

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

IN THE MATTER OF THE CLAIM OF

STEWART MACFARLANE

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU-0204

Decision No. CU - 6048

Counsel for claimant:

Clarence Moore, Esq.
Rufus King, Esq.

PROPOSED DECISION

This claim against the Government of Cuba, filed under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of \$4,714,636.08, was presented by STEWART MACFARLANE based upon the asserted loss of interests in certain real and personal property in Cuba, including stock and bond interests. Claimant has been a national of the United States since birth.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. 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.

Section 502(3) of the Act provides:

The term 'property' means 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.

The claim is based upon a home in Sagua la Grande, province of Las Villas; a duplex penthouse in Havana; furniture and furnishings, including automobiles; and upon stock and bond interests.

Claimant was married in Sagua la Grande, Cuba in 1926 to a British subject who has at all times retained her British nationality. The evidence establishes and the Commission finds that claimant acquired title to various items of property, discussed in detail below, after his marriage. The Commission further finds that pursuant to the community property laws of Cuba, claimant's wife acquired a one-half interest in the property claimed herein. (See Claim of Robert L. Cheaney and Marjorie L. Cheaney, Claim No. CU-0915.) Inasmuch as claimant's wife is not a national of the United States, she is ineligible under Title V of the Act for certification of loss with respect to her interests in the properties, and no claim has been filed by her or on her behalf. (See Claim of Sigridur Einarsdottir, Claim No. CU-0728, 25 FCSC Semiann. Rep. 45 [July-Dec. 1966].)

The taking of the various properties and their value is discussed under separate headings below.

The Act provides in Section 503(a) that in making determinations 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 fair market value, book value, going concern value or cost of replacement.

The question, in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant". This phraseology does not differ from

the international legal standard that would normally prevail in the valuation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

The record includes a substantial amount of supporting evidence, to which reference is made under the heading of the item of property to which it relates.

I. Real property

1. Home in Sagua la Grande

Based upon the evidence of record, including affidavits of persons who were acquainted with the claimant and his family, and reports of the United States Internal Revenue Service in Jacksonville, Florida, submitted by counsel, which made determinations of claimant's losses in Cuba for income tax purposes, the Commission finds that claimant was the owner of land measuring approximately 10,000 square meters in the "Reparto Ona" section of Sagua la Grande with a house erected thereon, enclosed by a cyclone fence built on a concrete base. The house, built in a luxurious Spanish style, had about ten rooms and usual facilities as well as terraces. A porch surrounded the house and the roof was made of stone tile. In addition, the property included a separate building containing a garage with cook's room and bath, and a garden with a small grove.

The Commission finds that this real property was subject to the Urban Reform Law, published in the Cuban Official Gazette on October 14, 1960. In the absence of evidence to the contrary, the Commission finds that this property was taken by the Government of Cuba on October 14, 1960. (See Claim of Henry Lewis Slade, Claim No. CU-0183, 1967 FCSC Ann. Rep. 39.)

The evidence indicates that claimant purchased the land in 1946 and subsequently caused the buildings and fence to be constructed. The Commission finds that the value of this improved realty on the date of loss was \$106,500.00, and concludes that claimant's one-half interest in the property had a value of \$53,250.00.

2. Duplex Penthouse Apartment in Havana

The Commission further finds that claimant had title to a duplex penthouse apartment located at No. 252 Calle Primera, between Paseo and Calle A, Vedado, Havana, which he acquired in 1958 at a cost of \$33,000.00, the amount claimed. The Commission holds that this property was also taken by the Government of Cuba on October 14, 1960, pursuant to the Urban Reform Law (supra).

On the basis of the foregoing, the Commission finds that the value of the apartment on the date of loss was \$33,000.00, and that claimant's one-half interest in the property had a value of \$16,500.00.

II. Furniture, Furnishings and Other Personalty

The evidence establishes and the Commission finds that the home in Sagua la Grande and the apartment in Havana were fully furnished, and that claimant had title to a 1958 Lincoln and a 1959 Oldsmobile automobile which were maintained on the premises. The record includes description and detailed listings of these property items with values corroborated by claimant's wife who had purchased most of the property and had maintained records of the home operations, which records were left in Cuba, and are no longer accessible to the claimant. The asserted values are also corroborated by others having personal knowledge of the facts and by reports of the United States Internal Revenue Service of Jacksonville, Florida, which determined claimant's losses in Cuba.

