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## American Claims against Cuba

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## American Claims Against Cuba

Current claims of United States nationals against the Republic of Cuba stem from the appearance of Communism in that country in 1959. Fidel Castro first came on the public scene in 1953 when he led an armed assault at Santiago de Cuba. As a result he was captured, tried and sentenced to prison. The following year, however, he was released in the course of a general amnesty. In 1956 he established a military position in the Sierra Maestra Mountains and waged guerilla warfare within Cuba. On January 1, 1959, with the rebels having gained a strong foothold and appearing on the verge of success, President Batista fled to the Dominican Republic. Castro then seized power and proclaimed a provisional President. The latter was sworn in and promptly appointed Castro as Commander-in-Chief of the armed forces. Within a month, Castro took over the post of Prime Minister and key ministries were assigned by him to "loyal" revolutionaries.

During the spring of 1959, Castro in various public speeches denied that he was a Communist and announced that there would be no confiscation of private property in Cuba. During this period he even visited the United States where he was accepted in some quarters as an agrarian reformer with at least "social justice" as a goal. Soon the type of "reforms" the Prime Minister had in mind began to appear. The first was on May 17, 1959, when the Agrarian Reform Law<sup>1</sup> was enacted. Events of a confiscatory and retaliatory nature against foreign property owners as well as against many Cubans followed in swift successive order. As a result, and in due course, the United States Congress enacted Title V of the International Claims Settlement Act of 1949, as amended,<sup>2</sup> providing for the

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\*Chairman, Foreign Claims Settlement Commission of the United States; member of the Council of the American Bar Association Section of International and Comparative Law; and former Chief Justice, Colorado Supreme Court.

<sup>1</sup> Cuban Official Gazette, Special Extraordinary Edition, June 3, 1959.

<sup>2</sup> 78 Stat. 1110, 22 U.S.C. Sections 1643-1643k, as amended, 79 Stat. 988 (1965) (hereinafter sometimes referred to as Title V or the Act).

present claims program against Cuba in order to protect the rights of American citizens who had suffered losses in Cuba.<sup>3</sup>

The Congressionally instituted program had a closing date for filing claims of May 1, 1967. As of April 25, 1969, a total of 8,404 claims had been filed. This consisted of 698 claims docketed by the Commission on behalf of Americans who were still in Cuba and who were unable to file for themselves; 6,635 other claims of individuals and 1,071 corporate claims. The asserted value of the personal claims was \$498,653,406.33 and of the corporate claims \$2,841,258,021.74 for a total of \$3,339,911,428.07. Also, by April 25, 1969, a total of 34 claims had been withdrawn and 297 dismissed for various reasons. The percentage of successful claimants on final decisions rendered stood at 79%, compared with 20% in the current Yugoslav Program. Awards totalling \$198,635,898.81 have been granted so far in this Program.

### The Basic Claims Act

Under Title V of the International Claims Settlement Act of 1949, as amended,<sup>4</sup> the Foreign Claims Settlement Commission of the United States was given jurisdiction over claims of nationals of the United States against the Government of Cuba. The program has a dual purpose, viz., to adjudicate individual claims before they become too stale, and to evaluate the total amount involved in all claims so our government has a definite sum to negotiate about when that time arrives. It should be noted that there is no money currently available to pay awards, and that the Congress has left payment or settlement of awards to the future.<sup>5</sup>

The filing period formally opened on November 1, 1965, although the Commission as a courtesy did accept some claims prior to that date, which were considered validated as to filing, on the November 1st date. The filing date, as above noted, expired May 1, 1967, except that under the Commission's regulations,<sup>6</sup> notice given during April 1967 of an intent to file extended the time for such claimants to May 31, 1967. Some large claims were timely filed as

<sup>3</sup> For a more nearly complete description of the beginnings of this Program and for an understanding of the mechanics of FCSC procedures, see Re, *The Foreign Claims Settlement Commission and the Cuban Claims Program*, Vol. 1, No. 1, *The International Lawyer* (1966).

<sup>4</sup> Title V, Section 503(a).

<sup>5</sup> *Id.*, Section 501.

<sup>6</sup> Code of Federal Regulations, Title 45, Chapter V, § 531.2(i).

class actions on behalf of stockholders and bondholders.<sup>7</sup> Such individuals were thereafter permitted to perfect their personal claims. This was a desirable procedure inasmuch as the Commission had to contact the persons concerned in processing their separate claims. One exception to the general closing date was that death and disability claims could be filed six months after the date the claim arose, even if these occurred after May 1, 1967.

Section 503(a) of the Act provides that:

The Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba, \* \* \* arising since January 1, 1959 \* \* \*, for losses resulting from the nationalization, expropriation, intervention, 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 \* \* \*.

In addition to the above-quoted requirement as to date of loss it should be noted that in order for a claim to be considered, it must have been held by one or more *nationals* of the United States continuously from the date of nationalization and until the date of its filing with the Commission.<sup>8</sup> An application of this rule appears in the *Claim of F. L. Smidth & Co.*,<sup>9</sup> in which national was defined as a natural person who is a citizen of the United States, or a corporation or other legal entity which is organized under the laws of the United States or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50% or more of the entity.

