

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

IN THE MATTER OF THE CLAIM OF

SMITH, KIRKPATRICK & COMPANY, INC.

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU -0581

Decision No. CU 1968

Counsel for Claimant:

Cusack & Stiles
By: Louis J. Dolan, Jr. Esq.

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, was presented by SMITH, KIRKPATRICK & COMPANY, INC., in the amount of \$166,257.34, and is based upon the asserted loss of payment for merchandise shipped to Cuba.

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.

Section 502(1) (B) of the Act defines the term "national of the United States" as (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 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

Officers of the claimant corporation have certified that the claimant was organized in the State of New York, and that at all times between the respective dates of loss and presentation of this claim on November 29, 1965, more than 50% of the outstanding capital stock of the claimant corporations has been owned by nationals of the United States within the meaning of Section 502(1)(B) of the Act.

The evidence of record, including a statement of a corporate official of claimant, discloses that at all times pertinent to this claim 100 per cent of the outstanding shares of stock of the SMITH, KIRKPATRICK & COMPANY were held by nationals of the United States.

The evidence of record includes copies of correspondence from the claimant corporation to Cuban banks and consignees and from banking institutions, including The Trust Company of Cuba, the Morgan Guaranty Trust Company of New York, The Chase Manhattan Bank and from the consignees and others, such as The American Express Company. Further, the record includes recapitulations of the transactions involved in this claim, prepared by claimant; and copies of invoices, drafts and other data concerning the shipments of merchandise to the accounts of the consignees, namely, E. Bustillo, C. & R., S.A., Licuba Trading Company and W. M. Anderson Trading Company, S. A. This evidence discloses that the purchase price of the merchandise and ac-

companying charges for such shipments were, in transactions with the W. M. Anderson Trading Company, S.A., paid by the consignee to The Trust Company of Cuba; and that the dollar reimbursement releases or authorization for such reimbursement were never granted by Cuban governmental officials. The other drafts for shipments made by claimant were not paid to the collecting banks by the consignees. Claimant states that it has not received any of the funds for the shipments, enumerated hereafter.

There follows hereafter a listing of the shipments made by claimant to the Cuban consignees, including information on the paid and unpaid drafts. The claimant utilized drafts which were to be paid upon delivery or were due and payable within 30 to 180 days from date of the invoices. The listed amounts are net after adjustment or credit.

I. PAID DRAFTS

<u>Date and Number of Draft</u>	<u>Amount</u>	<u>Date of Payment</u>
3182 (June 19, 1959)	\$ 486.27	December 12, 1959
3395 (August 7, 1959)	702.50	December 17, 1959
3466 (August 27, 1959)	1,626.10	February 26, 1960
3508 (September 10, 1959)	1,250.30	March 10, 1960
3660 (October 21, 1959)	203.12	February 2, 1960
	<u>\$4,268.29</u> (Total)	

II. UNPAID ACCOUNTS:

The claimant includes lists of transactions during the period June 1958, through February 1959, when numerous shipments of merchandise were shipped for the account of E. Bustillo C. & R., S.A. and the account of Licuba Trading Company, both of Havana, Cuba. The claimant advised that these shipments total \$161,989.05, with shipping and other attendant fees; and that claimant has never been paid due to the actions of the Cuban Government. The shipments include the following to E. Bustillo C. & R. for material and merchandise furnished to the Cuban armed services:

<u>Date and Number of Draft</u>	<u>Amount</u>	<u>Tenor of Draft</u>
1637 (June 12, 1958)	\$ 9,566.15	90 Days
1635 (June 12, 1958)	7,823.71	90 "
1693 (June 23, 1958)	5,922.51	90 "
1696 (June 24, 1958)	27,623.09	90 "
1902 (July 31, 1958)	4,773.73	90 "
1964 (August 13, 1958)	9,338.48	90 "
2034 (September 4, 1958)	6,741.54	90 "
2142 (September 24, 1958)	5,920.14	90 "
2205 (October 6, 1958)	1,675.76	90 "
2221 (October 10, 1958)	9,957.50	90 "
2256 (October 16, 1958)	48,393.13	90 "
2257 (October 17, 1958)	4,768.86	90 "
2270 (October 21, 1958)	354.06	90 "
2269 (October 21, 1958)	4,288.60	90 "
2331 (October 31, 1958)	4,776.42	90 "
2392 (November 24, 1958)	435.20	90 "
2477 (December 12, 1958)	250.91	90 "
2742 (February 25, 1959)	1,191.83	90 "
	<u>\$153,801.62</u>	

Open Account - E. Bustillo C. & R.

