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Daniel W. Fisk

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Foreign Claims

DANIEL W. FISK*

The issue of foreign claims continued to occupy the attention of the legal and policy-making communities during the 1997-98 period. Foreign claims questions intertwined with foreign policy concerns in a number of areas, including the U.S. dispute with Europe over Cuba, issues related to sovereign immunity and terrorism, violence in the Balkans and the settlement of claims against Albania, and lingering issues related to both the Iran and Iraq claims processes. This year's report reviews these developments, building on much of the background and analysis provided in the two previous years' reports.¹

Specifically, five subjects were identified where there have been notable developments in the foreign claims area during 1997-98. These were the agreement between the European Union and the United States on "property disciplines" addressing state support for investments in expropriated properties in a third country; an amendment to the Foreign Sovereign Immunities Act to allow private claimants to execute judgments by attaching blocked or frozen assets of terrorist-list states; adjudication of the assertion by claimants that espousal of their claim by the U.S. Government against Iran and failure to receive 100 percent of their award constitute a taking in violation of the Fifth Amendment; the failure to resolve the issue of U.S. claims against Iraq falling outside the jurisdiction of the United Nations' process; and the impact of residency requirements and continuing violence in the Balkans on the Albanian claims program.

I. EU-US Agreement on Property Disciplines

The discussion of the Cuban Liberty and Democratic Solidarity Act of 1996 (more popularly known as "Helms-Burton" or the LIBERTAD Act)² has been extensive in this journal, other

*Daniel W. Fisk served as an Associate Counsel of the Senate Committee on Foreign Relations, where he was responsible for issues related to the Western Hemisphere and international property claims, including playing a principal staff role in the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. He is now an Adjunct Fellow with the Center for Strategic and International Studies, Washington, D.C., and a Teaching Associate/Ph.D. candidate in the Department of Political Science at Arizona State University in Tempe.

1. See John F. Murphy, *Foreign Claims*, 31 INT'L LAW. 579 (1997); John F. Murphy, *Foreign Claims*, 32 INT'L LAW. 453 (1998).

2. Pub. L. No. 104-114, 110 Stat. 785 (1996) [hereinafter LIBERTAD].

legal journals, and the popular press, so a review of its background and the broader debate it has generated on sanctions and foreign claims will be limited here.³

The LIBERTAD Act seeks "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime."⁴ The Act seeks to achieve this purpose by making persons or entities that knowingly and intentionally "traffic"⁵ in confiscated U.S. properties in Cuba liable for damages in U.S. District Court to the U.S. national who owns the claim to a property confiscated by the Cuban Government⁶ and by authorizing the exclusion from the United States of foreign nationals who "traffic" or are involved in certain other activities related to property in Cuba, the claim to which is held by a U.S. national.⁷ The intent of these provisions is to deter third-country nationals from seeking to profit from wrongfully confiscated properties and to deny Castro a source of hard currency.⁸

Specifically, title III of the LIBERTAD Act established a private civil right of action for any U.S. national having ownership of a claim to commercial property confiscated by Cuba against a person or entity who is knowingly benefiting from the use of such confiscated property without the authorization of the U.S. national. Claims involving residential properties are restricted to those properties taken from a certified claimant or where the home is occupied by a senior official of the Cuban government or the ruling Cuban Communist Party.⁹ Title III is a grant of subject matter jurisdiction to U.S. courts and does not require a particular outcome. It does not require a property claimant to use this remedy; it is an option available to U.S. nationals who can satisfy the court's jurisdictional requirements.

The law further provides the president with the authority to suspend, on a six-month basis, the August 1, 1996 effective date of the right of action or the ability to file a claim in U.S. courts if he determines that such a suspension "is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."¹⁰ The president allowed

3. For more extensive consideration, see *The LIBERTAD Act: Implementation and International Law: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. On Foreign Relations*, 104th Cong. (1996); Andreas F. Lowenfeld, AGORA: THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996); Brice M. Clagett, AGORA: THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT CONTINUED, *A Reply to Professor Lowenfeld*, 90 AM. J. INT'L L. 641 (1996); Brice M. Clagett, AGORA: THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996); Wynn H. Segall, *Export Controls and Economic Sanctions*, 31 INT'L LAW. 393 (1997); Murphy, *supra* note 1, at 579 (1997); Brice M. Clagett, INTERNATIONAL SYMPOSIUM ON THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996, *The Controversy Over Title III of the Helms-Burton Act: Who Is Breaking International Law—The United States, or the States that Have Made Themselves Co-conspirators with Cuba in its Unlawful Confiscations*, 30 GEO. WASH. J. INT'L L. & ECON. 271 (1996-97); Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51 (1998); Robert L. Muse, INTERNATIONAL SYMPOSIUM ON THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996: *Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996)*, 30 GEO. WASH. J. INT'L L. & ECON. 1 (1998); and Wynn H. Segall, *Running on Empty: U.S. Economic Sanctions and Export Controls in 1997*, 32 INT'L LAW. 271 (1998).

4. LIBERTAD, *supra* note 2, § 3(6) ("Purposes").

5. *Id.* § 4(13). "Trafficking" includes the selling, transferring, dispensing, brokering, or managing property the claim to which is held by a U.S. national, as well as "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property" (§ 4(13)(ii)).

