between the rendering of the Proposed and Final Decisions in the First National Bank of Boston claim, the Commission continued to apply the test of book value with individual asset adjustment test. In the Claim of IBM World Trade Corporation, the major portion of the $7,866,167 claim was an entry of $5,881,949 for “Data processing rental machines.” Claimant argued for a valuation method based on the sale price of the machinery as of 1959, depreciated by an average of 50 percent, with the net increased by adding estimated freight charges and Cuban customs duties. The claimant believed that the original book value of the machines did not represent their fair value even at the time of the original capitalization. The Commission nevertheless rejected the argument, stating that the loss of machines and equipment should not be calculated on the basis of replacement costs but on the basis of cost less depreciation. As

160. In addition to the review of the branch bank valuation, the Commission repeated its denial of the claim for a debt of the Cuban Telephone Company, id. at 36. The Commission reversed, however, its original denial of a claim for a debt owed by Mid-Century Service, Inc. The original reasoning had been for reasons similar to those in the claim for the debt of the Cuban Telephone Company. On review, the Commission held the debt had been guaranteed by a since nationalized company and Mid-Century had become insolvent. Id. at 37.

161. 1968 FCSC ANN. REP. 69.

162. See text accompanying note 13 supra.
authority, the Commission referred to an early claim by IBM, filed under the War Claims Act for losses sustained during World War II.\footnote{163} While the result was an adjudication of a cost of production of $2,960,000, substantially less than the company's assertion of the aggregate sales price of the machines at $6,944,255, the Commission's more favorable depreciation allowance reduced the amount by only $854,654, while the company had calculated a depreciation of $2,314,729.\footnote{164} The Commission rejected the company's request for inclusion of $1,252,423 for freight charges and Cuban customs duties on the grounds that when a data processing machine was initially leased, the customer paid all import charges in addition to the monthly rental fee. The Commission stated that there was "no justification to increase claimant's loss with the amounts necessary to cover the estimated cost of freight, insurance, and Cuban customs duties, needed to import new machines in order to continue its business operations as prior to the date of loss."\footnote{165} In addition, the Commission totally rejected an asset listed as "Invoice clearing," which purportedly represented additional assets which the claimant was "unable to classify" because of a lack of sufficient data, and an item for the expected increase in profits between the date of the submitted balance sheet and January 26, 1961, the date of the nationalization. The Commission denied this portion of the claim on the grounds that prospective earnings were not recoverable under the Act. Other decisions of the Commission through 1969 similarly do not evidence a development of the First National Bank of Boston result. The claimants' demands were primarily based on individual asset valuations, rather than going concern values.

The question of the allowance of organizational expenses was resurrected in the Claim of Libby Holman Reynolds.\footnote{166} While the Commission stated that "in some cases organization expenses are not allowable,"\footnote{167} in this case they were allowed because they had been incurred in the creation of the chain store operation which was continued as a commercial operation by the Cuban government. The Commission reasoned that since the Cuban government was receiving the benefit of the creation of the claimants' chain store, organization expenses were indeed an asset of the nationalized corporation. It would therefore appear that the Commission's decision to include organizational expenses may be dependent upon the decision of the Cuban Government

\footnote{164. 1968 FCSC ANN. REP. at 73, 74.}
\footnote{165. \textit{Id.} at 74.}
\footnote{166. 1969 FCSC ANN. REP. 24.}
\footnote{167. \textit{Id.} at 27. See Claim of Bartlett-Collins Co., 1968 FCSC ANN. REP. 39.}
as to whether the particular corporation is a viable one in the framework of the newly created Cuban socialist economy. It seems patently unfair for a corporation which has expended sums in organizing a business, which under pre-revolutionary conditions in Cuba would have been continued with a going concern value, to be required to depend for allowance of certain assets on the decision of the expropriating government as to whether the business would be continued within the parameters of the new society.

In this same claim, although without any reference to its reason for inclusion, the Commission allowed an asset of goodwill. The decision does not indicate, however, whether this particular goodwill was a purchased asset or one which the corporation inserted in the corporation's balance sheet to reflect an acquired goodwill over its period of operation. If the former, the claim may be distinguished from the Claim of Bartlett-Collins Co.,168 in which goodwill was rejected. If the latter interpretation of goodwill is meant, the Commission would appear to have amended its earlier position and adopted a more liberal attitude toward the inclusion of goodwill.169 Because the goodwill included in the Reynold's claim amounted to only about one-sixteenth of the net worth, it may have been considered de minimus, while the goodwill asserted in Bartlett not only amounted to one-third of net worth, but the company had been operating at a loss, facts significant enough to raise an objection by the Commission.

