

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

IN THE MATTER OF THE CLAIM OF

CORNUCOPIA INC.

Under the International Claims Settlement
Act of 1949, as amended

Claim No. G-3257

Decision No. G-1745

Counsel for Claimant: Frank Schreck, Esquire

Hearing on the record held on **MAY 06 1981**

FINAL DECISION

This claim in the amount of \$1,479,000.00 against the Government of the German Democratic Republic, under Title VI of the International Claims Settlement Act of 1949, as amended by Public Law 94-542 (90 Stat. 2509), is based upon the principal and interest assertedly due on 980 sinking fund mortgage bonds, in principal amounts of \$1,000.00 each, issued by the Brandenburg Electric Power Company ("Maerkisches Elektrizitaetswerk Aktiengesellschaft") in 1928.

By Proposed Decision issued January 16, 1980, the Commission denied claimant's claim. In the decision, the Commission noted that the term "property" as used in the Act includes debts owed by enterprises which have been nationalized, expropriated or taken by the German Democratic Republic for which no restoration and no adequate compensation has been paid to the owners of such property. Presumably bonds issued by Brandenburg Electric Power Company fell under the class of debts of that company. However, the Commission denied the claim on the basis that no evidence had been submitted, nor had the Commission been able through its investigation to obtain evidence, to establish that the Brandenburg Electric Power Company had been nationalized by the German Democratic Republic. The Commission further denied the claim on

the basis that no evidence had been submitted to establish the ownership of the subject bonds or whether the owner or owners were nationals of the United States, as defined by the Act, prior to claimant's incorporation in 1973.

The claimant corporation, as represented by its treasurer, Edwin Slade, has objected to the Proposed Decision on several grounds. In addition, the treasurer met personally with the staff of the Commission on July 25, 1980. Subsequent to this meeting, in a written submission dated October 3, 1980, he repeated the arguments previously made in his objection, and also included a map of the German Democratic Republic, a copy of a portion of the constitution of the German Democratic Republic, and a copy of a declaration by the United States Secretary of State in 1949 regarding the United States' refusal to recognize the German Democratic Republic as a validly constituted government. The contentions made objection are set forth and discussed below.

It is first contended on objection that it is an unconstitutional impairment of the right of contract to require evidence establishing that the subject bonds were owned by a United States national when the obligor on the bonds, the Brandenburg Electric Power Company, was or might have been nationalized by the German Democratic Republic after World War II. This contention is without merit. The Act permits the Commission to make favorable determinations only on the claims of claimants whose property was owned by a United States national on the date of loss in keeping with the well-settled principle of international law that a State (in this case, the United States) may not espouse a claim on behalf of a private individual or entity against a foreign State for a loss of property unless that property was owned by a national of the first State when the loss occurred. Moreover, the espousal of claims by the United States against a foreign State is not obligatory under the Constitution or any other Federal law, but rather is undertaken by the "grace of the sovereign" for the benevolent purpose of obtaining redress for injuries sustained by its citizens. The United States-national ownership requirement

of the Act thus does not amount to an impairment of the right of contract of the present claimant, since the claimant has no unconditional entitlement, in the first place, to enforcement of its "contract" with the Brandenburg Electric Power Company through espousal by the United States of its claim against the German Democratic Republic. On the other hand, the Congress is empowered-- if not indeed obligated--to limit the provisions of the Act so as to authorize the Commission to consider favorably only those claims for which the United States then can validly hold the German Democratic Republic liable for compensation under international law.

As a further point, it should be mentioned that even if the nationality limitation in the Act were considered unconstitutional, such a conclusion would be of no benefit to the claimant, as it has generally been held to be beyond the competence of administrative agencies to rule on the constitutionality of Acts of Congress. See, e.g., Johnson v. Robison, 415 U.S. 361, 368 (1974).