6. *Id.* § 302.

7. *Id.* § 401.

8. *Id.* § 301.

9. *Id.* § 4(12)(B).

10. *Id.* § 306(b).

the civil wrong of "trafficking" to go into effect¹¹ but, to date, has six times suspended the right of American citizens to use this remedy.¹²

The basis of these provisions can be found in the large numbers of property takings occurring in the Western Hemisphere in the time period immediately preceding the initial drafting of the LIBERTAD legislation in 1994;¹³ in the Castro regime's search for new sources of hard currency following the demise of the Soviet Union; and in the LIBERTAD authors' conclusion that:

The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.^{14,15}

While many in the international community have objected to LIBERTAD's property provisions, they have had the effect of elevating international sensitivities about property rights, generally, and the rights of American property claimants in Cuba, specifically. For example, the Foreign Claims Settlement Commission has noted that, "notwithstanding the continued suspension of the right to file title III lawsuits, the Commission received many requests to examine files from its Cuban Claims Program during [1997]. Most of the requests were from attorneys representing foreign investors wishing to avoid involvement with any property in Cuba that is the subject of a certified claim in the program."¹⁶ However, the most significant step in this regard has been the May 18, 1998, European Union (EU)-United States "Understanding with Respect to Disciplines for the Strengthening of Investment Protection" (also known as the EU-US Property Disciplines).¹⁷

11. See *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act Implementation of Title III, U.S.-Cuba Policy Rep.*, Vol. 3, No. 7, July 29, 1996, at 1.

12. President Clinton suspended the right of action on: July 16, 1996; January 3, 1997; July 16, 1997; January 16, 1998; July 15, 1998; and, most recently, January 16, 1999.

13. See, REPUBLICAN STAFF OF COMMITTEE ON FOREIGN RELATIONS, 103D CONG., 2D SESS., CONFISCATED PROPERTY OF AMERICAN CITIZENS OVERSEAS: CASES IN HONDURAS, COSTA RICA, AND NICARAGUA (Comm. Print 1994). This report served as the basis for Senator Jesse Helms' effort in 1994 to attach an amendment to the Foreign Relations Authorization Act for fiscal years 1994 and 1995 to condition bilateral U.S. assistance and support in international financial institutions (IFIs) to those recipient states which had engaged in uncompensated takings of property owned by American citizens on the willingness of those nations to remedy their takings. Pub. L. No. 103-236, § 527 (1994).

14. LIBERTAD, *supra* note 2, § 301(8).

15. For background on LIBERTAD's property provisions, see Daniel W. Fisk, *How Sanctions Can Affect U.S. Policy Interests*, prepared statement before the Committee on International Relations, U.S. House of Representatives, bearing on *How Sanctions Can Affect U.S. Policy Interests*, Washington, D.C., June 3, 1998, available at <http://www.house.gov/international_relations/105th/full/ws63984.htm>; and Daniel W. Fisk, *The EU-U.S. Agreement and Protection of American Property Rights in Cuba*, Institute for U.S.-Cuba Relations Occasional Paper Series, Vol. 2, No. 2, July 23, 1998 [hereinafter *American Property Rights in Cuba*].

16. 1997 FCSC Y.B. 61.

17. The text of the May 18, 1998 EU-US *Understanding with Respect to Disciplines for the Strengthening of Investment Protection* can be found at <<http://presid.fco.gov.uk/news/1998/may/18/invest.txt>> [hereinafter EU-US Property Disciplines]. The EU-US Property Disciplines grew out of the EU's 1996 request to the World Trade Organization for a formal dispute resolution panel, the details of which are beyond the scope of this paper. In short, as the April 14, 1997 deadline drew nearer for the EU and United States, respectively, to file briefs with the WTO panel, both sides feared that such an action would set a course that they could not effectively control. The EU feared that the United States would invoke the "national security" exception and refuse to participate in the process or abide by a panel decision; the United States feared that the panel would conclude that it had the competence to adjudicate a "national security" claim, ruling that such claims are not self-judging. Neither party wanted to confront either outcome. On April 14, 1997, instead of filing WTO briefs, the EU and United States announced agreement "to develop disciplines which will inhibit and deter the acquisition of investments which have been expropriated in contravention of international law. Our goal in this endeavor is to globalize strong standards for the enhanced protection of property rights." See *American Property Rights in Cuba*, *supra* note 15, at 5-6. As part of this agreement to negotiate, the EU

Announced on May 18, 1998, the EU-US Property Disciplines "constitutes a political arrangement reflecting the participants' intention to apply these disciplines on a policy basis"¹⁸ in order to "inhibit and deter the future acquisition of investments from any State which has expropriated or nationalized such investments in contravention of international law, and subsequent dealings in covered investments."¹⁹

The Property Disciplines apply to transactions (known as "covered transactions") after May 18, 1998, related to property expropriated by a state (other than a party to the understanding) which involves (i) a direct ownership interest in the property, (ii) control of all or part of an expropriated property, or (iii) the acquisition of effective control of an entity owning or controlling expropriated property under (i) and (ii).²⁰ The Property Disciplines do not include as a "covered transaction" any acquisition of rights or interests in expropriated properties made before May 18, 1998, including the subsequent acquisition of that specific property or rights to the property. They would apply, however, to any additional or enhanced rights acquired after May 18, 1998.²¹

The EU and U.S. agreed to establish a registry where claimants may file their claims regarding property taken in contravention of international law. However, filing a claim with this registry does not make or otherwise imply that the claim is valid and merits the sanctions of the Property Disciplines. Also, the claimant is required to update annually the information on file.²² The registry would represent the first time that an international mechanism has been established through which claimants can provide notice of an expropriation/confiscation claim.