Property is defined in Section 502(3) of the Act as including:

\* \* \* any property, right, or interest, including any leasehold interest, and debts owed by the Government of Cuba \* \* \* or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba \* \* \* and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba \* \* \*.

A debt owed by an enterprise which does not qualify as a United States national is thus certifiable. However, in the *Claim of Anaconda American Brass Co.*,<sup>10</sup> it was held that a debt owed by a

<sup>7</sup> E.g., *Claim of Morgan Guaranty Trust Company of New York*, Claim No. CU-1594, 1967 FCSC Ann. Rep. 44.

<sup>8</sup> Title V, Section 504(a).

<sup>9</sup> Claim No. CU-0104, 25 FCSC Semiann. Rep. 44 (July-Dec. 1966).

<sup>10</sup> Claim No. CU-0112, 1967 FCSC Ann. Rep. 60.

corporation which qualifies as a United States national is not certifiable under Section 505(a), unless the debt is a charge on property which has been taken by Cuba. Nor is a stockholder interest in a qualifying United States corporation certifiable, under the holding in the *Claim of Mary F. Sonnenberg*,<sup>11</sup> as the corporation itself should make the claim.

Although an American stockholder may make a claim for an ownership interest in a nationalized Cuban corporation, if the interest is indirectly owned Section 505(c) of Title V requires a showing that at least 25% of the stock is United States owned. The Claim of Avon Products, Inc.,<sup>12</sup> is demonstrative of this requirement.

In the *Claim of Richard G. Milk and Juliet C. Milk*,<sup>13</sup> the Commission, in determining the amount of the claim, deducted all amounts the claimant had received from any source on account of the same loss or losses, as provided in Section 506 of the Act. Another case in which this occurred was the *Claim of Linden S. Blue*.<sup>14</sup> That claim involved a loss suffered when a private airplane was forced down in Cuba while on a flight from the United States to Central America. The loss was held to be recoverable only to the extent not previously recovered from the owner's insurance company. A further limitation, set forth in section 507(b) of the Act and applied in the *Claim of the Executors of the Estate of Julius S. Wikler, Deceased*,<sup>15</sup> is that one cannot make a profit by purchasing a claim.

Each Commission decision certifies to the successful claimant the amount determined by the Commission to be the dollar loss or dollar damage suffered. Each decision also certifies to the United States Secretary of State (e.g., *Claim of Lisle Corporation*<sup>16</sup>) the amount due together with interest thereon at the rate of 6% per annum from the date of the award. The basic information showing how the sum was computed together with a statement of the evidence relied upon and the reasoning employed in reaching its decision, are also included in order to comply with Section 507(a) of Title V. This format, of course, is traditional with Commission decisions in other prior programs. If payments are ever made for awards, however, it

<sup>11</sup> Claim No. CU-0014, 25 FCSC Semiann. Rep. 48 (July-Dec. 1966).

<sup>12</sup> Claim No. CU-0772, Amended Proposed Decision, 1967 FCSC Ann. Rep. 35.

<sup>13</sup> Claim No. CU-0923, 1967 FCSC Ann. Rep. 63.

<sup>14</sup> Claim No. CU-2420.

<sup>15</sup> Claim No. CU-2571.

<sup>16</sup> Claim No. CU-0644.

will probably be through the United States Treasury from funds to be received from a treaty negotiated with Cuba.

Section 503(a) of Title V provides that in making determinations as to the validity and amount of claims and the value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant as is more fully hereinafter discussed under "VALUE."

### **General Nature of Claims Filed**

American claims in Cuba arise from the seizure of business and industrial properties, from individual losses of personalty and realty and even from death and injury. There were large investments in agricultural and ranching properties used for sugar, coffee, and tobacco plantations and for cattle raising. There were small farms and ranches as well as large ones. Losses were incurred not only for land but also for growing crops and for the livestock and the equipment used in the undertakings. Both rural and urban claims usually cover various types of improvements from homes, barns and corrals to factories, stores, docks, warehouses, railroads and other utilities. Various forms of security and debt claims as well as currency items are also involved. Frequently the businesses were operated by individuals through Cuban corporations.

Many United States companies, of course, do business abroad. Cuba was no exception, as shown by the 1,071 corporations which filed claims and by the 760 corporate entities against which claims were filed with the Commission, either by parent corporations against subsidiaries or branch companies, or by individuals against such enterprises. Claimants have included such well-known corporations as Coca Cola, Colgate-Palmolive, Ebasco, International Telephone and Telegraph, Standard Oil Company of New Jersey, Texaco, Sinclair Oil and United Fruit.