The issue of organizing costs was again raised in the Claim of Independence Foundation.170 The Foundation's partly owned steel mill in Cuba had not yet commenced production and, consequently, there were no earnings to offset such expenses as “work-in-progress” and “financing and organizing costs,” both included in the claim. Expenditures for travel expenses and legal and other fees were included in the classification; similar expenses were rejected by the Commission in the Claim of Felix Heyman, involving oil drilling ventures.171 The FCSC was again concerned that the Cuban Government benefited from the company. Noting that some reports from Cuba suggested that the Government of Cuba continued the expansion of the corporation, and that by early 1964 it was a sizable operation, the Commission commented that “although Antillian Steel Corporation had

168. 1968 FCSC ANN. REP. 39, see text accompanying note 151 supra.
169. When the Commission began recognizing multipliers which provided an asset value higher than book value would evidence, the Commission was recognizing as an asset that intangible factor of value which a going business possesses, part or all of which may be attributable to goodwill. See, e.g., Claim of Johnson & Higgins, discussed in text accompanying notes 187-88 infra.
171. 1968 FCSC ANN. REP. 51. See also text accompanying notes 23 supra.
bright prospects for the future as of March 25, 1960, the date of intervention, it probably had not yet reached its break-even point, and therefore had not yet recouped any of its 'starting up' expenses, the benefit of which later accrued to the Government of Cuba." 172 Although earlier statements of the Commission appeared to have objected to the inclusion of the organization expenses, the Commission finally concluded by allowing the book value requested by the claimant, a value which offered a $100 per share valuation and reflected the inclusion of the organization expense asset rejected separately. The decision may have been based on the fact that the claim was filed by a Foundation which had actually paid the claimed $100 per share for its stock; the Commission stated with apparent compassion that such a measure was "most equitable to the claimants; . . .." 178 The Commission thus has rejected organizational expenses when the claimant company has not been in operation long enough to produce earnings to offset them, but allowed the expenses when the company produced earnings to offset the expenses, or where there was evidence that the Cuban government had continued the operation of the company and benefited from the claimant's expenditures.

The United Fruit Sugar Company, 174 in preparing its claim which finally totaled $85,100,147.09 for expropriated property, utilized the services of Parajon, the same professional appraiser whose appraisals the Commission had favorably accepted in earlier claims. 176 The Commission indeed stated that "[i]nasmuch as the method used by Parajon e Hijo has been accepted in other claims, that appraisal is followed to determine the value of the land and improvements . . .." 176 The land and building so appraised represented the greater proportion of the claim, amounting to $74,447,243.30. Claims for livestock, merchandise, autos and trucks, and other personal property assets appeared to have been well documented by the company and were accepted as stipulated by the corporation. The case illustrates a claim in which the corporation has presented a detailed documentation of its asserted list of assets, but has not asked for any going concern value on the basis of income. Whether the claimant's failure to request a going concern value was the result of unavailability of documents establishing sufficient income, or a lack of knowledge

172. 1969 FCSC ANN. REP. at 42.
173. Id.
175. See, e.g., Claim of Berwind Corp., 1968 FCSC ANN. REP. 28 (1968); Claim of Ruth Anna Haskew. 1968 FCSC ANN. REP. 31; see text accompanying notes 104-06 supra.
176. 1969 FCSC ANN. REP. at 45.
of the then recent acceptance by the Commission of going concern valuation, cannot be determined from the reported decision.

In a decision omitted from the FCSC's annual report for the year, the Commission accepted a going concern value based on the use of a capitalization multiplier. In the Claim of General Dynamic Corp., the Commission first rejected a suggestion of valuation using a multiplier of from 10 to 15,\textsuperscript{177} then accepted a capitalization rate of 10 after new evidence.\textsuperscript{178} The second stage of the breakthrough, following the acceptance of going concern concepts in the First National Bank of Boston claim, was complete—multipliers were recognized. The next challenge for perspicacious claimant attorneys was how high a rate the Commission might accept in a given set of circumstances. Chances for success appeared best with a very successful corporate operation.