In cases where the property claim is (i) the subject of an international arbitral tribunal, (ii) the claim is "well-founded in law and in fact" of an expropriation in contravention of international law, or (iii) in a case involving a country with "a record of repeated expropriations in contravention of international law," where the U.S. or an EU member state has come to view a property as expropriated in contravention of international law, each participant to the Property Disciplines is expected to make diplomatic representations against the expropriating state, as well as deny government support or government commercial assistance for "covered transactions" in the expropriated property. This includes a denial of government loans, grants, subsidies, and guarantees.²³

Implementation by the EU of these Property Disciplines is contingent on the United States "obtaining an amendment to title IV of the Libertad Act that would provide authority for a waiver that would apply, with respect to the EU, without a specific time limit. . . . Application of the disciplines and exercise of such waiver authority will be simultaneous."²⁴

U.S. officials note that the May 18, 1998 understanding "for the first time, establishes multilateral disciplines among major capital exporting countries to inhibit and deter investment

suspended the WTO panel. See U.S. Department of Commerce: International Trade Administration—Statement of Commerce Under Secretary Stuart E. Eizenstat, Special Representative of the President and Secretary of State for the Promotion of Democracy in Cuba, on the U.S.-EU Negotiations on the Libertad Act, Apr. 11, 1997. See also European Commission Delegation: Office of Press and Public Affairs—Statement by Sir Leon Brittan on Helms-Burton Negotiations Reach a Proposed Settlement, Apr. 11, 1997, No. 20/97.

18. EU-US Property Disciplines, *supra* note 17, ¶ II.2.

19. *Id.* preamble, recalling the EU-US Understanding of April 11, 1997 (See endnote 17).

20. *Id.* at Annex C (Definitions), ¶ 1 ("covered transactions").

21. *Id.* at pt. I, ¶ C and n. 3.

22. *Id.* at pt. I, ¶ A.3 and Annex A.

23. *Id.* at pt. I, ¶¶ B.1 and 2.

24. *Id.* at ¶ II.4. See also EU Unilateral Statement, May 18, 1998, available at <<http://presid.fco.gov.uk/news/1998/may/18/unilat.txt>>.

in illegally expropriated properties."²⁵ While the EU-US disagreement over Cuba was the genesis of the Property Disciplines—and its provisions on states with an “established record of repeated expropriations” arguably apply to Cuba—the global extent of their application cannot be overlooked: “This Understanding presents the United States with a unique and pathbreaking opportunity to establish new levels of protection of property rights globally through multilateral disciplines.”²⁶

Key members of Congress, including the Chairmen of the committees with jurisdiction over any changes in statutory U.S. Cuba policy—Senator Jesse Helms and Congressman Benjamin Gilman—have raised several concerns about how the Property Disciplines will be implemented and enforced. For example, the United States is required not only to recognize investments made prior to May 18, 1998, but must also accept that those investors remain eligible for governmental commercial assistance. The sanctions are weak, go only to new investments in properties not already having a European investor presence, and can be evaded by certain financing maneuvers. Further, while the disciplines address those states with a repeated pattern of expropriations in violation of international law, they do not contain a “meaningful requirement for heightened scrutiny for investment in” such “repeat offenders.” And EU companies have no incentive to disclose to either the EU or U.S. governments the terms of their current ventures in Cuba. Essential to enforcement is knowledge of what a country’s investors are doing in a country in which the disciplines are applicable. Finally, in the case of Cuba, there are three issues. First, do the disciplines permit the EU to reassess the claims of U.S. nationals certified by the FCSC? Second, there remains the question of how the disciplines protect the property interests of non-certified U.S. claimants, namely Cuban-American claimants. And third, are the EU’s prodemocracy efforts in Cuba contingent on a “permanent waiver” of LIBERTAD’s title III?²⁷

The State Department has attempted to answer these concerns. In a letter to the two Chairmen, Secretary of State Albright stated that any title IV waiver authority requested by the administration would allow for a continued exclusion sanction against any companies or entities which sought to circumvent the disciplines. She further emphasized that, in the case of Cuba, the department’s expectation is that the EU will be cautious in supporting investments on the island. And, as for the certified and Cuban-American claimants, respectively, the department takes EU actions relating to the disciplines “as a clear signal that the EU is willing to accept the legitimacy of the FCSC certified claims” and, since the registry is open to all claimants and “commits the Europeans to consult it before providing commercial assistance or other support to any investment,” non-certified claimants will find a degree of international protection for their rights that otherwise does not now exist.²⁸

25. S. Eizenstat, Under Secretary of State, *Testimony before the House International Relations Committee*, June 3, 1998, available at <http://www.house.gov/international_relations/105th/full/ws6398.htm>.

