## SECTION III: FINAL REPORT ON THE VIETNAM CLAIMS PROGRAM

On February 25, 1986, the Commission completed a program to determine the validity and amount of claims of United States nationals against the Socialist Republic of Vietnam arising from the nationalization or other taking of property. The program had been authorized by Public Law 96-606 which added title VII to the International Claims Settlement Act of 1949. The Commission made determinations on 534 claims granting awards to 192 claimants in the total principal amount of $99,471,983.51. The program constituted a pre-adjudication of claims because no claims settlement agreement had been reached with the Socialist Republic of Vietnam to provide funds for the payment of awards made by the Commission. The statute directed that the validity of claims be determined in accordance with applicable substantive law, including international law. For a claim to be found compensable, it had to be established that an interest in property had been nationalized, expropriated, or otherwise taken at a time when it was owned by a United States national. Although the number of claims adjudicated was relatively small in comparison with some of the programs conducted in the past by the Commission, a number of new and challenging issues were presented.

### Nationality

The statute authorizing the adjudication of claims specifically directed that a claim might be favorably considered only if the property right on which the claim was based was owned by a national of the United States on the date of loss. This direction of the statute was but a restatement of traditional international law which allows the United States to espouse claims against a foreign government only where a loss occurred to someone who was a United States national at the time.

This requirement caused the denial of over 200 claims filed by individuals who were clearly not United States nationals on the date their property was taken. Most of these were Vietnamese nationals who fled South Vietnam at the time of the Communist takeover and could not have become United States citizens, at the earliest, until 1980.

In some of these claims the assertion was made that, prior to the fall of South Vietnam, the Vietnamese owner of the property had transferred ownership to a son, daughter, or even a grandchild who was a United States citizen. In none of these claims, however, was the Commission able to find that an effective transfer of title had occurred prior to the date the property was taken. The claims were denied due to lack of credible contemporaneous evidence in support of the asserted transfers. In several claims, the Commission did recognize a transfer of an interest in property to a United States national under the Vietnamese law of intestacy.[3]

The nationality requirement also presented difficulties for a corporate claimant. To qualify as a United States national, a corporation or other legal entity had to establish that it was organized under the laws of the United States and that natural persons who were citizens of the United States owned directly or indirectly 50 per centum or more of the outstanding stock of such corporation or entity. To establish the fact of 50% ownership by natural persons who were citizens of the United States, corporate claimants normally provided evidence of the places of residence of the holders of their common stock. In most instances this established that 95% to 100% of all stock was held by stockholders who were residents of the United States. While the Commission recognized

3 Claim of Ahn Quach, Claim No. V-0320, Decision No. V-0318

that residence in the United States was not conclusive of the fact that an individual was a United States citizen, the Commission was willing to presume that at least 50% of the stockholders must have been United States citizens.

In one claim,[4] a subsidiary of Shell Oil Company had entered into a joint venture with a subsidiary of Cities Service Company under a drilling concession permitting the exploration for oil off the coast of Vietnam. The majority of the stock of Shell Oil Company was held by two foreign corporations so that the Shell subsidiary did not qualify as a United States national. The subsidiary of Cities Service did qualify as a United States national as over 95% of the shares of Cities Service were held by United States residents. It was argued that the Commission should look to the joint venture as constituting a legal entity which qualified as a national of the United States. The Commission agreed that the joint venture could be considered as the claimant. This conclusion was reached due to the fact that under the law of Texas where the joint venture had been formed, a joint venture was considered a separate legal entity, although this view was not universally held throughout the United States. Any doubt concerning this conclusion was removed by reference to the wording of the House report accompanying Public Law 96-606, which cited a joint venture as falling within the definition of "other legal entity" as used in the statute.

In its Proposed Decision, however, the Commission went on to find that the record did not establish that the joint venture qualified as a United States national. While it was established that more than 50% of the indirect ownership of the joint venture was in the hands of stockholders who were residents of the United States, the number did not sufficiently exceed 50% to allow the Commission to presume that 50% of the stock was actually held by natural persons who were also citizens of the United States. The Commission, therefore, made an award for half of the total loss to the subsidiary of Cities Service.

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4 Claim of Pecten Vietnam Company, Claim No. V-0522, Decision No. V-0425

After filing an objection to the Proposed Decision, Shell Oil Company submitted further evidence demonstrating that a higher percentage of the joint venture was indirectly owned by residents of the United States. Evidence was submitted that the two foreign corporations owning most of Shell were, themselves, partially owned by stockholders in the United States which served to increase the indirect ownership of the joint venture by United States residents. A block of the shares of Shell Oil was held on behalf of United States employees of that company which, as a group, were almost entirely United States citizens. The additional evidence was sufficient to allow the Commission, upon reconsideration, to conclude that the joint venture did qualify as a United States national, justifying an award to the joint venture for the entire amount of the loss.