Some American business enterprises shipped merchandise to consignees in Cuba. Shipments were usually made with drafts calling upon the consignee to make payment to a specified Cuban bank. Early in 1959, Cuban Governmental interference made it difficult, if not impossible, for banks to transfer the funds paid in to meet such drafts, or even for the consignees to make payments to the banks. In

September 1959, the Cuban Government enacted its Law 568,<sup>17</sup> described as a Foreign Exchange Law. That law put into a legal format what already existed in fact and precluded payment of debts to banks and the transfer of funds out of the country. The Commission has held, for example, in the *Claim of the Schwarzenbach-Huber Co.*,<sup>18</sup> that both the earlier practice and the later statute were an intervention in the contractual rights of the persons involved. Consequently, it has certified losses of such claimants when other elements were established.

On November 17 and 23, 1959, the Cuban Government issued its Laws 617<sup>19</sup> and 635<sup>20</sup> which affected various American mining and petroleum interests. One major case in this area is that of the *Claim of Felix Heyman*,<sup>21</sup> in which the Commission allowed a claim for the seizure of oil concession leases and drilling equipment.

Intervention of enterprises was authorized on November 25, 1959, when the Cuban Government issued its Law 647.<sup>22</sup> This device, as utilized in Cuba, is a form of national administration. It appears to have been the practice of the Cuban Government first to intervene a business enterprise and much later to effect its nationalization. Consequently, the Commission has found that Law 647 is also the basis for certification of awards under the United States statute. It should be noted, however, that the Commission has recognized, in cases such as the *Claim of Jack Moss*,<sup>23</sup> that intervention is not always the date of the law. It may have occurred even prior thereto due to various resolutions of agencies of the Cuban Government or by the ouster of an owner or of corporate officials when persons merely showed up and "took over" prior to the official adoption of Law 647.

Following the United States' action in cutting off trade and breaking diplomatic relations with Cuba because of its treatment of both American nationals and their property, the Cuban Government, on July 6, 1960, adopted Law 851<sup>24</sup> which authorized the nationalization of properties belonging to persons or entities of the United States. This law did not in itself necessarily accomplish individual

<sup>17</sup> Cuban Official Gazette, September 29, 1959.

<sup>18</sup> Claim No. CU-0019, 25 FCSC Semiann. Rep. 58 (July-Dec. 1966).

<sup>19</sup> Cuban Official Gazette, November 17, 1959.

<sup>20</sup> *Id.*, November 23, 1959.

<sup>21</sup> Claim No. CU-0412.

<sup>22</sup> Cuban Official Gazette, November 25, 1959.

<sup>23</sup> Claim No. CU-0225, 25 FCSC Semiann. Rep. 52 (July-Dec. 1966).

<sup>24</sup> Cuban Official Gazette, July 7, 1960.

takings of properties not yet seized, but it was followed by a rapid succession of additional resolutions and laws in furtherance of that purpose. For example, Resolution 1 of August 6, 1960<sup>25</sup> took 26 companies; Resolution 2 of September 17, 1960<sup>26</sup> took branches of three large banks, The First National of Boston, The Chase Manhattan and The First National of New York; Resolution 3 of October 24, 1960,<sup>27</sup> took 31 groups of enterprises; and then, Law 890 of October 13, 1960,<sup>28</sup> took 26 groups of companies. The Commission's decisions have recognized that when a company listed in such a Cuban Resolution or Law is in fact a United States national, the legal effect thereof is that its properties in Cuba have been confiscated.

The Cuban Government also adopted an Urban Reform Law on October 14, 1960.<sup>29</sup> This Law effectively nationalized various rental properties and specifically excluded citizens of foreign countries from any so-called benefits under it.

The Agrarian Reform Law of May 17, 1959,<sup>30</sup> established the National Agrarian Reform Institute and provided for the expropriation of rural properties and for the distribution of land among peasants and agricultural workers. The Fifth Transitory Provision of this Act provided that until regulations for the Law were promulgated, it should be applied through resolutions of the National Agrarian Reform Institute. The regulations for carrying out the expropriation of such rural property were contained in Law 588, enacted October 7, 1959.<sup>31</sup>

Article 31 of the Agrarian Reform Law<sup>32</sup> provided that indemnity would be paid in redeemable bonds for property taken thereunder. It set out that an issue of Republic of Cuba bonds would be

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<sup>25</sup> National Association of Cuban Proprietors, Circular on Legal Dispositions, No. 127, August 6, 1960.

<sup>26</sup> Cuban Official Gazette, Special Edition, September 17, 1960.

<sup>27</sup> *Id.*, Extraordinary Edition, October 24, 1960.

<sup>28</sup> *Id.*, Special Edition, October 13, 1960.

<sup>29</sup> *Id.*, *Urban Reform Law*, Special Edition, (Unnumbered) of October 14, 1960. It can be noted here that in certain nationalizations, as distinguished from confiscations and abandonments, some Cuban citizens who remained in that country after this Law went into effect, were to be paid in installments from payments made by new owners. Cuban Government bonds were to be issued as collateral for any mortgages cancelled by virtue of Article 30 of the Law. The valuations to be used and amounts to be paid are not within the scope of this article. In any event, there is no evidence available to the Commission that such payments ever were, or are being, made by new owners or that any bonds were ever issued.