26. *Id.* See also A. Larson, Assistant Secretary of State for Economic and Business Affairs, remarks before the Institute for U.S. Cuba Relations Policy Forum on *The EU-U.S. Agreement and Protection of American Property Rights in Cuba*, Washington, D.C., July 23, 1998. (Also present at this Policy Forum were representatives from the European Union, House International Relations Committee, and the American property claimant community.)

27. See Letter from Benjamin A. Gilman, Chairman, Committee on International Relations, House of Representatives, and Jesse Helms, Chairman, Senate Committee on Foreign Relations, to the Honorable Madeleine Albright, Secretary of State (June 17, 1998) (discussing the May 18, 1998 EU-US Property Disciplines). See also Letter from Benjamin A. Gilman, Chairman, Committee on International Relations, to Sir Leon Brittan, Vice President, European Commission (Jan. 8, 1999) (requesting clarification on the EU-US Property Disciplines). (“Repeat offender” phrase is from Fisk, *American Property Rights in Cuba*, *supra* note 15, at 10.)

28. Letter from the Secretary of State to the Honorable Benjamin A. Gilman, Committee on International Relations, House of Representatives (discussing the May 18, 1998 EU-US Property Disciplines).

II. Foreign Sovereign Immunities Act Amendments

Three incidents involving the agents of foreign states in the killing of American citizens have resulted in significant amendments to the Foreign Sovereign Immunities Act (FSIA)²⁹ over the past two years. The first two of these amendments were included in the Antiterrorism and Effective Death Penalty Act of 1996³⁰ and resulted largely from the frustrations of the survivors of Americans victimized by terrorist attacks involving the agents of foreign states. Frustration with the courts' application of the FSIA in these specific cases resulted in a statutory provision which allows for a "suit for money damages against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if the act or provision of support is engaged in by an official agent of the foreign state while acting within the scope of his or her duties."³¹ Further, the act permits the "attachment of, or execution upon a judgment against, the property of a foreign state, used for a commercial activity in the United States."³²

Based on this act, the personal representatives in three cases involving the killing of U.S. citizens by agents of foreign states pursued claims for damages against those foreign states: Libya for its involvement in the 1988 Pam Am Flight 103 bombing;³³ Iran for providing support to a radical Palestinian group responsible for the 1995 terrorist bombing of an Israeli bus in which an American citizen was killed;³⁴ and Cuba for the killing of three American citizens when two civilian aircraft were shot down by the Cuban Air Force over international waters in February 1996.³⁵

In the Pam Am Flight 103 case against Libya, after enactment of the Antiterrorism and Effective Death Penalty Act, the plaintiffs commenced a new action against which Libya argued that the court lacked both subject matter jurisdiction and personal jurisdiction. The trial court denied Libya's motion to dismiss.³⁶ On appeal, the Second Circuit affirmed the trial court's holding, further concluding that the Congress did "not unconstitutionally delegate legislative power by allowing the existence of subject matter jurisdiction over foreign sovereigns to depend on the State Department's determinations of whether particular foreign states are sponsors of terrorism."³⁷ In the view of the court:

The decision to subject Libya to jurisdiction under [sec.] 1605(a)(7) was manifestly made by Congress itself rather than by the State Department. At the time that [sec.] 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pam Am 103. That jurisdiction existed the moment that the [Antiterrorism and Effective Death Penalty Act] amendment became law.³⁸

29. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611 (1994)). For background on the FSIA as it applies in the foreign claims area, see Murphy, *supra* note 1, at 581-82 (1997); and Murphy, *supra* note 1, at 453 (1998).

30. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

31. Murphy, *supra* note 1, at 455-56 (1998).

32. *Id.* at 456.

33. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); and *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

34. *Flatow v. Iran*, 999 F. Supp. 1 (D.C. 1998).

35. *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

36. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y.), *aff'd*, 162 F.3d 748 (2d Cir. 1998).

37. *Rein*, 162 F.3d at 762.

38. *Id.* at 764.

Plaintiffs in the Pam Am 103 case seek \$21 million in damages for each of 100 plaintiffs and \$2 billion in punitive damages. In *Flatow v. Iran*, the court awarded damages totaling \$247.5 million. In executing the judgment, the Flatows have attempted to seize four properties formerly used by the Shah's government and seized by the U.S. Government following tensions resulting from the fall of the Shah and the taking of the U.S. Embassy in Tehran in 1979. Frozen Iranian assets currently amount to some \$20 million (including the value of the four properties sought by the Flatows).³⁹ And in *Alejandro*, the families of three Brothers to the Rescue pilots killed in February 1996 were awarded \$188 million, including punitive damages of \$137 million (a figure calculated by the court based on the value of a MiG fighter jet, the aircraft used to shoot down the two Brothers' aircraft).⁴⁰

With the constitutionality of the 1996 Antiterrorism and Effective Death Penalty Act having been upheld and trial courts awarding damages to plaintiffs, the issue became one of how to effect payment. Even with the 1996 amendment to FSIA on the ability of a plaintiff to execute a judgment against "the property of a foreign state, used for a commercial activity in the United States," this has been difficult to effect. There is no successful case of such happening with any of these three cases.

