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

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| In the Matter of the Claim of | : | |
| FREDERICK FRAENKEL<br>112 Central Park South<br>New York, New York | : | Docket No. Y-706 |
| Under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949 | : | Decision No. 356 |

Counsel for Claimant:

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## FINAL DECISION

A proposed decision denying this claim in its entirety was issued on September 17, 1952. Thereafter, pursuant to applicable procedures, a hearing was held before the Commission at which testimony was taken and argument heard on the two basic issues presented: (1) whether the claimant had established his claim of ownership to the property allegedly taken by the Government of Yugoslavia; and (2) whether the action taken by Yugoslavia with respect to that property constituted, within the meaning and intent of the Yugoslav Claims Agreement of 1948, a compensable "nationalization or other taking" thereof.

Upon consideration of all of the facts and argument presented at such hearing and of a brief thereafter filed by counsel for the claimant, the Commission has concluded that its prior decision should be adhered to and this claim denied.

In its proposed decision, the Commission assumed, without acknowledging, the validity of the claimant's assertion of ownership

and based its decision on the sole ground that, since the facts did not spell out a case of nationalization or other taking within the scope of the Claims Agreement, the matter was not one within the jurisdiction of the Commission.

The testimony taken at the hearing on the ownership question is inconclusive on this aspect of the claim. But the Commission finds it unnecessary to resolve that question because it has again concluded, for the reasons set forth below, that such loss or damage as the claimant may have suffered did not result from any action by the Government of Yugoslavia for which compensation is provided in the Claims Agreement and under the International Claims Settlement Act of 1949.

The claim is based upon claimant's alleged ownership of a wholesale paper business, a sole proprietorship, in Zagreb, Yugoslavia. It is asserted that the business had certain valuable contracts for the supply of paper and paper products, one of them with the Yugoslav paper cartel and others with paper mills in other European countries, which gave it exclusive rights to sell various paper products in Yugoslavia; that when Yugoslavia nationalized its economy, its government took over the ownership and operation of all paper mills and the importation, exportation and wholesale distribution of paper products; that as a result the claimant could no longer get paper with which to continue his business; and that it became "worthless to him as effectively as though someone had come in and directly taken it for their own account." It is conceded that at no time did the Government of Yugoslavia ever appropriate any of the tangible assets of the business; nor is it contended that any of its contract rights as such were ever taken over by Yugoslavia. In 1946 or 1947, the business was liquidated by the owners or managers. Thus, the claim is one for the potential value of the business, particularly the value of its contracts, operating relationships and goodwill —essentially, a claim for future earnings.

The Yugoslav Claims Agreement does not purport to compensate United States nationals for every kind of loss or damage suffered by them as a result of any action by the Government of Yugoslavia during the period, specified in the Agreement, between September 1, 1939 and July 19, 1948. Its provisions were expressly limited to claims against that government "on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property." Its coverage was apparently intended to be narrower than that provided in other international claims agreements entered into by the United States on behalf of its citizens. In treaties or agreements of that kind, which contemplated that all losses or damages would be compensable, clear and express provision to that effect has been made. For example, in the convention of September 10, 1923, between the United States and Mexico, the jurisdiction of the Claims Commission thereunder was fixed to include the settlement of "claims arising from losses or damages suffered by American citizens through revolutionary acts . . . "

While the remedial nature of the Yugoslav Agreement and of its implementing legislation indicates a liberal construction, it must also be kept in mind that to subject the limited claims fund here available to any and all claims for loss or damage resulting, in any way, directly or indirectly, from the nationalization of the Yugoslav economy would not only do violence to the express language of the Agreement, but a grave injustice to the many claimants whose properties and well-defined claims were particularly contemplated by the Agreement. Moreover, just as it must be said that the Agreement did not contemplate compensation for all types of loss or damage, it must also be said that claims were to be compensated only if they derive from the kind of conduct expressly described in the Agreement -- the "nationalization or other taking" of property. And the International

Claims Settlement Act provides that, in its determination of claims, the Commission shall first apply "the provisions of the applicable claims agreement;" and only thereafter, if required, "the applicable principles of international law, justice, and equity."