<sup>30</sup> See note 1 above.

<sup>31</sup> Cuban Official Gazette, October 7, 1959.

<sup>32</sup> See note 1 above.

floated in such amount, and under such terms and conditions as might be fixed in due time, the bonds to be called "Agrarian Reform Bonds" and to be considered public securities. As far as is known, such bonds were never issued.

The expropriation and restriction of currency and bank accounts naturally has also resulted in a number of claims. Banking was made a public function by Law 891, issued on October 13, 1960.<sup>33</sup> Under that authority the government took all banks not theretofore expropriated, except the Royal Bank of Canada and the Bank of Nova Scotia. This action did not in itself nullify debts to depositors, although some accounts, such as corporation accounts, may have been taken by other nationalizations of such entities. It appears that the Royal Bank of Canada and the Bank of Nova Scotia were later sold to the Cuban Government.

Law 930, issued on February 23, 1961,<sup>34</sup> gave the Cuban National Bank the power to effect centralization of liquid assets "temporarily" taken from the people. In effect, this froze or continued the blocking of bank accounts.

A forced currency exchange, at no change of value, was required of all cash on August 4, 1961 by virtue of Law 963.<sup>35</sup> Excess amounts of "old" currency (over 200 pesos freely exchanged) were placed in "special accounts" established by that Law. On August 9, 1961, after getting such "special accounts" into its custody, the Government issued its Law 964 and in effect confiscated the latter sums.<sup>36</sup> This did not affect bank accounts already in existence, except that the deposits of emigrés were seized under Law 989 on December 6, 1961.<sup>37</sup> That ukase is often referred to (presumably facetiously) as the "abandoned property" law. Under it any property left behind by a person permanently leaving Cuba was confiscated. It is well-known that emigrés were not permitted to take out anything except limited

<sup>33</sup> Cuban Official Gazette, Special Edition, October 13, 1960.

<sup>34</sup> *Id.*, Special Edition, February 23, 1961.

<sup>35</sup> *Id.*, August 4, 1961.

<sup>36</sup> *Id.*, August 9, 1961. This law provided that the owners of the special deposits created under Law 963 could draw up to 1,000 P, the balance up to 10,000 P remained in his special account, and all over 10,000 P passed to the Cuban State Treasury. There were some exceptions as, for example, persons in need who could draw 2,000 P out of a 20,000 P account and companies which could draw 5,000 P out of a 10,000 P account. The Foreign Claims Settlement Commission considers all of such special accounts as seized, however, because the owners are denied actual use of their funds. Prior to the confiscations by the Cuban Government, the peso was on a par with the dollar.

<sup>37</sup> *Id.*, December 6, 1961. Also, see *Claim of Floyd W. Auld*, Claim No. CU-0020, 25 FCSC Semiann. Rep. 55 (July-Dec. 1966).

amounts of clothing and personal effects and thus were forced to "abandon" all other property.

Americans also have filed numerous claims for which awards have been made for defaulted bond issues. The *Claim of Clemen R. Maise*,<sup>38</sup> is an example of a claim based on Republic of Cuba bonds which have been found certifiable as debts of the Cuban Government as of the date of default. Examples of claims which involved railroad bonds are the *Claim of Edward R. Smith*<sup>39</sup> (Consolidated R.R. debentures); the *Claim of Joseph Gans*<sup>40</sup> (Cuba R.R. bonds); and the *Claim of Albert Harris*<sup>41</sup> (Cuba R.R. First Lien & Refunding Bonds, Series A and B). And in the *Claim of Gustavus Basch*,<sup>42</sup> the issue concerned bonds secured by religious school properties which had been intervened.<sup>43</sup>

Besides the usual type of claims for the loss of physical goods, of real property, or of amounts due on equities, the Foreign Claims Settlement Commission has also had to determine Cuban law on such questions as when is an action to foreclose a mortgage barred in Cuba; and, does a statute of limitations bar an action for the payment of interest on Cuban Government Gold Bonds after the bond maturity date. These issues were decided in cases such as the *Claim of Emilio J. Pasarell*,<sup>44</sup> where a twenty year statute of limitations was found to bar a mortgage foreclosure as a valid claim;<sup>45</sup> and in the *Claim of Edward Kuerze*,<sup>46</sup> which was a claim based on unpaid coupons from Republic of Cuba Gold Bonds of 1904. In the latter case the Commission held that there was no valid claim because Cuban law prohibited the bringing of an action for payment of such bond interest five years after the due date—and it was found that the time had begun to run in 1944 for those particular bonds.

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<sup>38</sup> Claim No. CU-3191, 1967 FCSC Ann. Rep. 68.

<sup>39</sup> Claim No. CU-5001.

<sup>40</sup> Claim No. CU-1720.

<sup>41</sup> Claim No. CU-2398.

<sup>42</sup> Claim No. CU-0972.

<sup>43</sup> Cuban Official Gazette, (unnumbered) June 7, 1961. Under that Law the Government of Cuba nationalized all centers of instruction being operated by private entities, as well as all properties, rights and interests therein. (See the *Claim of Calvin R. Hemphill*, Claim No. CU-1479.)