As with the 1996 amendments to FSIA, the families returned to Congress to seek an amendment to allow for the execution of judgments using assets of the defendant state that have been blocked or frozen by the U.S. Government. One precedent for such an amendment can be found in the Clinton Administration's October 1996 decision to award \$300,000 each to the families of the four Brothers to the Rescue pilots killed the previous February. These awards came from "certain assets of the Cuban government maintained in blocked accounts in the United States."⁴¹

In October 1998, Congress approved an "exception to immunity from attachment or execution" in the Omnibus Consolidated and Emergency Supplemental Appropriations for fiscal year 1999. Any state that is subject to suit due to its direct actions or those of its agents involving terrorism, torture, aircraft sabotage, or extrajudicial killings, amongst other activities, and that has "any property with respect to which financial transactions are prohibited or regulated [by the U.S. government] shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state . . . claiming such property is not immune under section 1605(a)(7)."⁴²

This amendment further requires that, at the request of a successful plaintiff, the secretaries of State and Treasury assist such a requesting party in "identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state" not immune under FSIA section 1605(a)(7).⁴³ This requirement, in part, is in response to the

39. *Once-Supportive U.S. Fights Family Over Iranian Assets*, WASH. POST, Sept. 27, 1998, at A8 [hereinafter *Iranian Assets*].

40. *Alejandro*, 996 F. Supp. at 1253.

41. *Clinton Transfers Blocked Assets*, U.S.-Cuba Policy Rep., Vol. 4, No. 1, Jan. 31, 1997, at 5.

42. Pub. L. No. 105-277, § 117 (exception to immunity from attachment or execution) (Oct. 21, 1998). (Section 117 is in Title I of the Treasury Department Appropriations Act, 1999, which can be found starting at page 497 of the Conference Report to accompany H.R. 4328, H.R. REP. NO. 105-825 (1998)). Section 117 specifically notes that it applies to transactions prohibited or regulated pursuant to the Trading with the Enemy Act, sec. 5(b) (50 U.S.C. app. § 5(b)), the Foreign Assistance Act of 1961, section 620(a) (22 U.S.C. § 2370(a)), the International Emergency Economic Powers Act, sections 202 and 203 (50 U.S.C. §§ 1701-1702), "or any proclamation, order, regulation, or license issued pursuant thereto . . ."

43. *Id.* at subsec. 117(2)(A).

Flatows' efforts to identify Iranian properties seized by the United States.⁴⁴ Finally, the 1998 amendment provides waiver authority to the president if he determines that such action is "in the interest of national security."

On the same day he signed the fiscal year 1999 appropriations containing this exception to the FSIA, President Clinton exercised his waiver authority with regard to section 117. "If the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk. Our ability to use foreign properties as leverage in foreign policy disputes would also be undermined."⁴⁵

The first plaintiffs to test these amendments—and the effect of the president's waiver—were the families of the Brothers to the Rescue pilots killed by the Cuban Air Force in 1996. In U.S. District Court in southern Florida, they argued that the waiver only applied to the provision in section 117 requiring that the Secretaries of State and Treasury assist plaintiffs in identifying assets. The waiver, they argued, does not go to the ability of a plaintiff to execute a judgment against the actual blocked assets. The U.S. District Court judge agreed with the plaintiffs and ruled that they could proceed in their efforts to be compensated from Cuban assets.⁴⁶ In this case, the families of the Brothers' pilots have identified the revenues earned by the Cuban government from telecommunications between the United States and Cuba. The Cuban government's share of telecommunications revenues average about \$80 million a year.⁴⁷ In January 1999, the families "filed notice that they intend to garnishee payments made to Cuba's phone company by AT&T, MCI and six other U.S. telephone firms."⁴⁸ The Justice Department has filed a challenge with the court asserting that "the U.S. trade embargo [against Cuba] bans any financial dealings with Cuba, including garnishments, unless specifically licensed by Washington"⁴⁹ (namely, the Office of Foreign Assets Control in the Department of the Treasury).

The Florida court's decision has legal and policy ramifications, and has embroiled the United States in another dispute with Cuba, which has responded to the Florida court's action by threatening to cut phone links with the United States.⁵⁰

III. Iranian Claims

As part of the resolution of the Iranian hostage crisis, the United States and Iran agreed in January 1981, *inter alia*, to create the Iran-U.S. Claims Tribunal to arbitrate all claims against either country brought by nationals of the other, arising "out of debts, contracts, . . . expropria-

44. On the Flatows' efforts to identify Iranian assets held by the U.S. Government, see *Iranian Assets*, *supra* note 39.

45. The White House: Office of the Press Secretary, Statement by the Press Secretary (Oct. 21, 1998) available at <http://www.state.gov/www/global/terrorism/981021_wh_terrorism.html>. See also The White House: Office of the Press Secretary, Presidential Determination No. 99-1 (Oct. 21, 1998) available at <http://www.state.gov/www/global/terrorism/981021_wh_determin.html>.