The Commission faced another persistent bank in the Claim of First National City Bank.\textsuperscript{179} First National City urged that the going concern value method was necessary because its eleven Cuban branches had been operating since the 1920's and book value for real property, furniture, fixtures, and equipment did not accurately reflect the true value as of the date of loss. The claimant suggested several methods for arriving at a fair valuation, each, less offsets, closely supporting its asserted value of $12,899,132.30. Included was an asset of “Goodwill and going concern value,” listed at $5,812,279.10.

While the Commission accepted a going concern value method, it disagreed with the claimant regarding the appropriate multiplier. The Commission rejected suggested multipliers of the claimant of 13.3 and 15.1 because they were computed from statistics relating to five United States banks. The Commission adjudged the better multiple to be closer to the 9.9 used for three Latin American banks and computed the claimant’s capitalization at a rate of 10 percent. The rate was applied to earnings from 1955 to 1959, and the loss was established as $9,510,000. The capitalization method was again affirmed.

One of the largest claims presented under the Cuban Claims Act was that of the Cuban Electric Company\textsuperscript{180} in the amount of $323,570,419.38. While the largest portion of the claim, $285,266,482, allegedly the value of the utility plant, was accepted by the Commission, several other items were reduced. Additionally, the Commission rejected amounts paid to employees

\textsuperscript{177} Proposed Decision, Dec. No. CU-3787 (July 30, 1969).
\textsuperscript{179} 1969 FCSC ANN. REP. 54.
\textsuperscript{180} Claim of the Cuban Electric Company, 1969 FCSC ANN. REP. 74.
not as compensation for property taken as a result of the Government's actions, but rather for severance pay, pensions and for other resettlement reasons. The final reductions for certain indebtedness reduced the judgment to $266,513,667.40. The claim was based on an asset valuation without reference to goodwill or going concern criteria. There was no discussion in the case of attempting to establish a going concern value. Whether the substantial amount requested and allowed for the "Utility plant" included a going concern element is not apparent from the reported decision.

The method of evaluation of a corporation's leasehold interest, using going concern value, was determined in the Claim of Intercontinental Hotels Corp.\textsuperscript{181} IHC had purchased a hotel lease for $3,600,000. Between 1958 and 1960 but prior to the confiscation of its properties, it expended an additional $1,454,827 on improvements. The lease had approximately 29\textfrac{1}{2} years remaining after the date of nationalization. Evidence submitted by IHC showed an extremely profitable operation, with net incomes of $780,209.64 and $880,468.82 for 1956 and 1957, respectively. Substantial net losses were shown in 1958 and 1959, and for the brief period in 1960 prior to nationalization. All the losses were attributed by the claimant to the reduction in tourism because of the revolutionary movement of Castro and his ultimate take-over of the country. The claimant urged a computation of a going concern value for its leasehold using a multiplier of 8 for its earnings during the allegedly "normal" years of 1956 and 1957, which resulted in a going concern value of $6,850,000. The Commission agreed that book value was inappropriate, and offered to increase the multiplier from the requested 8 to 10. The offer was not without a quid pro quo. The Commission refused to eliminate the 1958 income from consideration since, although Castro may have had an effect on the nation, he did not begin his nationalization program until after assuming power in 1959. Consequently, the Commission included the three year period 1956 through 1958, which produced an average annual net earnings of $401,396.73. The reasoning of the Commission was clearly inadequate. While the losses prior to the take-over on January 1, 1959 are not compensable under the Act, the claimant merely requested the omission of the 1959 losses in determining the value of the hotel business, which was not "lost" within the meaning of the Act until 1960. It was a legitimate request by the claimant; the year 1958 was not a normal year for tourism.\textsuperscript{182} The inclu-

\textsuperscript{181} 1970 FCSC ANN. REP. 25.
\textsuperscript{182} This author was in southern Cuba in January of 1958. Few police were seen in contrast to the state existing in Havana where searches were frequent and
sion of the year's substantial losses caused a clear distortion in the earlier proven earnings capacity of the hotel.