<sup>44</sup> Claim No. CU-1585, 1967 FCSC Ann. Rep. 56.

<sup>45</sup> See also: Lanzas, *A Statement of the Laws of Cuba in Matters Affecting Business*, 2d. ed., 317 (1958) where the author cites Articles 1964, 1st part, and 1968, subsection 1, of the Cuban Civil Code.

<sup>46</sup> Claim No. CU-0638.

The text of the Claims Statute makes no specific provision for expenses, costs or attorneys' fees in preparing and filing claims, thus all claims for these items, as well as for the cost of translations, are denied by the Commission. In the *Claim of Mary Pauline Seal*,<sup>47</sup> the Commission, for example, disallowed translation costs for this reason.

Debts of nationalized enterprises, not qualifying as United States nationals, were found compensable in the *Claim of Kramer, et al.*<sup>48</sup> This case involved the Cuba Railroad and the Compania Cubana. There it was held that it was not necessary that the debt in question be secured by property which had been nationalized because the debtors were not Americans.

Since the fundamental basis of all awards in this type of Claims Program requires the existence of a claimant's American citizenship at the moment the loss occurred, no recovery was allowed in the *Claim of Sigridur Einarsdottir*,<sup>49</sup> since it was filed by a non-national, based on the bank account of her United-States-national son, which account she had inherited. In that situation, even if it were assumed that the bank account had been taken by the Government of Cuba during the lifetime of the son, it would have made no difference in the result.

One Commission decision, viz., the *Claim of Morgan Guaranty Trust Company of New York*,<sup>50</sup> held that a Trustee having filed a claim with respect to certain railroad bonds, and the individual owners having also filed claims, the Trustee was not authorized to pursue its claim further. It was also held in that case that the corporation's timely filing of its claim protected the rights of holders of its bonds to have their claims considered; provided, however, that filing was effected not later than March 1, 1970. This date was held suitable in view of the Commission's Regulation 531.5(1)<sup>51</sup> which provides that at any time after the final decision has been issued on a claim, but not later than 60 days before the completion of the Commission's affairs in connection with the program, a petition to reopen on the ground of newly discovered evidence may be filed. The March 1, 1970 date was selected as a closing date because it is the

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<sup>47</sup> Claim No. CU-0059, 1967 FCSC Ann. Rep. 57.

<sup>48</sup> Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 (July-Dec. 1966).

<sup>49</sup> Claim No. CU-0728, 25 FCSC Semiann. Rep. 45 (July-Dec. 1966).

<sup>50</sup> See note 7 above.

<sup>51</sup> Code of Federal Regulations, Title 45, Chapter V.

latest time within which a matter can be processed before the program will be completed according to the present law.

The Congressional intent to exclude claims by the Government of the United States was decided in the *Claims of the United States of America*.<sup>52</sup> The filings in those cases were based upon the nationalization by the Government of Cuba of assets of Cuban Nickel Company and nickel ore at Moa Bay, Cuba.

It was to be expected that infants who are nationals of the United States would be held to be represented by their appropriate guardians and the Commission did so hold in the *Claim of Gladys Goldman, Individually, and as Mother and Natural Guardian of the Minors Denise Myra Goldman and Mitchell Elliot Goldman*.<sup>53</sup>

The Commission held in the *Claim of Kramer, et al., supra*,<sup>54</sup> that a corporation formed in the United States, but not owned by United States nationals to the extent of 50%, does not qualify as a national of the United States. And claims have been denied when the claimant corporations were owned by United States nationals in the requisite 50% or more on the date of the loss but not at the time of filing the claim. Examples of the latter are the *Claim of John Wood International Corporation*,<sup>55</sup> and the *Claim of John Wood Pan-American Corporation*.<sup>56</sup> In the *Claim of Compania Ganadera Becerra, S.A.*,<sup>57</sup> the claimant was organized under the laws of the Republic of Cuba, and it was held that, regardless of the extent of United States ownership, it was not qualified as a claimant.

Another interesting decision is the *Claim of Berwind Corporation*,<sup>58</sup> in which a successor in interest by merger of its wholly owned subsidiary was held eligible to maintain a claim when its assets had been taken by the Government of Cuba. And in the *Claim of Anaconda American Brass Co., supra*,<sup>59</sup> the Commission denied a claim based on a debt of a corporate national of the United States when the debt was not shown to be a charge upon property which was nationalized or otherwise taken. This latter situation should be distinguished, however, from interference in a contractual relationship as

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<sup>52</sup> Claims Nos. CU-2522 and CU-2618, 1967 FCSC Ann. Rep. 50.

<sup>53</sup> Claim No. CU-1033.

<sup>54</sup> See note 48 above.

<sup>55</sup> Claim No. CU-241.

<sup>56</sup> Claim No. CU-0400.

<sup>57</sup> Claim No. CU-0726, 25 FCSC Semiann. Rep. 47 (July-Dec. 1966).