The claimant contends, first, that the contracts or contract rights which, in essence, constituted his business were "property" within the meaning of that word, as used in the Agreement; and, second, that the acts of the Government of Yugoslavia described above constituted a "taking" of that property within the intent of the Agreement. He concedes that his claim cannot be based upon a "nationalization" of the property.

Unquestionably, under United States domestic law, a contract right is generally regarded as "property", particularly with reference to the Fifth Amendment to the United States Constitution relating to the taking of private property for public use. And, presumably, the same may be said of most other legal systems. The language of this Agreement and the history of its negotiations suggests some doubt as to whether contract rights should be regarded as property for the purposes of the Agreement. However, it is not necessary to resolve that problem since the claim can be finally determined on the question whether the acts of the Government of Yugoslavia constituted a "taking" within the Agreement.

In this respect, counsel for the claimant, in oral argument before the Commission, stated:

> "Now, we construe the term 'nationalization' to mean specific acts of sovereign power directed openly to a named business or piece of property. I think that it was so intended in the Act, and I think that Congress clearly showed that it understood it to mean that. So we must concede in this case that there was no nationalization within the strict meaning of that word. However, we have this term that has been inserted into the Act, 'or other taking', and it seems to me that the principal job of the Commission is to determine what that means."

Claimant contends that the phrase "or other taking" was included in the Agreement in recognition of the fact that much property had been taken by Yugoslavia in various ways -- some "devious" and perhaps illegal by our standards -- other than pursuant to the openly recognized processes of nationalization.

It seems clear to us that, even in the case of any "other taking", it must have been directed, as claimant's counsel puts it, "to a named business or piece of property." The "other taking" was intended simply to encompass all other means by which particular properties had been taken.

Whatever was done by the Government of Yugoslavia which adversely affected claimant's business was not directed specifically at his particular business. Such loss as the claimant suffered resulted, indirectly, from the general process of nationalization undertaken by the Government of Yugoslavia. In his oral argument and brief, claimant's counsel lays great stress on the argument that the program of nationalization undertaken by Yugoslavia was "at variance with natural justice" and, in other respects, contrary to our views on "human rights" and other concepts underlying our system of jurisprudence. He also suggests that the acts of the Government of Yugoslavia constituted a "devious" attempt to deprive the claimant and others of their property rights without compensation. And he therefore urges that "taking" should be construed broadly enough to include his case.

To this argument, the Commission need respond only that, whatever else may be said about it, there appears to have been nothing "devious" or otherwise concealed about the process of general nationalization undertaken by Yugoslavia. Neither can it be validly contended, under recognized principles of international law, that the nationalization of the Yugoslav economy was "not a legitimate exercise

of governmental powers," as stated in counsel's brief. The right of a sovereign power to nationalize or otherwise take property for public use at any time has never been questioned.

The simple and decisive question, therefore, is whether, when Yugoslavia took over all paper manufacturing and distribution facilities in Yugoslavia and, by indirection, frustrated the exercise by claimant of his rights in the various contracts above-mentioned, it may be said to have "taken" those rights.

Our courts have ruled on similar questions in relation to governmental "taking" within the meaning of the Fifth Amendment to the United States Constitution. Perhaps the most closely analogous case is Omnia Commercial Co., Inc. vs. United States 261 U.S. 502 (1923), an opinion by the United States Supreme Court.

The headnotes to the opinion in that case summarize the facts and its holding:

> "A valuable contract right is property within the meaning of the Fifth Amendment, and when taken for public use must be paid for by the Government; but when it is lost or injured as a consequence of lawful governmental action not a taking, the law affords no remedy.
>
> "When the Government, for war purposes, requisitioned the entire production of a steel manufacturer, rendering impossible and unlawful of performance an outstanding contract between the manufacturer and a customer, the customer's rights were not taken by the Government, but frustrated by its lawful action."