By capitalizing at 10 percent, the net valuation acceptable to the Commission was $4,013,967.30. The Commission then added to the amount those improvements made shortly before intervention on the basis that IHC was unable to reap the rewards of the recent investment. The decision substantiates the view that when the Cuban government continues a business, and it was common knowledge that the government was using the hotels in Cuba for its own purposes, expenditures by the former owners of the business which had not yet been recouped by profits are allowable by the FCSC.

In the same claim, the Commission rejected the claimant's request for fees for "management compensation." The company requested a 12.5 capitalization multiplier for a $25,000 annual fixed fee guaranteed to it for managing the hotel. The Commission, consistent with earlier opinions, indicated that this claim was one for future earnings and not appropriate under Title V of the Act.

The Commission's newly acquired attraction to multiplier concepts even led it to request a statement of net earnings in a subsequent decision, perhaps in an attempt to use a multiplier to establish the validity of claimant's apparently inflated assets. The FCSC was beginning to learn the utility of the multiplier to check inflated claims as well as to allow a more appropriate valuation than book value alone. In that case, claimant provided an asset valuation by an officer of the corporations in addition to two balance sheets for the years 1958 and 1959. The affidavit of the claimant included accounts receivable, which had been noted by the company's accountant at the end of 1958 as potentially uncollectable and had been written off the books in 1959. Concerned that the assets were inflated, the Commission suggested submission of net annual earnings. The claimant responded by indicating it would eliminate the accounts receivable assets from its claim, which would reduce the total claim by approximately 40

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police carried automatic weapons as a matter of course. On an earlier visit in February, 1957, this author was searched several times during a period of a week, although only at apparently high risk functions and places, such as at a plaza awaiting a speech by President Batista, and when near an army barracks and La Cabaña, the prison used by Cuban presidents to house political prisoners. In March of 1957, a tourist was shot by Cuban police during resistance to an attack on President Batista in the Presidential Palace by insurrectionists. Curiously, the family of the tourist successfully filed a claim under the Act, since the government of Cuba had admitted liability and agreed to compensate the decedent's mother. Claim of John Korenda, 1971 FCSC ANN. REP. 36.

percent. At the same time, however, claimant increased its asserted loss approximately two-fold on the basis of an alleged going concern value. Claimant offered profit and loss statements for the years 1953 through 1958, and calculated its total loss as including the net worth of its subsidiaries on December 31, 1958, the date of expropriation in the view of the claimant. Claimant then added the estimated net profits of the subsidiaries through December 31, 1969, and an estimated loss of earnings on those net profits at six percent for that same 10 year period. The estimate was based on the theory that the earnings from the company could have been invested at an annual return of six percent. The Commission totally rejected the method of calculation, indicating that any profits after the date of the expropriation belonged to the government of Cuba and not to the claimant. The Commission instead adopted an evaluation based on the average net earnings for a five year period ending December 31, 1958, capitalizing them at 10 percent. Then, rather surprisingly, the Commission added to the capitalized value of the corporation what it considered additional factors to be considered in the amount of the "excess of liquid assets, such as cash and accounts receivable, over current liabilities. . . ." Since the purpose of the capitalization rate is to determine the total amount which a corporation is worth, i.e., its assets over its liabilities, the addition of any value to that amount would be effectively increasing the capitalization rate. In this case the result was that the Commission increased the value of the corporations to an amount which, applying the stated average incomes, reflected multipliers of approximately 14 and 12 for the two corporations.

Although the multiplier concept had finally become a standard fixture in the FCSC's repertoire of valuation methods, it continued to use book value, with adjustments, where requested or appropriate.

The Commission evidenced its increasing willingness to accept non-book value approaches when presented with convincing evidence. In the Claim of Johnson and Higgins, the FCSC in its Proposed Decision, granted a goodwill value of $300,000 for