In addition to the requirement that property had to be owned by a United States national on the date of loss, was the further requirement that the claim had to be continuously owned by United States nationals from the date of loss until the date of filing. This rule caused the denial of one claim for the loss of real property owned by a corporation.[5] The corporation had not been formed under the laws of the United States and therefore it did not qualify as a United States national. The corporation, however, was substantially indirectly owned by United States stockholders. To the extent of such ownership, a valid claim arose. Prior to the date the claim was filed, however, the assets of the corporation were sold to foreign interests. Although claimant argued that the claim against Vietnam was not included in the assets so transferred, the evidence failed to support this contention. The Commission found that all of the assets, including the claim against Vietnam, had been transferred, and denied the claim on the ground that it had not been continuously owned by United States nationals from the date of loss until the date of filing.

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5 Claim of American International Group, Inc., Claim No. V-0332, Decision No. V-0405

In some claims, the owner of the property had become a United States citizen within a year or two of the fall of South Vietnam. While the Commission presumed, absent other evidence, that most property in Vietnam had been taken over by the Communist authorities at the time of the fall of South Vietnam on or about May 1, 1975, in these cases the Commission scrutinized the record to see if there was any evidence or reason to believe that the property may not have been taken until after the owner had become a United States citizen. In some of these claims, the property had been occupied by relatives of the owner and, in fact, the premises were not taken until a later date when the relatives either escaped from Vietnam or were expelled from the premises by government officials.[6] In those claims, the Commission was able to find that the property had not been taken until after it had become owned by a United States citizen.

In one series of claims it was argued that, although the property was owned by Vietnamese nationals, the fact that the United States Government had closed its Embassy with the fall of South Vietnam, and had not granted diplomatic recognition to the present government of Vietnam, resulted in a violation of the claimants' rights under the United States Constitution and that, therefore, the Commission should ignore the statutory requirement for United States ownership of the property on the date of loss. This theory would have required that awards be made to all Vietnamese, whether still in Vietnam or the United States, for all losses of property because the United States had withdrawn from Vietnam. The Commission rejected the theory out-of-hand.

A variation on this issue arose due to the fact that a non-Vietnamese citizen was not, in general, allowed to own real property in Vietnam. There was a laborious procedure by which a non-Vietnamese citizen could ultimately apply for permission from the President of the Republic of Vietnam to record title. Due to these requirements, a number of Americans

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6 E.g. Claim of Hien Hoang Clayton, Claim No. V-0118, Decision No. V-0399

working in Vietnam purchased homes, but placed them in the name of a Vietnamese national, normally, a spouse or fiancee. Technically, under Vietnamese law, therefore, the property was not owned by a United States citizen on the date of loss. The Commission considered this factual situation at length and reached the conclusion that, to the extent the United States citizen could establish an actual financial contribution to the purchase of the residence, the Commission would, in effect, follow the res (in this case the money) and where the investment was lost due to the confiscation of the premises, would find that an award was justified.[7]

## Availability and Interpretation of Evidence

One difficulty which continued to plague both claimants and the Commission throughout the program was lack of supporting documentation of the claims. In the weeks leading up to the fall of Saigon, the American business community and Americans employed in Vietnam were being assured by governmental authorities that there was no need for concern and that the political situation would remain stable. Suddenly, American residents in Vietnam were faced with a deterioration of the military situation which necessitated immediate evacuation. Often the claimants had but a few hours' notice of evacuation and were limited to taking with them only one suitcase of personal effects.

It would have been an unfair burden to require the claimants who left under such circumstances to support each aspect of their claim with detailed documentary evidence. On the other hand, the Commission had a responsibility to determine the merits and value of each claim based upon some factual basis beyond mere speculation or vague assertions. The Commission also encountered some claims where claimants had initially indicated that they were not in possession of any supporting documentation but, when faced with the possibility that their claim might be denied or approved only in a minimal amount, grudg-

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Claim of William Yerabek, Claim No. V-0167, Decision No. V-0257 ingly came forward with documentation which had, in fact, been in their possession, but which substantially contradicted some of their original assertions.

The Commission was willing to consider any evidence available, including affidavits or documentation available in the United States which supported claimant's assertions, such as proof of transfers of U.S. funds to Vietnam on or about the time the claimant asserted that certain investments had been made in Vietnam. In a number of claims claimants were encouraged to come before the Commission and testify under oath to facts within their knowledge so as to allow the Commission to accept that evidence which appeared credible. In some claims, the claimant was able to locate in the United States former builders, architects, or accountants who could provide testimony concerning the construction and description of buildings or, in some cases, copies of building plans or even balance sheets prepared for claimant in Vietnam.