The Commission finds that all of the personal property on the premises in Sagua la Grande and Havana, including the two automobiles, was taken by the Government of Cuba on October 14, 1960, at the time the real properties were taken.

The detailed listings show that the home in Sagua la Grande contained furniture and related household goods with an aggregate value of \$38,350.00, and that the duplex apartment in Havana had furniture, furnishings and household goods with a value of \$22,500.00. The record further establishes

that there were other items of personal property on the premises in Sagua la Grande and Havana, such as sterling silverware, china tableware, antiques, valuable paintings, a record collection, books, etc. The Commission finds that the aggregate value of this additional property on the date of loss was \$48,500.00, and that the value of the two automobiles was \$4,160.00.

The losses of this personal property are summarized as follows:

Furniture and furnishings in Sagua la Grande	\$ 38,350.00
Furniture and furnishings in Havana	22,500.00
Automobiles	4,160.00
Silverware, antiques, paintings, etc.	<u>48,500.00</u>
Total	\$113,510.00

The Commission finds that claimant's one-half interest in the property was worth \$56,755.00.

III. Stock Interests

1. Fundicion de Macfarlane, S.A.

On the basis of the evidence of record, including copies of stock certificates, statements from The Royal Bank of Canada, statements from the former Vice-President and General Manager of Fundicion de Macfarlane, S.A., and reports of the United States Internal Revenue Service of Jacksonville, Florida following an audit of claimant's income tax returns, the Commission finds that claimant (with his wife, for the reasons stated above) held a 100% stock interest in Fundicion de Macfarlane, S.A., a Cuban corporation, hereafter referred to as Fundicion.

Since Fundicion was organized under the laws of Cuba, it does not qualify as a corporate "national of the United States" defined under Section 502(1)(B) of the Act as a corporation or other legal entity organized under the laws of the United States, or any State, the District of Columbia, or the Commonwealth of Puerto Rico, whose ownership is vested to the extent of 50 percent or more in natural persons who are citizens of the United States. In this type of situation, it has been held that an American stockholder is entitled to file a claim for the value of his ownership interest. (See Claim of Parke, Davis & Company, Claim No. CU-0180, 1967 FCSC Ann.

Rep. 33.)

On October 24, 1960, the Cuban Government published in its Official Gazette Resolution No. 3 pursuant to Law No. 851 which listed as nationalized, among others, Fundicion de Macfarlane, S.A. The Commission therefore finds that Fundicion was nationalized by the Government of Cuba on October 24, 1960, within the meaning of Title V of the Act.

Claimant has stated that Fundicion's net worth was \$4,380,225.08 based upon replacement costs. The Commission, however, has held consistently that the term "cost of replacement", as used in Section 503(a) of the Act, means replacement in kind, taking into consideration the age and condition of the property in question on the date of the loss. It is noted, moreover, that claimant has asserted the replacement values for the assets of Fundicion without considering its liabilities.

The Commission reaffirms its holding that Title V of the Act does not provide that property shall be evaluated on the basis of replacement costs for new assets, but rather that determination should be based upon the values of the properties on the date of the loss. (See Claim of M & M Dredging and Construction Co., et al., Claim No. CU-0219, 1969 FCSC Ann. Rep. 28.)

The record includes copies of balance sheets for Fundicion as of December 31, 1958 and December 31, 1959, and a copy of the trial balance as of August 31, 1960. Claimant has stated that these financial statements were prepared by his accountant in Cuba or under his accountant's supervision. The trial balance of August 31, 1960 shows that Fundicion suffered a loss of \$271,348.12 for the eight-month period ending August 31, 1960, whereas the balance sheet as of December 31, 1959 shows a surplus. In 1960, the effects of Cuba's nationalization policy were already being felt. Under these circumstances, the Commission finds that it would be inequitable to base the valuation of Fundicion on the trial balance of August 31, 1960.

Upon consideration of the entire record, including the aforesaid reports of the United States Internal Revenue Service in Jacksonville, Florida, the Commission finds that the valuation most appropriate in this case and equitable to the claimant is that shown in the balance sheet for Fundicion as of December 31, 1959.