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184. The Commission stated that Title V did not encompass future earnings, citing Claim of Robert L. Cheaney and Marjorie L. Cheaney, Claim No. CU-0915; Claim of Ford Motor Company, Claim No. CU-3072. The interest was actually added, but in a different manner. Consistent with all claims, the Commission allowed interest at the rate of six per cent to the date of settlement.
185. 1970 FCSC ANN. REP. at 35.
an expropriated insurance agency. The amount was slightly more than the agency's annual gross income from 1955 to 1959. After an oral hearing at which an insurance appraiser testified that an agency is conservatively worth twice the annual gross income from commissions, the FCSC accepted the multiplier of 2 and increased the goodwill valuation to $600,000.\textsuperscript{188} The use of a multiplier of 2 should not be confused with the 10 multiplier which earlier had been accepted by the Commission. Not only did the claim involve the uniqueness of an insurance agency, but the 10 multiplier was applied to net rather than gross income. Since net income of the insurance agency had averaged about $150,000 in the immediate pre-Revolution period, the Commission used a multiplier of about 4 applied to net income to obtain goodwill. Even that does not explain the multiplier, since it was used only to find the value of goodwill, not the value of the business as a whole. The Commission also allowed an amount representing net worth, assets minus liabilities, of $89,099.23. The Commission's decision thus appears consistent with its increasing pattern of an awareness of the limitations of its old straightjacket, the book value method of valuation.

The Commission's use of multipliers took on an added importance in the Claim of Colgate-Palmolive Co., when the FCSC allowed for the first time a multiplier of 15.\textsuperscript{189} Claimant objected to a Proposed Decision by the Commission partially because the Commission used a multiplier of 10.\textsuperscript{190} Claimant argued that its Cuban subsidiary corporations' business had been increasing and that a multiplier of 20 times net earnings of each corporation or 18 to 43 times average net earnings for the successful year of 1959 would be appropriate. The Commission was convinced that higher multiples could be justified for corporations with demonstrated growth rates and allowed a multiplier of 15 for the 1959 net earnings. What is particularly significant is that the Commission not only increased the multiplier which it had been applying previously by 50 percent, but applied that multiplier only to 1959, apparently the best year for the claimant. In earlier decisions, the Commission had used a span of years from which to gain an average for net earnings. The growth of the claimant, however, aside from the increased multiplier, justified the use of only one year in the Colgate decision.

Although the Colgate decision was not the breakthrough represented by the Commission's initial recognition of multipliers,

\textsuperscript{188} 1971 FCSC \textsc{Ann. Rep.} 40.
\textsuperscript{189} Dec. No. CU-4547 (Feb. 3, 1971), reported in 65 \textsc{Am. J. Int'l L.} 627 (1971).
\textsuperscript{190} Dec. No. CU-4547 (March 4, 1970).
it is important in that the Commission was willing to consider multipliers other than the ten factor which was first adopted. The FCSC has appropriately lessened an apparent rigidity in relying on relatively fixed concepts of valuation. A claimant in future programs may expect acceptance of a well-documented and persuasively argued claim which requests the utilization of a multiplier appropriate to the particular circumstances of the claimant. If recent profitability justifies a higher multiplier, then, as in the *Colgate* decision, the FCSC may be expected so to decide. However, *Colgate* remains a sale precedent. Subsequent to that decision, the Commission did not have, or did not exercise, an opportunity to adjudicate a similar claim.

**CONCLUSION**

In June, 1972, the claims period expired and the work of the Commission under the Cuban Claims Act was completed. In retrospect, it was an important half dozen years in the developing process of international claims. During the first few years of the program, the Commission remained tied to a narrow book value approach, a claims method utilized in past programs. The Cuban Claims Act rejected book value as a legislatively dictated requirement, allowing more liberal and accurate methods by including varying approaches to valuation, primarily the important going concern value method. The Commission may be criticized for its slowness in adopting going concern valuations, but that criticism must be tempered. A study of the claims decisions suggests that fault for the book value fixation must be shared with unimaginative and possibly unprepared claimant counsel who failed to take advantage of the alternative valuation methods of the claims program for Cuban expropriations.

In retrospect, those applicants whose claims were adjudicated during the final months of the program, and who pleaded their claims with a sound use of the going concern value, may have benefitted at the expense of the earlier claimants who were limited to the narrow strictures of book value. With the ability to re-open claims on the basis of new evidence, however, it would appear that counsel for claims adjudicated during the early years of the program on a book value approach could have filed for re-hearings upon convincing the Commission that the going concern value was more appropriate for the adjudication of their claim. The expense involved in requesting the re-opening of a claim and the preparation of a new plea based on a more involved method of valuation would appear, however, to be prohibitive when it is realized that the likelihood of an eventual settlement of the claim
for anything more than a very small fraction of the total is indeed remote.