<sup>58</sup> Claim No. CU-0538.

<sup>59</sup> See note 10 above.

discussed in the Commission's decision in the *Claim of The Schwarzenbach Huber Co., supra*.<sup>60</sup>

### The Problem of Establishing Ownership

Establishing ownership of property in a non-accessible foreign country has many difficulties particularly for refugees who have not been permitted to take their records and papers with them. The law is clear, however, that in situations such as in the *Claim of Steel Heddle Manufacturing Company*,<sup>61</sup> and in the *Claim of Joseph Simone*,<sup>62</sup> when a claimant does not choose to or fails to establish a claim, it must perforce be denied. Nevertheless, most claimants, for reasons discussed later under the section of this article entitled "THE QUESTION OF VALUE", are able to produce sufficient competent evidence as to ownership to get them over that hurdle.

The problem of proving ownership is assuaged to some extent due to the fact that under Cuban law, a sale is consummated and becomes binding on the purchaser and seller if there has been a meeting of the minds on the subject and price, even though neither the thing nor the price has been delivered.<sup>63</sup> Also, registration is not necessary for the transfer of ownership or rights in rem between the parties concerned, but it is required if the transaction is to be binding on third parties.<sup>64</sup> Thus the Commission found in the *Claim of Wallace Tabor and Catherine Tabor*,<sup>65</sup> that ownership of realty may be established without a recorded deed.

Another problem for owners arises when a claim is made for the difference between the purchase and sale price of corporate stock. For example, in the *Claim of John A. Stiehler*,<sup>66</sup> no award could be made in the absence of evidence that the seller did not transfer his claim for the loss suffered by the corporation when he transferred the stock. On the other hand, a difficult and pertinent question of continuous United States ownership of a claim was resolved favorably to the claimant in the *Claim of Wikler, supra*,<sup>67</sup> in which the Commission took notice of the fact that the subject bonds were

<sup>60</sup> See note 18 above.

<sup>61</sup> Claim No. CU-0737, 25 FCSC Semiann. Rep. 61 (July-Dec. 1966).

<sup>62</sup> Claim No. CU-1021.

<sup>63</sup> Lanzas, *supra* at 78.

<sup>64</sup> *Id.*, 277.

<sup>65</sup> Claim No. CU-0109, 25 FCSC Semiann. Rep. 53 (July-Dec. 1966).

<sup>66</sup> Claim No. CU-2725, 1967 FCSC Ann. Rep. 70.

almost entirely owned and traded by persons having addresses in the United States. In that case an inference was adopted that the securities were continuously owned by nationals of the United States from the date of loss. In the *Claim of Veronica Geister*,<sup>68</sup> the Commission also found that ownership was established by submission of an affidavit from a broker stating that the securities were purchased in bulk and could not be segregated for submission.

In a more unusual case, in the *Claim of Helen Moore Foster, et al.*,<sup>69</sup> the executrix established that she had been in possession of certain lost securities, and did not transfer them. As a result, the Commission held that the requisite ownership was established. Similarly, a loss was favorably determined in the *Claim of Fidelity & Deposit Company*,<sup>70</sup> even though the claimant lacked the original instruments which were kept by the Treasurer General of Cuba. It was held in that case, that the ownership of the securities could be established by copies of receipts issued by the Cuban Government agency.

In the *Claim of Philip W. Conrad*,<sup>71</sup> the Commission found that the claimant had established his ownership and the value of property by proving that these questions had been litigated before the Tax Court of the United States. And concerning assignments, it was held in the *Claim of the Lunkenheimer Co.*,<sup>72</sup> that a claimant may become the owner by assignment through purchase although, as noted earlier, one cannot make a profit on the purchase of a claim.<sup>73</sup>

## The Question of Value

Section 503(a) of Title V provides in pertinent part that:

In making the determination with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to, (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement.

<sup>67</sup> See note 15 above.

<sup>68</sup> Claim No. CU-8141.

<sup>69</sup> Claim No. CU-2752.

<sup>70</sup> Claim No. CU-2285.

<sup>71</sup> Claim No. CU-0676.

<sup>72</sup> Claim No. CU-0869.

<sup>73</sup> This is in accordance with the wording of Title V in which it is provided in Section 507(b) that:

The amount determined to be due on any claim of an assignee who acquires the same by purchase shall not exceed \* \* \* the amount of the actual consideration paid by such assignee, or in case of successive assignments of a claim by any assignee.

This was applied in the *Wikler* decision, note 15 above.

Obviously, the above wording means that no overall-precedent decision can be rendered in the field of value. It is basic, of course, that the burden is on each claimant to prove in a reasonable manner not only his loss but also the extent and value thereof.