The balance sheet discloses that the financial condition of Fundicion as of that date was as follows:

CURRENT ASSETS

Materials & Supplies on hand and in transit, less reserve	\$ 520,202.25
Shipments in transit	239,519.28
Material on Consignment	3,713.07
Accounts Receivable (less Reserve of \$75,000.00)	927,887.55
Bills Receivable	444,861.12
Loans to Employees	17,834.48
Due by Officers and Directors	9,855.75
Other Accounts Receivable	39,327.99
Work in Process	253,406.83
Cash on Hand and in Bank	25,369.74
Investment	5,097.00
Prepaid Insurance, Freight and Guarantees	10,120.25

FIXED ASSETS

Building Repairs and Deferred Payments	22,280.35
Land	40,845.56
Building Improvements (Depreciated)	79,779.69
Machinery and Tools (Depreciated)	149,744.36
Furniture, Fixtures and Autos (Depreciated)	24,255.36
Spares, Small Tools, etc.	<u>26,440.08</u>
Total	<u>\$2,840,540.71</u>

LIABILITIES

Loans - Bank	\$ 550,000.00
Bills (Trade) Discounted	359,871.03
Notes & Accounts Payable (Suppliers)	291,458.73
Accrued Taxes	30,663.78
Accrued Vacation Pay	58,732.69
Accrued to Cover Sugar Differential	26,926.68
Other Accounts Payable	44,170.86
Advances from Customers	30,640.86
Due to Agencia, S.A.	<u>29,766.11</u>
Total Liabilities	<u>\$1,422,230.74</u>
Capital Stock	1,415,400.00
Surplus	<u>2,909.97</u>
Total	<u>\$2,840,540.71</u>

The Commission finds, on the basis of the above balance sheet, that the net worth of Fundicion, or the excess of its assets over its liabilities, on October 24, 1960, the date of the loss, was \$1,418,309.97 and concludes that the loss claimant sustained as the owner of a 50% stock interest in Fundicion, was \$709,154.99.

2. Agencia Macfarlane, S.A.

Based upon the evidence of record, including copies of stock certificates, statements of The Royal Bank of Canada, and an affidavit from a Cuban attorney, who was counsel to the former Secretary of Agencia Macfarlane, S.A., the Commission finds that claimant had title to a 100% stock interest in that Cuban corporation, hereafter referred to as Agencia.

Agencia was a sales organization affiliated with Fundicion, which operated a foundry. The former Manager of Agencia states that he was present on the premises of Agencia when Cuban officials took over control of Agencia in January 1961. The Commission finds, in the absence of evidence to the contrary, that Agencia was taken by the Government of Cuba on January 15, 1961.

Since Agencia was organized in Cuba, claimant is eligible to file a claim for his stockholder's interest. (See Claim of Parke, Davis & Company, supra.)

Claimant has asserted a loss of \$37,015.00 on account of his stock interest in Agencia, based upon the par value of the stock. No financial statements or other documentary evidence to establish the value or net worth of the company on the date of the loss are on record. The affidavit of the former Manager of Agencia includes a statement that Agencia earned in excess of \$150,000.00 per year and that its net worth was in excess of \$75,000.00, but these figures are based upon the affiant's recollection, and not upon any financial statements.

Having considered the entire record, the Commission finds, in the absence of evidence to the contrary, that the value of Agencia on the date of the loss was \$37,015.00, and concludes that claimant's 50% stock interest in Agencia was \$18,507.50

3. Trans-Cuba Oil Company

Based upon an affidavit from a former Cuban stockbroker, the Commission finds that claimant had title to 20,000 shares of Trans-Cuba Oil Company. These shares were maintained physically in the offices of the broker in Havana, Cuba, and accordingly are no longer available.

For the reasons stated above, claimant is eligible to file a claim for his ownership interest in this corporation, organized under the laws of Cuba.

The Commission has held that the properties of Trans-Cuba Oil Company were taken by the Government of Cuba on November 23, 1959, and that one share in that corporation had a value of \$0.1198 on the date of loss. (See Claim of D. R. Wimberly, Claim No. CU-3417.)

Accordingly, the Commission finds that the value of the 20,000 shares was \$2,396.00 and concludes that claimant's one-half interest therein was worth \$1,198.00.

IV. Bond Interests

Claimant asserts the loss of \$10,000.00 Republic of Cuba 4% Public Works Bonds and \$12,000.00 Bonds of the Cuban Electric Company. The evidence discloses that these bonds were in a safe deposit box with The Royal Bank of Canada in Sagua la Grande, from where they were removed to the National Bank of Cuba.