With the completion of the program, the Department of State now possesses a thoroughly documented aggregate of claims to utilize in future negotiations with Cuba regarding the restoration of trade relationships between the two nations. The $1.8 billion total of adjudicated claims is certainly an ominous amount for the Cuban government to face in the event renewed relationships with the United States are conditioned upon a fair settlement of the claims.\footnote{191. 1971 FCSC ANN. REP. 35.}

Cuba is unlikely to recognize the total claims amount adjudicated by the FCSC as representative of the value of nationalized property. The decisions of the Commission, as illustrated above, did not involve either physical participation by Cuban representation, or a recognition that Cuban evaluation of the properties would have produced different results. The concepts of valuation utilized by the Commission may not have been the most appropriate for valuing property located in Cuba. It would appear, however, that at the time of the evaluation, the principles in Cuba for determining property values were similar to those prevailing in the United States. Consequently, the valuation methods seem generally appropriate. An additional concern, however, is that there was no party representing the interest of the taking government who could seriously challenge the presented claims. Challenges will therefore undoubtedly be made in the negotiations for a future lump sum settlement.

It is quite clear that there can be no substantial lump sum dollar settlement. The Cuban economy, deeply in debt to the Soviet Union, does not have the ability to effectuate more than a token lump sum settlement. The amount of Cuban assets frozen under the Cuban Assets Control legislation in the United States was insignificant. It is likely that these funds will be part of any future settlement. If any expectation of more than a token payment is to be realized, it will have to be derived from funds generated by renewed trade with Cuba which gives Cuba a significant export balance. Cuba’s only sizable export commodity continues to be sugar. If the settlement of the claims can only occur with a reestablished sugar trade, there are certain problems which will require solutions. Congress is unlikely to renew a trade pattern which involves a subsidization of Cuban sugar. Pressures from United States producers and from those nations which received Cuba’s allocation after 1959 will be certain to influence
The contrasting pressure from the successful claimants for the establishment of trade relationships conditioned upon a significant settlement create a perplexing situation. Furthermore, Cuba can no longer be expected to respond to unilateral United States economic or political decisions, and may well reject the significant ties to the United States which would allow a fair settlement. One of the strongest reactions by Prime Minister Castro soon after the revolution was to the unilateral changes in the Cuban sugar quota by the United States Congress. It appears certain that decisions in the future regarding the amount of sugar to be imported from Cuba by the United States will be the result of bilateral negotiations rather than unilateral Congressional dictates. The Cuban government is likely to reject directing significant amounts of sugar to the United States in order to avoid the actuality or appearance of a return to economic dominance. In the absence of an extreme change in the government in Cuba, it is most likely that future trade patterns will begin with no more than a minimum contact, and that whatever sugar agreement evolves between the two nations will generate funds for the payment of only a very small proportion of the claims. Furthermore, if the claims are to be paid from a fund created by a United States subsidization of the Cuban sugar economy, then the result would be little more than were the United States government to make direct payments to the claimants. The history of the Cuban Claims Act suggests that Congress has been reluctant to provide for a subsidization of United States foreign business interests in this context.  

Whether or not the Cuban Claims Act adjudications will be as significant a factor in dealing with the Cubans as some United States spokesmen believe must await those negotiations. If an ultimate lump sum settlement with Cuba amounts only to a very small fraction of the total adjudicated claims, then it is necessary to question whether the cost to the claimants and to the United States has been worth the result. One benefit to filing claims after a lump sum settlement is that if the settlement is extremely small, many persons with minor claims will not waste the effort in filing. The obvious problem, however, is that where the settlement is long delayed, it is impossible to expect a high degree of accuracy in presenting and determining the claims.

The theory of national claims commissions is strongly supported by most sectors; the continued viability of the Foreign Claims Settlement Commission in practice, however, is largely dependent upon the success of the Department of State in negoti-

192. See text accompanying note 2 supra.
ating sufficiently high percentage settlements with the expropriating nations to justify the continued expense involved. The alternatives for the determination and collection of claims suggest, however, that the continuation of pre-adjudication by the FCSC is justified in the expectation that future settlements will provide at least a moderate percentage of the recovery of the adjudicated claims.