In that case, the plaintiff-appellant, on May 19, 1917, became the owner, by assignment, of a contract by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Co. of Pittsburgh at a price under the market. The contract was of great value and if carried out would have produced large profits. In October 1917, before any deliveries had been made, the United States Government requisitioned the steel company's entire production of steel

plate for the year 1918 and directed that company not to comply with the terms of appellant's contract, "declaring that if an attempt was made to do so, the entire plant of the steel company would be taken over and operated for the public use." The appellant argued that "the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the steel company and thereby appropriated for public use appellant's property in the contract."

The court rejected this contention and denied the claim for compensation. The following quotations from the court's opinion are of interest here:

at page 509,

> " The contract in question was property within the meaning of the Fifth Amendment . . .; and if taken for public use the government would be liable. But destruction, or injury to property is frequently accomplished without a 'taking' in the constitutional sense."

at page 510,

> " The conclusion to be drawn from these and other cases is that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. If under any power, a contract or other property is taken (italicized in opinion) for public use, the government is liable, but if injured or destroyed by lawful action, without a taking, the government is not liable. What was here requisitioned was the future product of the steel company and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former ipso facto took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. . . Plainly, here there was no acquisition of the obligation or the right to enforce it."

at page 513,

> " The government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound, the government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery the performance of which its action made impossible. This is

> inadmissible. Frustration and appropriation are essentially different things."

It is true, as is contended, that this Commission is not bound to follow decisions of United States courts in respect of similar problems. It must be recognized, however, that the representatives of the United States who negotiated this treaty must have used the phrase "or other taking" in the light of their understanding of how similar expressions have been construed by United States courts.

The liberality with which "taking" is to be construed may go to its inclusiveness; that is, whether certain acts, for example, deprivation of or interference with use or control without formal transfer of title, may be regarded as "takings". And in cases involving such interference with ownership rights, the Commission has ruled that a "taking" may be involved. But there would always be the additional question whether any particular property had been taken in this manner. The simple fact that a claimant has been injured in some way by general governmental action would not resolve that question.

It seems to us that, no matter how liberally the provisions of the Yugoslav Claims Agreement are to be construed, the reasoning of the United States Supreme Court in defining a "taking" as applied to the facts in the Omnia case must be adopted by the Commission. The claim now before us seems to be, in all significant respects, identical with that presented by the plaintiff in that case. The claimant may have suffered a substantial loss as a result of action taken by the Government of Yugoslavia; but the Commission cannot find that this loss resulted from either the nationalization or other taking of his property.

For the foregoing reasons, the denial of this claim by Proposed Decision No. 356 is affirmed.

Dated at Washington, D. C. SEP 29 1954

DEPARTMENT OF STATE
INTERNATIONAL CLAIMS COMMISSION
OF THE UNITED STATES

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| In the Matter of the Claim of<br><br>FREDERICK FRAENKEL<br><br>Under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949 | Docket No. Y-706<br><br>Decision No. 356 |

PROPOSED DECISION

MARVEL, CHAIRMAN. This claim seeks the recovery of $256,000, the asserted value of a certain business and property in Yugoslavia alleged to have been nationalized by the Yugoslav Government in 1944 or 1945.

The claim is before this Commission upon the proceeding of the Solicitor of the Commission pursuant to Section 300.16 of the Rules of Practice and Procedure of the Commission.

Evidence before the Commission shows that of the $256,000 sought to be recovered, approximately $112,000 thereof, representing an account receivable, was transferred and assigned to a Swiss corporation by claimant in 1938. As to this portion of the claim, it is clear that the Swiss corporation could not assert the claim against the fund created by the Yugoslav Claims Agreement of 1948; in fact, no such claim has been asserted by the Swiss corporation and the time for doing so has passed.

As to the remaining portion of the claim, claimant has submitted no evidence that the property, a business enterprise, was ever nationalized or otherwise taken by the Yugoslav Government. On the other hand, there is evidence that the business enterprise was not

nationalized or otherwise taken by the Yugoslav Government. Thus claimant has failed to meet the provisions of the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949.

The claim is denied in whole.

Commissioners McKeough and Baker concur in the above.

September 17, 1952