With respect to the Republic of Cuba 4% Public Works Bonds, the Commission has held that the Government of Cuba defaulted on the service of these bonds on May 1, 1961, and that this fact constituted, in essence, a taking of the bondholders' property within the meaning of the Act. (See Claim of Clemens R. Maise, Claim No. CU-3191, 1967 FCSC Ann. Rep. 68; and Claim of Westchester Fire Insurance Co., Claim No. CU-1703.) The Commission therefore finds that in this case the default by the Cuban Government on May 1, 1961 gave rise to a claim within the meaning of Title V of the Act.

These bonds carried coupons for interest in the amount of 4% annually, payable semiannually on May 1 and November 1 of each year until maturity on November 1, 1983. The record shows that interest was last paid to the claimant on May 1, 1960. The Commission therefore finds that as of May 1, 1961, the date of loss, the Government of Cuba owed claimant the amount of \$12,000.00 plus \$480.00 interest, and that claimant's loss, attributable to actions of the Cuban Government, amounted to one-half of the amount of \$12,480.00, that is, to \$6,240.00.

With respect to the bonds of the Cuban Electric Company, the record does not disclose whether the bonds were mortgage bonds, secured by a mortgage on the property of the corporation, or income debenture bonds, which were not secured by a charge on the corporation's property. Pursuant to Section 505(a) of the Act, debts due from American concerns, such as the Cuban Electric Company, may not be allowed unless they constituted charges on property nationalized, expropriated, intervened or taken by the Government of Cuba. The Cuban Electric Company was nationalized by the Cuban Government by Resolution No. 1 under Law No. 851 on August 6, 1960. However, in the absence of any evidence to show that the bonds in question were secured by a mortgage or other lien on the property of the Cuban Electric Company, the Commission is constrained to find that claimant has failed to establish that the securities described as Bonds of the Cuban Electric Company were certifiable under the Act. This item of the claim is therefore denied.

It has been noted that claimant originally included in his claim the loss of proceeds of a life insurance policy issued by the Confederation Life Association of Canada, in the amount of \$14,246.00, but that in his affidavit of September 12, 1969, claimant has withdrawn this portion of the claim.

Recapitulation

Claimant's losses within the meaning of Title V of the Act are summarized as follows:

	<u>Date of Loss</u>	<u>Amount</u>
(I) Real Property:		
Home in Sagua la Grande	October 14, 1960	\$ 53,250.00
Penthouse in Havana	October 14, 1960	16,500.00
(II) Furniture, furnishings, etc.	October 14, 1960	56,755.00
(III) Stock Interests:		
Fundicion Macfarlane, S.A.	October 24, 1960	709,154.99
Agencia Macfarlane, S.A.	January 15, 1961	18,507.50
Trans-Cuba Oil Company	November 23, 1959	1,198.00
(IV) Bonds	May 1, 1961	<u>6,240.00</u>
	Total	<u>\$861,605.49</u>

The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644), and in the instant case it is so ordered as follows:


<u>FROM</u>	<u>ON</u>
November 23, 1959	\$ 1,198.00
October 14, 1960	126,505.00
October 24, 1960	709,154.99
January 15, 1961	18,507.50
May 1, 1961	<u>6,240.00</u>
	\$861,605.49

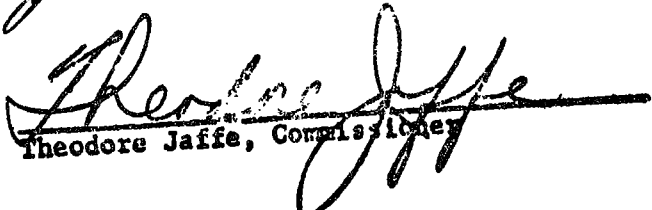
CERTIFICATION OF LOSS

The Commission certifies that STEWART MACFARLANE suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Eight Hundred Sixty-one Thousand Six Hundred Five Dollars and Forty-nine Cents (\$861,605.49) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement.

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

FEB 9 1971


Lyle S. Carlson, Chairman


Theodore Jaffe, Commissioner

NOTICE TO TREASURY: The above-referenced securities may not have been submitted to the Commission or if submitted, may have been returned; accordingly, no payment should be made until claimant establishes retention of the securities or the loss here certified.

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended (1970).)