46. *Pilots' Families Gain Recourse; New Way to Collect From Cuba*, LAUDERDALE SUN-SENTINEL, Oct. 28, 1998, at 1B.

47. Telecommunication services between the United States and Cuba, including the licensing of payments to Cuba, are authorized under the Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992), at tit. XVII, sec. 1705(e) (codified at 22 U.S.C. § 6004(e)). For the most recent figures on payments to Cuba related to telecommunications, see U.S.-Cuba Policy Rep., Vol. 5, No. 10, Oct. 31, 1998, at 5.

48. *Justice Department Seeks to Block Garnishment of Phone Payments to Cuba*, ASSOCIATED PRESS S. & LOC. WIRE, Jan. 29, 1999.

49. *Id.*

50. Tamayo, *Cuba Bristles at Lawsuits, Threatens to End U.S. Phone Links*, MIAMI HERALD, Jan. 12, 1999, at A5.

tions or other measures affecting property rights," as well as certain other government-to-government disputes.⁵¹ Claims by nationals of less than \$250,000 ("small claims") were required to be presented to the tribunal by their respective governments. The tribunal was to serve as the exclusive forum for the adjudication of claims, and the United States agreed to terminate all legal proceedings in U.S. courts involving the claims of U.S. nationals against Iran, to nullify all attachments and judgments, and to prohibit further litigation of such claims.⁵² These agreements are known as the Algiers Accords.

To ensure the payment of awards, an interest-bearing security account was established. Initially the account was funded with \$1 billion in blocked Iranian assets and then was to be maintained through deposits by Iran. This account is to have a minimum balance of \$500 million. As of September 30, 1998, the security account was less than the minimum balance, standing at \$107,563,705, with the interest account holding \$26,226,833. Given this failure of Iran to meet its obligations, the United States has continued to pursue its case to require Iranian compliance.⁵³

The tribunal continues to adjudicate claims, having rendered a total of 588 awards, the majority of which have been favorable to U.S. claimants. The value of awards to successful U.S. claimants stood at \$2,501,515,655 as of September 30, 1998. These awards are paid out of the security account.⁵⁴

As the work of the tribunal progressed, the resolution of "small claims" lagged. As of 1989, only eighty-two small claims had been adjudicated, leaving some 2,200 remaining to be decided. In May 1990, the U.S. and Iran reached agreement whereby a lump-sum payment of \$105 million by Iran would result in the settlement of the small claims of U.S. nationals and a separate claim of the United States involving loans to the Imperial Government of Iran. The agreement provided, *inter alia*, for the espousal of the small claims by the U.S. government, extinguishment of these claims, and referral of the small claims to the Foreign Claims Settlement Commission (FCSC).⁵⁵ Upon the tribunal's approval of the May 1990 *Settlement Agreement in Claims of Less Than \$250,000*, the U.S. State Department transferred the claims to the FCSC and issued a determination dividing the \$105 million lump-sum payment into \$55 million to cover the U.S. government claim and \$50 million to cover the small claims.⁵⁶

The FCSC completed its adjudication of claims by the end of 1995. In all, 1,066 awards were made to 1,075 claimants totaling \$41,570,936 in principal and \$44,984,859 in interest. In 578 cases, the claims were dismissed either at the request of the claimant(s) or because the claimants could not be found. A total of 1,422 claims were denied by the FCSC. The aggregate total of the principal and interest awards came to \$86.5 million. However, the amount in the claims program was just over \$57.8 million (with the initial \$50 million having increased by

51. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 1981, 20 I.L.M. 230.

52. *Id.*

53. The White House: Office of the Press Secretary, Text of a Letter from the President to the Speaker of the House of Representatives and the President of the Senate (Nov. 16, 1998) available at <<http://www.usia.gov/regional/nea/gulfsec/iran1116.htm>>.

54. *Id.*

55. Settlement Agreement in Claims of Less Than \$250,000, Case No. 86 and Case No. B38. In anticipation of such a lump-sum settlement, Congress in 1985 had given the FCSC standby jurisdiction to adjudicate claims of U.S. nationals against Iran (Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. 99-93, tit. V, 99 Stat. 405, 437 (1985)).

56. 1995 FCSC Y.B. 5-6.

almost \$8 million through an investment in Treasury securities). As a result, claimants received 100 percent of their principal, but interest awards were paid on a pro rata basis of 34.96 percent of each claimant's interest award.⁵⁷

In April 1995, a group of twenty-two claimants whose claims were upheld by the FCSC filed suit in the Court of Federal Claims, arguing that the 1990 Settlement Agreement between the United States and Iran constituted a "taking" in violation of the Fifth Amendment. These claimants sought payment of the unpaid portion of their awards from general monies in the U.S. Treasury.⁵⁸ "Plaintiffs do not object to the valuation of their claims by the [FCSC]. They argue that a taking occurred because the Settlement Agreement failed to provide for a complete payment of the interest on their claims."⁵⁹ The Court of Federal Claims applied the "takings" test articulated in *Penn Central Transportation Co. v. New York*⁶⁰ and concluded that "no compensable taking occurred and granted summary judgment to the United States."⁶¹ The U.S. Court of Appeals for the Federal Circuit affirmed the trial court's decision. While agreeing with the plaintiffs' position that the *Penn Central* analysis did not fit comfortably in the regulatory taking category, the Court of Appeals reiterated the trial court's observation that "those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity."⁶² In the case of the Settlement Agreement with Iran, the United States "provided an alternative tailored to the circumstances which produced a result as favorable to the plaintiffs as could reasonably be expected."⁶³