A number of claimants had some documentation concerning the value of their property, such as purchase contracts, tax assessments related to real property or business financial records, all of which were denominated in Vietnamese piasters. The official exchange rate between the piaster and the U.S. dollar had changed significantly during the decade before the fall of South Vietnam. In 1966, the official exchange rate went from 35 piasters to the dollar to 80 piasters to the dollar where it remained until 1972. The piaster was again devalued in 1972 and the exchange rate became 425 piasters to the dollar. It steadily declined thereafter to the last official exchange rate of 755 piasters to the dollar at the time of the fall of Saigon. In addition, there were as many as three parallel exchange rates applicable to various types of transactions. In interpreting the evidence submitted, the Commission attempted to establish the date of the particular transaction reflected by the evidence available in order to apply the exchange rate applicable at that time to determine the dollar value evidenced by the document. Thus, for example, an agreement reflecting the purchase of a house in the latter part of 1972 for 10,000,000 piasters would be evidence reflecting a value at that time of approximately $24,000. A similar purchase for 10,000,000 piasters at the end of 1974 would be evidence reflecting a value approximating $14,000.

The Commission also had to consider the assertion made by many claimants that the stated purchase price of property or the actual balance sheet for a business deliberately understated the actual payment or the actual value of a business for the purpose of reducing tax liability under Vietnamese law.

**The Confiscation of Property**

Many claimants did not have proof concerning precisely what happened to the their property after they left Vietnam. From general information available, it was clear to the Commission, as it had been to the Foreign Relations Committee of the House of Representatives, that the Communist government had expropriated in one form or another, all property previously owned by United States citizens.

It was also clear that with the fall of South Vietnam, the Communist government had moved immediately to requisition unoccupied houses and, absent specific evidence to the contrary, the Commission presumed that such property had been taken as of May 1, 1975. In some instances, real property or businesses had been left in the custody of Vietnamese nationals who ultimately escaped from Vietnam and were able to provide more precise evidence as to the exact date that property was taken over, in which case, the Commission was able to determine the actual date of confiscation.

Many claims were made for personal property such as furniture, household effects, or vehicles which were left behind when the claimant was evacuated. This presented an issue for the Commission as to whether it could be held that such personal property had, in fact, been confiscated by government authority as contrasted with being dispersed into the hands of relatives, neighbors, landlords, thieves, or vandals.

The Commission's research had unearthed a detailed account of the fall of Saigon which related how Communist soldiers immediately went from door to door checking on the ownership of individual dwellings and taking inventory of their contents. Houses previously occupied by Americans, or South Vietnamese who had fled the country, were occupied by the soldiers and all personal property was requisitioned. Vietnamese in possession of any personal property were required to prove that it had not been acquired from Americans who had departed and, absent such proof, the personal property was confiscated. The requisition of such property was confirmed by official communications by the new government. Based upon these accounts, the Commission was able to presume that personal property left behind by departing Americans had, in fact, been confiscated by governmental authority.

One claim presented an issue relating to the loss of a unique type of property.[8] With the evacuation of South Vietnam, substantial quantities of blank travelers checks were left behind in Vietnam. Some were in the vault of the branch of Bank of America in Saigon and the rest were in the hands of agents. Over the ensuing years several hundreds of thousands of dollars worth of these checks had been presented to claimant in the United States for payment. As the signatures on the checks were in agreement, claimant was required to make good on a large percentage of these checks. In some instances, claimant was able to go back against a prior endorser; however, claimant had still suffered a loss of almost $300,000 and asserted that there was the potential for additional future losses of over $100,000. The issue presented to the Commission was whether the Government of Vietnam was responsible for this loss or whether the checks had come into the hands of private Vietnamese citizens who had processed them without government authority.

As to the checks which claimant established were in the bank vault, the Commission had little difficulty in determining that the government was respons-

8 Claim of BA Cheque Corporation, Claim No. V-0207 Decision No. V-0444

ible for their ensuing presentation for payment, as decrees issued by the government authorized the nationalization of all banks and the opening of all bank vaults. Additional decrees of the Communist government required that any individual in possession of property owned by "imperialistic" American companies had to declare such property and turn it over to government authorities subject to substantial penalties for failure of compliance. The Commission, therefore, concluded that the Government of Vietnam was responsible for those checks which had, in fact, been presented to claimant as of December 28, 1980, the date of the passage of Public Law 96-606. The Commission also held, however, that claimant had not suffered a loss until such time as it was required to make good on a traveler's check, and that claimant was therefore not entitled to an award for those checks left behind which had not been presented for payment. The Commission noted that at such time as a settlement with Vietnam occurred, claimant would, undoubtedly, be afforded the opportunity to establish any losses occurring after December 28, 1980.

