

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

LEIB MERKIN

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CN-2-009

Decision No. CN-2-015

Counsel for Claimant:

Elia Weinbach, Esquire

FINAL DECISION

This claim against the People's Republic of China (hereinafter "PRC"), under the China Claims Agreement of 1979 and Section 4 of Title I of the International Claims Settlement Act of 1949, is based on a loss resulting from the nationalization, confiscation, or other taking of property in China.

A Proposed Decision was issued on October 3, 1979 denying this claim for lack of sufficient evidence to establish that the property claimed was nationalized or otherwise taken by the PRC between November 6, 1966 and May 11, 1979. Claimant filed objection thereto and requested an Oral Hearing before the Commission. An Oral Hearing on this claim was scheduled for January 29, 1981. A staff member of the Commission was advised by counsel of record by telephone on January 19, 1981 and January 21, 1981 that he would be submitting a request for a continuance to a date in April 1981 due to a conflict in his schedule. Counsel was advised that the hearing could be rescheduled but no later than March 15, 1981, as that was the last date established by the Commission for submission of additional evidence before the issuance of Final Decisions on all claims pending in this program. The Oral Hearing was rescheduled for March 10, 1981 to accommodate the scheduling conflict of counsel. After a further rescheduling to accommodate another scheduling conflict of counsel, an Oral Hearing was held before the Commission on this claim on March 2, 1981, at which counsel of record appeared.

The claimant contends in the objection that the Commission erred as a matter of law and fact in determining that it lacked jurisdiction over pre-November 6, 1966 losses; that the claimant did submit evidence and made a good faith effort to determine the date of taking of the property, satisfying the burden of proof; and that the Commission has arbitrarily imposed a greater burden of proof on claimant in the second China Claims Program than in the first China Claims program, in denial of due process and equal protection of laws. Claimant also asserts that the Commission failed to give sufficient and adequate notice to the potential claimants of the first China Claims program and that the Commission has had no intention of certifying any claims under the second China Claims Program. Claimant has not submitted any evidence to establish a taking during the requisite period of time.

In regard to notice of the first China Claims Program, the Commission notes that following the appropriation of funds by Congress on November 8, 1967, for the administration of the China Claims Program, the Commission published notice of the filing period for the program in the Federal Register, as the statute required. The filing period was from January 6, 1968, to July 6, 1969. Additionally, the Commission undertook to widely disseminate information about the program through press releases and notices to persons known to the Commission to possibly have claims for loss of property in mainland China.

Its records indicate that in March 1967 notices of that program were mailed to 3,350 possible claimants on a list compiled from the following five sources which indicated ownership of property in mainland China by U.S. nationals at the time of or during the decade prior to the ascension to power by the present Government of the PRC: (1) China Trade Act Corporations; (2) TFR-500 Treasury Form, tabulation of foreign assets in 1943; (3) War Claims Commission Form 801, loss or damage to property during World War II; (4) General War Claims filed under Public Law 87-846; and (5) correspondence received by the State Department and the

Commission which noted an interest in asserting a claim. Claimant was not on this list. Furthermore, the Chairman of the Commission at that time issued a press release on December 27, 1967, announcing the filing period of the China Claims Program. That press release was mailed to all members of Congress, 821 trade associations, 37 foreign news media entities, 813 domestic news media entities, and 1,300 entities on a Chinese-American mailing list. A subsequent press release issued on January 25, 1969, reminded potential China claimants of the impending final filing date of July 6, 1969. The authorization of a China Claims Program and its commencement in the near future had previously been mentioned in press releases issued by the Commission on April 17, 1967, and June 9, 1967. In the first China Claims Program 579 claims were filed of which 476 were from individuals, 59 were from corporations and other business entities, and 44 were from non-profit and religious organizations.

The limited jurisdiction of the Commission in this second China Claims Program was discussed in the Proposed Decision on this claim. The Commission is not persuaded by the contention of the claimant that the Commission has the authority to ignore the clear direction of Congress in Title V of the International Claims Settlement Act of 1949, as amended, to complete the first China Claims Program within a specific period of time; and the legislative precedent, as discussed in the Proposed Decision, regarding the limited authority of the Commission in a second claims program, such as this program, regardless of whether specifically authorized or administered pursuant to Title I of the Act; in order to favorably consider claims arising prior to November 6, 1966 in this program. The Commission is, also, not persuaded by the contention of the claimant that the burden of proving the date of taking after November 6, 1966 is too onerous. The burden is set forth in the Regulations of the Commission [45 CFR 531.6(d)]:

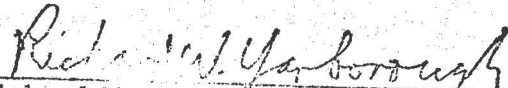
Claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim.


In this program one of the crucial issues for all claimants is establishing that the date of taking was on or after November 6, 1966 and prior to May 11, 1979. After a careful review of the evidence of record in this claim and the arguments of counsel the Commission finds that the evidence is not sufficient to establish that a loss occurred during the requisite period of time and that the Commission does not have the authority to favorably consider claims for losses that occurred during another period of time.


Accordingly, the Commission concludes that the Proposed Decision dated October 3, 1979 denying this claim must be and is hereby affirmed as its final determination on this claim.

Dated at Washington, D.C.
and entered as the Final
Decision of the Commission.