It is next contended that the evidence of record establishes that the Brandenburg Electric Power Company was the subject of a de facto nationalization by the German Democratic Republic, because almost all of the real property which served as security for the subject bonds was located in the territory of the present-day German Democratic Republic. This contention is also without merit. While it is true that some 28 of the 32 parcels of real property in question apparently were located within the German Democratic Republic, the record gives no indication as to whether those parcels constituted either a majority or even a substantial part of the assets of the Brandenburg Power Company. Furthermore, there is no indication that any of those parcels, or any other assets of the Brandenburg Electric Power Company, were in fact subjected to action amounting to a nationalization or other taking by the German Democratic Republic. On the contrary, as was pointed out to the treasurer of the claimant corporation during his meeting with the Commission staff, the West German

government has taken the position that the assets of the Company were never subjected to such action by the German Democratic Republic at any time before the Company went out of existence in 1951 or 1952. Furthermore, the constitution of the German Democratic Republic adds no weight to claimant's objection on this point, as it makes no reference even to the kinds of enterprises which would be expropriated.

Claimant's related argument, that the Commission has a "duty" to determine the amount involved in the partial settlement by the government of West Germany on the bonds of the Brandenburg Electric Power Company, and to grant to the claimant a prorated award in conformity with the partial settlement, is also unfounded. The Commission is given authority under the Act to adjudicate claims only against the German Democratic Republic; it has no authority to adjudicate claims against West Germany.

An additional point, not discussed in the Proposed Decision, must also be mentioned. Paragraph III. of the seven-page "Mortgage Instrument" in the record provided that the Equitable Trust Company of New York and the "Deutsche Kreditsicherung Aktiengesellschaft" ("German Credit Security Corporation") of Berlin were to be the representatives of the holders of the subject bonds, and they were authorized to take actions on behalf of the holders "as against everyone, especially all public authorities," including dispositions of the mortgage securing the bonds and enforcement of the mortgage and receipt of payments, "especially in the course of forced sale and receivership proceedings" relating to the mortgage. The instrument further provided that the "authorities. . .of the aforementioned representatives are exclusive, so that the holders. . . .of the individual partial bonds shall not be authorized to enforce their rights under the mortgage."

Therefore, even if the contentions made on behalf of the claimant corporation on objection were to be found meritorious, its claim could not be favorably considered, as the terms of the instrument which defined its rights as a holder of the subject

bonds preclude it from bringing a claim for any loss connected therewith. Instead, the Commission would be able to give favorable consideration to the claim only if it had been filed on the claimant corporation's behalf by its authorized representative, the Equitable Trust Company of New York.

Based upon the foregoing, and having reviewed the entire record, the Commission must therefore conclude that a change in the findings made in the Proposed Decision in this claim is not warranted. Accordingly, the Commission affirms the denial set forth in the Proposed Decision as its final determination in this claim.

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

MAY 6 1981

This is a true and correct copy of the decision
of the Commission which was entered as the final
decision on MAY 6 1981

Richard W. Yarborough
Richard W. Yarborough, Chairman

Francis L. Jung
Francis L. Jung, Commissioner

Francis T. Martens
Executive Director

Ralph W. Emerson
Ralph W. Emerson, Commissioner

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Counsel for Claimant:

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PROPOSED DECISION

This claim in the amount of \$1,479,000.00 against the Government of the German Democratic Republic, under Title VI of the International Claims Settlement Act of 1949, as amended by Public Law 94-542 (90 Stat. 2509), is based upon the principal and interest assertedly due on 980 sinking fund mortgage bonds, in principal amounts of \$1,000 each, issued by the Brandenburg Electric Power Company ("Maerkisches Elektrizitaetswerk Aktiengesellschaft") in 1928.

Claimant is assertedly a United States citizen, within the meaning of the Act, by having been incorporated under the laws of the District of Columbia on May 15, 1973, and more than 50% of its assets being owned by a United States national. No information has been provided, however, as to the citizenship of the owner of the bonds before the claimant's date of incorporation.