Certain claims were filed for bank accounts in Vietnamese banks. In a number of previous programs, the Commission had found that claims for bank accounts were not compensable because the foreign government had not confiscated the account, even though currency restrictions had severely limited the use of such accounts and forbade their conversion into United States currency and transfer to the United States. In the case of Vietnam, the Commission's investigation found that bank accounts came under the management of the revolutionary administration, although permission to make withdrawals could theoretically be obtained for "humanitarian reasons." The Commission supplemented its investigation with interviews with Vietnamese witnesses who had remained in Vietnam for several years after the fall of South Vietnam, and who themselves had no claim for lost bank accounts. From this investigation, the Commission was able to determine that seldom was any withdrawal allowed and even then could only be made in person and in no event in a greater amount than the equivalent of $33.00.

The Commission, therefore, concluded that bank accounts of United States claimants were effectively taken and that an award could be made for this type of loss.[9]

The issue of what constitutes a confiscation of "property" arose in several major claims involving oil drilling concessions.[10] Several American petroleum companies, either individually or through joint ventures, had been granted exclusive five year concessions by Vietnam to explore for oil in certain offshore locations. To obtain the concessions, the claimants had initially paid a multi-million dollar concession fee and had then expended large sums for seismic studies and test drilling. Under the terms of the concessions, the results of these studies and test wells were shared with the Government of Vietnam. With the fall of South Vietnam, the Communist government revoked these concessions, although they had only been in operation in one case less than one year and in no case more than two years.

After a review of the record and previous precedents of the Commission, the Commission found that such a concession constituted a property right which had been taken. The Commission considered whether the entire value of the concession had been taken or only the percentage representing the remaining years of the concession at the time it was revoked. The Commission concluded that the entire concession had been taken because in each case the claimant had an automatic right to renew the concession for an additional five years and because a concession to explore for oil for only one or two years would have been valueless as it would not have afforded time to carry out reasonable exploration.

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9 Claim of The Pearl S. Buck Foundation, Inc., Claim No. V-0261, Decision No. V-0439

10 Claim of Amerada Hess Corporation of Vietnam, Claim No. V-0247, Decision No. V-0427; Claim of Esso Exploration & Production Vietnam, Inc., Claim No. V-0236, Decision No. V-0436

The Commission then faced the issue of attempting to determine the value of this property right which had been taken. As oil in commercial quantities had not been discovered by the time the concessions were revoked, there was no basis to speculate as to whether such oil might or might not have been discovered or what, if any profits might have accrued to the claimants. The Commission determined that the concession should be valued by the amount of the capital expenditures made by the claimants. These included, in addition to the concession fee, the capitalized expenses of seismic and geologic studies as well as the drilling costs for test wells. As the results of the studies and drilling had been provided to the Vietnamese government and the fee had been paid to the Vietnamese government, the Commission considered that these capitalized expenses both represented the loss suffered by the claimants and the advantage gained by the Vietnamese government. In each case the Commission excluded from the award normal administrative expenses which it felt could not properly be capitalized.

## Valuation

In accord with the general rules of international law, where the Commission determined that property has been taken, it was required to determine the value of that property on the date of loss. In addition, the Commission awarded interest from the date of loss until such future date as a claims settlement is reached with the Government of Vietnam. Establishing the value of different types of property as of the date of loss was made difficult in many claims by the lack of documentation of such value.

As the Commission had determined that personal property left behind in Vietnam had presumptively been taken by government authority, the Commission had to determine the value of a wide range of personal property, including furniture, household effects, artifacts, clothing, vehicles, pets, and similar items. Under the circumstances, it was not reasonable to require the claimants to produce sales receipts or other documentary evidence of the value of such items. The Commission did require an itemized list of the property claimed along with individual estimates of values for the property. The Commission then had to determine whether these asserted values were reasonable. To assist in this determination the Commission consulted mail order catalogues from 1975 and the official N.A.D.A. Used Car Buying Guide for 1975, which sources provided a range of prices for new property in that year. In cases where the estimates reflected an exaggeration of values, or where the estimates were based upon replacement value of new property when the actual property admittedly was several years old, the Commission often found the value of the property to be less than the amount claimed. Where losses of substantial quantities of personal property were made, the Commission also considered such information as the previous income and financial standing of the claimants, as well as the amount of time they had been living in Vietnam, to judge whether it was reasonable that they would have had the amount of personal property asserted. Without some other corroborating evidence, the Commission limited the amount it would award for cash which assertedly had been left behind in a residence.