APR 1 1981


Richard W. Yarborough, Chairman


Francis L. Jung, Commissioner


Raymond W. Peterson, Commissioner

This is a true and correct copy of the decision
of the Commission which was entered as the final
decision on APR 1 1981


Executive Director

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Counsel for claimant:

Elia Weinbach, Esq.

PROPOSED DECISION

This claim, in the amount of \$750,000, against the People's Republic of China is based on the loss of property in Harbin and Shanghai, China. Claimant, a national of the United States by naturalization on April 10, 1956, states that the properties were taken on or after and between November 7, 1966 and May 11, 1979; however, he is unaware of the means or authority under which they were taken.

Under Section 4 of Title I of the International Claims Settlement Act of 1949, as amended, the Commission is given jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of nationals of the United States included within the terms of any claims agreement concluded on and after March 10, 1954, between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II), arising out of the nationalization or other taking of property [22 U.S.C.A. Sec. 1623(a)]. In this section the Commission is directed to decide claims in accordance with provisions of the applicable claims agreement and the principles of international law.

On May 11, 1979, an agreement was concluded between the Governments of the United States of America and the People's Republic of China (hereinafter referred to as the PRC) settling claims of nationals of the United States against the PRC arisi

from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States on or after October 1, 1949, and prior to the date on which the agreement was concluded.

Under the provisions of Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. Sec. 1643-1643k (1964), as amended by Public Law 89-780, approved November 6, 1966, 80 Stat. 1365 (1966)], the Commission was given jurisdiction over claims of nationals of the United States against the Chinese Communist regime (the PRC) arising since October 1, 1949, for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States. In that program, the Commission considered claims that arose between October 1, 1949 and November 6, 1966, the date on which the program was authorized. That program was completed on July 6, 1972 pursuant to a statutory mandate in the enabling legislation.

The question presented by this claim is whether the Commission has the jurisdiction to consider claims that arose prior to November 6, 1966. On June 1, 1979, the Commission published notice in the Federal Register announcing that a new China Claims Program would be initiated under which it would consider claims by nationals of the United States against the PRC for losses that arose between November 6, 1966 and May 11, 1979. August 31, 1979 was established as the deadline for filing such claims.

The period during which losses must have occurred for favorable action to be taken on claims in the second China Claims Program was established because the Congress of the United States had previously made provisions under Title V of the Act, supra, for the filing and adjudication of claims by nationals of the United States for property losses in China that arose between October 1, 1949 and November 6, 1966, and mandated a date by which such a claims program

must be completed. Accordingly, the Commission concluded that its jurisdiction over such claims expired on July 6, 1972 and that it no longer has the authority to accept and take favorable action on those claims. Congress having provided its remedy for the 1949-1966 claims, the Commission is not at liberty to provide another.

This situation is not unique in the programs that the Commission had been authorized to administer in the past. In 1955 the Commission was authorized to receive and consider claims of nationals of the United States against the Governments of Bulgaria, Hungary, and Rumania for losses resulting from the nationalization or other taking of property prior to August 9, 1955 [Title III of the International Claims Settlement Act of 1949, 69 Stat. 570 (1955), 22 U.S.C. Sec. 1641-1641q (1964)].

These programs preceded a claims settlement agreement with the countries and covered losses that arose prior to August 9, 1955, the date that the programs were authorized by the Congress. Subsequent to the completion of the programs on August 9, 1959, as mandated by the statute, claims agreements were concluded with each of the governments of Bulgaria, Hungary, and Rumania, covering losses that arose prior to the dates that the agreements with such governments entered into force, July 2, 1963; March 6, 1973; and March 30, 1960; respectively.

The Commission was unable to implement those claims agreements under Title I of the International Claims Settlement Act because the United States had declared the existence of a state of war against those countries during World War II. Thus, before the agreements could be implemented, legislation had to be enacted by the Congress. In each case the legislation enacted specifically limited the compensable claims to those that arose between August 9, 1955, and the dates on which the agreements were concluded. The Commission

was not authorized to consider and grant compensation on any claim that arose prior to August 9, 1955, [82 Stat. 422 (1968), 22 U.S.C. Sec. 1641b(4); 88 Stat. 1386 (1974), 22 U.S.C. Sec. 1641b(5)].

Following the legislative precedent in these second programs which precluded the favorable consideration of claims that arose during the period covered by the first programs, the Commission concludes that it does not have the jurisdiction to consider claims against the PRC that arose prior to November 6, 1966, and after May 11, 1979, the date of the agreement with the PRC.

On the Statement of Claim, FCSC Form 780-2, claimant was advised that documentation must be submitted at the time of filing to establish the date and manner of the taking of the subject property. However, no such evidence has been submitted in support of this claim.

The Regulations of the Commission provide:

Claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim. (FCSC Reg., 45 C.F.R. §531.6(d) (1977).)


Based upon the foregoing, the Commission finds that the evidence of record in this claim is not sufficient to establish that the property or interest therein claimed was nationalized or otherwise taken by the PRC between November 6, 1966, and May 11, 1979.

Accordingly, the Commission concludes that this claim must be and it hereby is denied.

Dated at Washington, D.C.
and entered as the Proposed
Decision of the Commission


Richard W. Yarboynugh, Chairman

OCT 3 1979


Wilfred J. Smith, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended.)