IV. Claims Against Iraq

Iraq's invasion and occupation of Kuwait in August 1990 prompted an international response, under the auspices of the United Nations, which included the establishment of a U.N. commission to review, process, and evaluate claims and to pay compensation for losses and damages suffered as a result of the Iraqi action. This United Nations Compensation Commission (UNCC) is a subsidiary organ of the United Nations Security Council, having been created by Security Council Resolution.⁶⁴

Claims are submitted to the UNCC by governments on behalf of themselves or their nationals (including corporations), or by U.N. entities filing on behalf of persons not in a position to have a claim submitted through a government (e.g., Palestinians).⁶⁵ The UNCC reports that it has received "over 2.6 million claims with a total *asserted* value of approximately US\$250

57. *Id.* at 7. See also 1996 FCSC Y.B. 50-52.

58. *Abraham-Youri v. United States*, 36 Fed. Cl. 482 (1996).

59. *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997), cert. denied, 118 S. Ct. 366 (1998).

60. *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

61. *Abraham-Youri*, 139 F.3d at 1465.

62. *Id.*

63. *Id.*

64. S.C. Res. 692, U.N. SCOR, 2987th mtg. (1991). For background on the structure and mandate of the UNCC, see Murphy, *supra* note 1, at 586-87 (1997). Also, basic information about the UNCC can be found at <<http://www.unog.ch/uncc/>>.

65. The UNCC reports that "over 3,000 claims on behalf of Palestinians and other persons" not able to submit a claim through a government have been submitted by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the United Nations Development Programme (UNDP), and the Office of the United Nations High Commissioner for Refugees (UNHCR).

billion" by some 100 governments or United Nations entities.⁶⁶ As of November 1998, the UNCC had issued 1.3 million awards equaling some \$7 billion. "To date the United States Government has received funds from the UNCC for initial installment payments on approximately 1435 claims of U.S. claimants."⁶⁷

One of the issues plaguing the UNCC has been inadequate funds from which to pay awards. In 1991, the Security Council authorized the Compensation Fund to a thirty percent share of Iraqi oil exports.⁶⁸ A significant development occurred in May 1998, when the Secretary-General approved the Iraqi government's distribution plan for humanitarian supplies to be provided to the Iraqi people under the "oil-for-food" mechanism. The Secretary-General's action effected the coming into force of a Security Council resolution approving an increase in Iraq's export of oil to a value of US\$5.256 billion for 180 days.⁶⁹ Previously, the Security Council had authorized that Iraqi "oil-for-food" exports be capped at \$1 billion a quarter.⁷⁰ This increase was extended by the Security Council for an additional 180 days on November 26, 1998.⁷¹

The UNCC process only applies to claims arising on or after August 2, 1990, the day Iraq invaded Kuwait. An estimated \$5 billion in U.S. claims are not within the UNCC's jurisdiction. In reaction to the Iraqi invasion and occupation of Kuwait in August 1990, the U.S. government froze \$1.2 billion in Iraqi assets in the United States. Between 1993 and 1997, legislation was introduced in the U.S. Congress, with the encouragement of the Executive Branch, to authorize a claims process for the determination of and awarding of compensation for claims by the U.S. government and U.S. nationals that are outside the jurisdiction of the United Nations process, either because they arose before August 2, 1990, or involve claims otherwise outside the UNCC's jurisdiction.⁷² In March 1996, Congress approved the conference report for the Foreign Relations Revitalization [Reauthorization] Act which included authorization for the Foreign Claims Settlement Commission (FCSC) to adjudicate outstanding claims against Iraq.⁷³ The legislation was vetoed by the president over disagreements not related to Iraq or the FCSC.

Prior to the House-Senate conference on the Foreign Relations Revitalization Act, but after each chamber had approved the legislation authorizing FCSC adjudication of Iraqi claims, the Attorney General, in January 1996, approved the establishment of the Iraq Claims Registration Program under the auspices of the FCSC. Specifically, U.S. nationals were allowed to register their claims with the FCSC for future adjudication. According to the FCSC, more than 3,700 registration forms had been received by the end of 1996.⁷⁴

In 1997, the Senate Foreign Relations Committee approved legislation authorizing the vesting of blocked Iraqi assets in the United States for the satisfaction of claims by U.S. nationals and the

66. United Nations Compensation Commission, *The Claims*, available at <<http://www.unog.ch/uncc/claims.html>>.

67. The White House: Office of the Press Secretary, Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Nov. 5, 1998) available at <http://www.state.gov/www/regions/nea/981105_whletter_iraq.html>.

68. S.C. Res. 705, U.N. SCOR, 3004th mtg., U.N. Doc. S/RES/705 (1991). The authorities and mechanism for funding the UNCC from 1991 to 1996 have been discussed previously by Murphy, *supra* note 1, at 586 (1997).