In applying the statutory directive the Commission has held that the question, in all cases, is to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant." It has concluded that this phraseology does not differ from the international legal standard which would normally prevail in the evaluation of nationalized property. The Commission applies the statutory wording as something designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider. There can be no doubt that under some circumstances the book value is the most appropriate to the property and equitable to the claimant, whereas, under other facts it would not be fair. Illustrative of the problem are the final decisions in the *Claim of Felix Heyman, supra*,<sup>74</sup> (Cuban-Venezuelan Oil Voting Trust Decision); the *Claim of Berwind Corporation, supra*,<sup>75</sup> (Havana Coal Company Decision); and the *Claim of Ruth Anna Haskew*<sup>76</sup> (Vertientes-Camaguey Sugar Decision).

Fortunately, most claimants are in possession of some documents, or can furnish detailed affidavits which show the original purchase of the confiscated personal or real property. This is especially true of the corporate claimants which also had offices in the United States, although it is not limited to their claims. Nevertheless, corroborating evidence is also requested by the Commission in some instances and it is generally procured by claimants without too much difficulty due to the large number of refugees outside of Cuba. In addition, the Commission has on hand, or can procure in certain instances for claimants who in good faith have been unable to do so themselves, certain evidence as to both ownership and value. Such evidence is made freely available to claimants where it is applicable to their claims. If the totality of the evidence demonstrates that a claimant should receive a larger award than claimed, the Commission will grant it. The Commission did that, for example, in the *Claim of Eileen M. Smith*,<sup>77</sup> in which, in effect, the pleadings were conformed to the proof.

<sup>74</sup> See note 21 above.

<sup>75</sup> See note 58 above.

<sup>76</sup> Claim No. CU-0849.

<sup>77</sup> Claim No. CU-3038.

Another interesting question which arose in connection with determining value had to do with the problem as to whether a United States parent corporation, which remains liable for the debts of its confiscated Cuban subsidiary, should have such liabilities deducted from its award. In the *Claim of Standard Fruit and Steamship Company*,<sup>78</sup> it was held that no deduction would be made in that situation. But, as mentioned earlier, in commenting on the *Milk* and *Blue* decisions,<sup>79</sup> amounts paid on losses from other sources must be deducted from awards.

In the *Claim of Deak & Co., Inc.*,<sup>80</sup> it was held that a claimant having settled a New York attachment suit for a lesser sum, did not extinguish its claim for the unpaid balance. The Commission noted in that case that there had been no stipulation with prejudice, no general release and no covenant not to sue. In another claim the Commission had to decide whether a corporation operating at a loss could claim the item of "good will" which appeared on its balance sheet as an asset. In the *Claim of Bartlett-Collins Company*,<sup>81</sup> it was held that it could not do so.

## Interest

Title V of the International Claims Settlement Act of 1949, as amended, makes no provision for the inclusion of interest as a part of the amount of loss resulting from the nationalization or other taking of property by the Government of Cuba. The statute, however, directs the Commission to determine the amount of loss "in accordance with applicable substantive law, including international law."<sup>82</sup> In construing what the law is in this regard, the Commission turned first to Title I of the Act.<sup>83</sup> Section 7(a) of Title I, for example, authorizes and directs the Secretary of the Treasury to pay on awards under that program, as prescribed by Section 8, " \* \* \* an amount not exceeding the principal of each award, plus accrued interest on such awards as bear interest \* \* \* ."<sup>84</sup> Also, Section 8, after providing for certain payments on the principal of each award, directs

<sup>78</sup> Claim No. CU-0485.

<sup>79</sup> See notes 13 and 14 above.

<sup>80</sup> Claim No. CU-0381.

<sup>81</sup> Claim No. CU-2192.

<sup>82</sup> Title V, Section 503(b).

<sup>83</sup> 64 Stat. 12, 22 U.S.C. 1621-1627.

<sup>84</sup> *Id.*, Section 7(a); Section 1626(a).

the Secretary of the Treasury, " \* \* \* after payment has been made of the principal amounts of all such awards, to make pro rata payments on account of accrued interest on such awards as bear interest."<sup>85</sup> Nowhere does the Act specify, however, *which* awards shall bear interest.

It is true that some Commissions have refused to allow interest in programs of this type on the ground that it is a matter of contract which should be specifically provided for in the protocol.<sup>86</sup> The Foreign Claims Settlement Commission, however, regards it as a settled principle of international law that interest, according to the usage of nations, is a necessary part of a just national indemnification. Its conclusion was reached not only on principles of equity and justice but also on the basis of several notable authorities in the field.<sup>87</sup>

The Commission was next faced with the problem of the proper rate of interest. This has generally varied from 3 to 6%, although higher amounts have been granted on occasion.<sup>88</sup> The Mixed Claims Commission of the United States and Germany,<sup>89</sup> following World War I, granted 5%; the Spanish-American Commission of 1871 allowed 8%.<sup>90</sup>

Since apparently no settled rule as to the rate of interest exists, it was deemed to be an appropriate exercise of the jurisdiction of the Commission to determine this rate in accordance with all the circumstances before it, including the applicable principles of international law, justice and equity. Its object in so doing was to arrive at a just

<sup>85</sup> *Id.*, Section 8(c)(5); Section 1627(c)(5).

<sup>86</sup> See Borchard, *Diplomatic Protection of Citizens Abroad* (1928) at 428, and authorities cited therein.