A number of claims involved the loss of houses in Vietnam. Fortunately, some claimants were able to submit documentary evidence of the actual purchase price, or the actual construction cost of the houses along with photographs. The Commission also secured information from the United States Foreign Service concerning the construction cost per square foot of various types of housing built for Embassy personnel. The Commission could then use these indicia of value to determine a reasonable value for houses belonging to other claimants who had no documentary evidence of the value of their particular house.

A number of claims were filed by claimants who had established businesses in Vietnam. These included a wide range of businesses, including import/export, restaurant and catering, manufacturing, hotels and health service institutions, among others. The economic situation in Vietnam for several years before the fall of South Vietnam had been an entrepreneur's delight, and many of the claimants were involved in a number of business interests. Record which were available relating to the value of these businesses were often short on detail and a number of claimants frankly informed the Commission that certain sets of records either deliberately undervalued the property for tax reasons or overvalued property to assist in obtaining financing. In most of the claims of this nature, the Commission encouraged oral hearings so that the businessman could testify under oath and provide details as to the business operation.

In several claims, American corporations submitted detailed balance sheets setting forth the book value of the company's Vietnamese operation.[11] Claimants asserted claim for the book value after certain adjustments were made in the books to more accurately reflect the true value of the assets. It was contended, and the Commission agreed, that physical assets which had been, for accounting purposes, fully depreciated would have had an actual market value of 20% of their original cost. A second contention made was that the depreciated value of assets originally entered at cost at the time of acquisition should be increased by the same percentage that the acquisition cost would have increased to reflect the present depreciated value. The Commission also agreed with this contention, although it had to decide which of several sets of economic indicators properly reflected the increase in the acquisition cost.

A difficult issue of valuation arose in two interrelated claims for the loss of a Vietnamese general insurance agency and a branch office of a world-wide insurance company, both of which were owned by an American insurance holding company. Following the fall of South Vietnam, the new government eliminated the private sector, both foreign and domestic, from the insurance industry and thereafter all insurance was issued by the government. In the claim for the insurance agency,[12] the government occupied

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11 Claim of Caltex (Asia) Limited, Claim No. V-0325, Decision No. V-0435; Claim of Esso Eastern Inc., Claim No. V-0235, Decision No. V-0438

12 Claim of American International Group, Inc., Claim No. V-0331, Decision No. V-0426

the leased premises and ordered that all remaining employees work for the government in writing insurance and adjusting claims. Although it appeared that a number of key personnel of the agency had been evacuated from Vietnam, the Commission concluded the agency had been taken over as a going concern and that in addition to limited tangible assets, the government had acquired intangible assets of value, including the training and experience of the former employees of claimant, as well as its established procedures and forms. Therefore, the Commission found that claimant was entitled to an award for a going concern value substantially higher than the actual net book value. Records produced as to the operation of the insurance agency, however, demonstrated vastly fluctuating income over the previous five years which presented substantial difficulties in determining the fair going concern value. The Commission arrived at a value determination based upon consideration of multiples of average earnings and distributions to stockholders over the preceding five years.

In the companion claim involving an American insurance company,[13] the Commission found that the fact that its Vietnamese office was closed, and that the government had excluded the private sector from the insurance business, did not provide the basis to determine that the insurance company had been taken over as a going concern. The Commission found that the branch office in Vietnam essentially operated as conduit for premiums; that the capital and resources in support of the Vietnamese operation all existed outside of Vietnam; and that, in fact, the loss to the claimant was the loss of the Vietnamese market which the Vietnamese government was entitled to close to the private sector. An award was given for the loss of the assets of the Vietnam branch, including bank accounts, bonds, and accounts receivable.

## Conclusion

The Commission certified awards in the principal amount of $99,471,983.51 to the Department of the

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13 Claim of American International Group, Inc., Claim No. V-0330, Decision No. V-0404

Treasury, which will ultimately be responsible for distributing funds to the awardees when such funds become available. As of the conclusion of the program, there were no funds to pay the awards of the Commission. The program was in the nature of a pre-adjudication of claims to determine the total amount of damages suffered by United States nationals. This amount will then form the basis for future negotiations to be carried out by the Department of State with the Socialist Republic of Vietnam to obtain a lump sum claims settlement with that government. When such settlement is obtained, the funds received from Vietnam will be turned over to the Department of the Treasury to be distributed to the awardholders.