Under section 602, Title VI of the Act, the Commission is given jurisdiction as follows:

"The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims by nationals of the United States against the German Democratic Republic for losses arising as a result of the nationalization, expropriation, or other taking of (or special measures directed against) property, including any rights or interests therein, owned wholly or partially, directly or indirectly, at the time by nationals of the United States whether such losses occurred in the German Democratic Republic or in East Berlin. . . ."

In addition, section 601(3) of the Act provides the following definition:

"The term 'property' means any property, right or interest, including any leasehold interest, and debts owed by enterprises which have been nationalized, expropriated, or taken by the German Democratic Republic for which no restoration or no adequate compensation has been made to the former owners of such property."

Claimant, through its attorney, contends that its claim is compensable under the Act based on the assertion that the issuer of the subject bonds, Brandenburg Electric Power Company, and its assets, were located in Potsdam, within the territory of what is now the German Democratic Republic, apparently arguing that the company should be deemed by the Commission to have been nationalized by the German Democratic Republic Government based on the asserted fact of the company's location. However, no evidence has been submitted to show directly that the office of the Brandenburg Electric Power Company or any of the company's assets were located in Potsdam or elsewhere in the German Democratic Republic. The only evidence submitted in this regard is a list of pre-World War II bond issues for which the Federal Republic of Germany agreed to assume partial responsibility for payment in the 1950's, pursuant to the Agreement on German External Debts, 4 UST 443, TIAS 2792 (1953). Based on the fact that issues of the Brandenburg Electric Power Company were not included in this list, claimant apparently infers that the company and its assets must have been nationalized by the German Democratic Republic.

According to an investigation by the Commission's field office in West Germany, the offices of the Brandenburg Electric Power Company were, in fact, located at Keithstrasse 30, in what is now West Berlin, at all times before the company went out of existence in 1951 or 1952. It thus would have been impossible for the German Democratic Republic to carry out an actual, "de jure" nationalization or other taking of the company after World War II.

Moreover, the Commission notes that in a subsequent agreement signed in Bonn, West Germany, on August 16, 1960, the Federal Republic of Germany extended the list of bond issues for which it had originally assumed responsibility for payment to include Brandenburg Electric Power Company bond obligations such as those subject herein, thereby indicating that a significant portion of the assets of the company were located in what is now West Germany.

Based upon the foregoing, the Commission therefore finds that claimant has failed to establish that the mortgage bond obligations of the Brandenburg Electric Power Company on which its claim is based constitute a debt of an enterprise which has been nationalized, expropriated, or taken by the German Democratic Republic, within the meaning of the Act. For this reason, its claim must be and is hereby denied.

As an additional point, it is again noted that no information has been provided as to the citizenship of the owner of the subject bonds prior to claimant's incorporation in 1973.

In this regard, section 603 of the Act provides:

"A claim shall not be favorably considered under section 602 of this title unless the property right on which it is based was owned, wholly, partially, directly or indirectly, by a national of the United States on the date of loss, and if favorably considered, the claim shall be considered only if it has been held by one or more nationals of the United States continuously from the date that the loss occurred until the date of filing with the Commission."

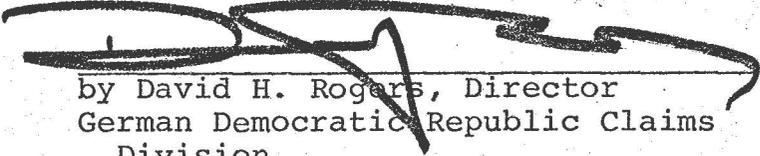
Therefore, for the further reason that the requirements of this section of the Act have not been met, this claim must also be denied.

The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

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

JAN 16 1980

For Presentation to the Commission



by David H. Rogers, Director
German Democratic Republic Claims
Division

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, a Final Decision based upon the Proposed Decision will be issued upon approval by the Commission any time after the expiration of the 30 day period following such service or receipt of notice. (FCSC Reg., 45 C.F.R. 531.5 (e) and (g), as amended.)