<sup>87</sup> E.g., Moore, *A Digest of International Law*, 1029 (1906), citing Davis, *Notes, Treaty Vol. (1776-1887)*; Wirt, *At. Gen.*, 1 Op. 28; Crittenden, *At. Gen.*, 5 Op. 350; *Geneva Award, 4 Papers Relating to the Treaty of Washington*, 53; and Eagleton, *The Responsibility of States in International Law* 203-4 (1928). In Eagleton, for example, it is said:

The award of interest is usually considered to be merely a part of the duty to make full reparation \* \* \* arbitral tribunals have felt that it was not outside of their jurisdiction to award interest, *even though the Convention by which they were set up made no mention of interest.* (Emphasis added.)

<sup>88</sup> See authorities cited in Borchard, *supra*, note 86.

<sup>89</sup> *Opinions of Mixed Claims Commission, United States and Germany, 1925-1926*, 62 (Consol. Ed. 1927) (Ad. Dec. No. 3.).

<sup>90</sup> For a listing of Commissions which have allowed interest on awards together with the various rates of interest, see Ralston, *International Arbitral Law and Procedure*, 82-87 (1910).

and equitable compensation for the wrong. The Commission also had the right to consider its own decisions concerning the applicable rate of interest in its prior international claims programs and it did so here. Initially, in those, the Commission had adopted the figure of 6% as a traditional and proper interest rate for claims of this nature.<sup>91</sup> Therefore, based on all the evidence and law before it, the Commission adopted the figure of 6% interest to apply in the Cuban Program.

There also does not seem to be any settled rule in universal effect as to the period during which the interest granted on awards shall run. Various dates have been applied by different commissions, including the date of the original injury and the date of the notice of the claim.<sup>92</sup> The Commission determined, however, that the better and prevailing view in international law is that such interest should run from the date the claim arose until the date of payment, and in the *Claim of Lisle Corporation, supra*,<sup>93</sup> and subsequent decisions it has so held.

An interesting case decided concerning an interest award was the *Wikler* decision, *supra*.<sup>94</sup> In that case, the Commission held, pursuant to Section 507(b) of the Act, that a claimant who purchases a claim subsequent to the date of loss, is limited to the amount paid, and that interest should be computed only from the date the claim was acquired.

## Payment

As noted above, Title V of the Act makes no provision for payment of awards against the Government of Cuba under the current program. In fact, Section 501, which is a preamble to the body of the statute, expressly states: "This title shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims."

Although it is not within the scope of this article to discuss how or when a settlement may be made between the United States and Cuba, it should nevertheless be noted that the Cuban Government has now settled with both the French and the Swiss-Liechtenstein

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<sup>91</sup> E.g., the *Claim of Joseph Senser*, Claim No. Y-1756, *FCSC Decisions and Annotations* 140 (1968).

<sup>92</sup> See authorities cited in Eagleton, *supra*, note 87 above, at 204-5, and in Borchard, *supra* note 86 above, at 428-29.

<sup>93</sup> See note 16 above.

<sup>94</sup> See note 15 above.

Governments for nationalizations and expropriations against citizens of those countries. Apparently, however, the percentages of claimed values paid were small.<sup>95</sup>

### Conclusion

The Cuban Claims Program of the United States is not a modest challenge to the Foreign Claims Settlement Commission, as can be seen from its scope and from some of the issues discussed above. Although the program has its usual share of what might be labeled "ordinary claims," it also has had many large and complex cases with all the ramifications that arise therefrom. Also, as noted earlier, the problem of proper evidence has at times been difficult; and the fact that there is no fund from which the awards can be paid seems to create a lethargy in some claimants who tend to drag their feet in furnishing requested evidence when they find this may involve further expenditures. All things considered, though, the program has moved ahead remarkably well, due in great part to an able staff, and to the advance planning and dedicated direction given it by Dr. Edward D. Re, the former Commission Chairman. Due to a fiscal year 1968-69 budget reduction, however, it is not contemplated that the program can be completed by the present May 1, 1970 deadline, and an extension of that date is being requested.

In working on this as well as on other programs, the Commission and staff constantly keep in mind that it is necessary to process and decide claims as promptly as possible, and, if feasible, before available evidence is lost or destroyed. Only in that way can claimants who have relied on a Congressional Act be protected. Only in that way can the sums which many claimants have spent to prepare and file their claims be vindicated. And in the Cuban program, in which no funds now exist for payment, it is believed that after the claims have been adjudicated, our State Department will have complete and necessary information to use in negotiating a fair settlement with Cuba when that eventful day arrives!

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<sup>95</sup> See: Vol. 9761, *Journal Officiel de la République Française*, 4 Octobre 1967, and the "accord" signed March 2, 1967, between the Cuban and Swiss Governments. The latter appears in "Message" No. 9701 of May 26, 1967, furnished the Swiss Federal Assembly. It is known, of course, that Switzerland has represented Liechtenstein in its foreign affairs since World War II.