69. S.C. Res. 1153, U.N. SCOR, 3855th mtg., U.N. Doc. S/RES/1153 (1998).

70. S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (1995).

71. S.C. Res. 1210, U.N. SCOR, 3946th mtg., U.N. Doc. S/RES/1210 (1998).

72. 1995 FCSC Y.B. 23-24.

73. H.R. 1561, 104th Cong. (1995). The companion Senate legislation was S. Res. 908, 104th Cong. (1995).

74. 1996 FCSC Y.B. 28.

U.S. government that are not within the jurisdiction of the UNCC.⁷⁵ During the House-Senate conference on the foreign relations authorization, *USA Today*, under the headline "Helms Bill Favors Tobacco Firms Over Vets," accused Senate Foreign Relations Chairman Jesse Helms of writing legislation in which "business interests, including seven tobacco companies, get priority in filing claims against \$1.3 billion in impounded Iraqi funds."⁷⁶ This report linking veterans compensation with frozen Iraqi funds resulted in the House voting to instruct its conferees, in the words of the motion's sponsor, "to reject section 1601 of the Senate amendment which provides for payment of all private claims against the Iraqi Government before those of U.S. veterans and the U.S. government (i.e., U.S. taxpayers)."⁷⁷ This House action forced the conferees to strip the Iraqi claims section from the conference report. This incident not only clouded the issue of veterans compensation with that of foreign claims, a point noted by Senator Helms in a statement responding to the *USA Today* article,⁷⁸ but also ended any prospects of immediate congressional action on Iraqi claims. As a result, no congressional action took place in 1998 on the Iraq claims question and none is expected during the current session of Congress.⁷⁹

V. Claims Against Albania

As part of continuing United States efforts to resolve claims arising from the actions of Communist governments in central and eastern Europe that came to power at the end of World War II, the United States reached agreement with Albania in March 1995. This agreement called for the settlement of U.S. national property claims against Albania for a lump-sum payment of \$2 million.⁸⁰ The Albanian Parliament approved the agreement in April 1995 and paid the \$2 million to the United States in October 1996.⁸¹

For purposes of the Albanian claims settlement, the State Department inserted a residency requirement in the Agreed Minute to the settlement agreement which limited the agreement's jurisdiction over claims of Albanian-Americans. The Agreed Minute states that:

... the term 'United States nationals' shall include dual United States—Albanian nationals only if those nationals are domiciled in the United States currently or for at least half the period of time between when the property was taken and the date of entry into force of this agreement [April 18, 1995].⁸²

This residency requirement has impacted the number of claims receiving FCSC certification. Of the 325 claims filed with the FCSC, fifty have been denied because the claimant could not satisfy the residency threshold outlined above even though the claimant is a U.S. national by birth. As the commission noted:

75. S. Res. 903, 105th Cong. § 1601 (1997) (the Foreign Affairs Reform and Restructuring Act of 1997).

76. John Hanchette, *Helms Bill Favors Tobacco Firms Over Vets*, USA TODAY, Sept. 10, 1997, at 1.

77. CONG. REC. H8114 (daily ed. Sept. 29, 1997) (statement of Rep. Doggett). (The motion to instruct conferees was approved by the House on October 1, 1997, by a vote of 412 in favor to five opposed (Roll no. 480)).

78. Senator Jesse Helms, Statement on *Veterans and Iraqi Claims*, Memorandum to the Press, released by the Senate Foreign Relations Committee (Sept. 10, 1997).

79. Telephone interview with a Senate staff member (who requested anonymity) familiar with the 1997 House-Senate conference (Feb. 3, 1999).

80. The agreement is reprinted in 1995 FCSC Y.B. 17-20.

81. 1996 FCSC Y.B. 9-10. Also in 1996, the Albanian Government paid \$2 million to the United Kingdom to settle the Corfu Channel case in which two British destroyers were sunk allegedly by Albanian mines.

82. 1995 FCSC Y.B. 19.

Many of the claimants before the Commission could not satisfy the residency requirement. Although they considered themselves United States nationals and likely would have taken up residence in the United States after World War II if they could have done so, the oppressive, isolationist Communist regime that took power in Albania in 1944 prevented them from leaving that country. Moreover, even after the fall of the Communist regime in 1991, most were so desperately poor that they could not amass sufficient funds to finance their travel to the United States before April 1995.⁸³

Throughout 1997 and 1998, the commission continued to adjudicate claims, having completed its review of all but fewer than two dozen claims. Violence in Albania erupted in 1997 and has continued to the present time to an extent that has hindered claimants' ability to obtain the documentation to prove their cases and the FCSC's efforts to verify the documentation it already has in hand. However, for those cases which were certified prior to the outbreak of the violence, the Department of the Treasury has compensated the certified amounts of the claimants. In all, seventy-eight awards have been certified, with the Treasury Department issuing a total of \$759,332 in principal and interest.⁸⁴

83. 1997 FCSC Y.B. 52; *see also* 1996 FCSC Y.B.11.

84. 1997 FSSC Y.B. 53.