December 31, 1958	Debit Note #9349	\$ 45.49
December 31, 1958	#9348	77.34
February 20, 1959	#9479	63.19
		<u>\$186.02</u>

TOTAL, due and payable, E. Bustillo C. & R., \$153,987.64

In connection with transactions with Licuba Trading Company, the claimant has submitted copies of claimant's drafts bearing No. 586, dated November 22, 1957, and February 20, 1958, in the total amount of \$17,426.40. This sum was reduced to \$7,426.40 in accordance with Item 114313, June 17, 1958, The Chase Manhattan Bank to the claimant.

In correspondence to The Chase Manhattan Bank from claimant, dated October 28, 1958, Drafts 1805, 1806 and 1807, in the total amount of \$7,426.40, were to be returned to claimant and in their stead the following drafts were substituted for collection:

<u>Date of Draft</u>	<u>Amount</u>	<u>Draft No.</u>	<u>Due Date</u>
October 28, 1958	\$1,000.00	1-586	December 15, 1958
October 28, 1958	1,000.00	2-586	February 15, 1959
October 28, 1958	1,000.00	3-586	April 15, 1959
October 28, 1958	1,000.00	4-586	June 15, 1959
October 28, 1958	1,000.00	5-586	August 15, 1959
October 28, 1958	1,000.00	6-586	October 15, 1959
October 28, 1958	1,000.00	7-586	December 15, 1959
October 28, 1958	426.50	8-586	February 15, 1960
	<u>\$7,426.50</u>		

Interest Charges on above Drafts:

October 27, 1958	Debit Note #9231	\$559.46
February 3, 1959	#9418	<u>15.45</u>
		\$574.91
		<u><u> </u></u>

TOTAL, due and payable, Licuba Trading Company, \$8,001.41

Claimant advised that the sums listed hereafter are due and payable; and that claimant has never been paid for the merchandise shipped to the Cuban consignees:

W. M. Anderson Trading Company	\$ 4,268.29
E. Bustillo C. & R.	153,987.64
Licuba Trading Company	<u>8,001.41</u>
Grand Total	\$166,257.34

The Government of Cuba, on September 29, 1959, published its Law 568, concerning foreign exchange. Thereafter, the Cuban Government effectively

precluded not only transfers of funds to creditors abroad, but also payment to creditors within Cuba, by numerous, unreasonable and costly demands upon the consignees, who were thus deterred from complying with the demands of the Cuban Government. The Commission holds that Cuban Law 568 and the Cuban Government's implementation thereof, with respect to the rights of the claimant herein, was not in reality a legitimate exercise of sovereign authority to regulate foreign exchange, but constituted an intervention by the Government of Cuba into the contractual rights of the claimants, which resulted in the taking of American-owned property within the meaning of Section 503(a) of the Act. (See Claim of The Schwarzenbach Huber Company, Claim No. CU-0019, 25 FCSC Semiann. Rep. 58 July-December 1966; and Claim of Etna Pozzolana Corporation, Claim No. CU-0049).

Accordingly, the Commission finds that the unpaid accounts were lost as a result of intervention by the Government of Cuba, and that in the absence of evidence to the contrary, such losses occurred on the respective maturity dates from date of shipment with regard to unpaid accounts, maturing after September 29, 1959. However, with respect to the dates of loss as to those goods shipped for which payment was due prior to September 29, 1959, the Commission finds that the losses occurred on September 29, 1959, the effective date of Law 568. The Commission further finds that in those instances in which payments were made by the Cuban consignees, the losses occurred on the days after payments were made by the Cuban consignee to the Cuban bank.

The Commission has decided that in certification of losses 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 dates of loss to the date of settlement. (See Claim of Lisle Corporation, Claim No. CU-0644.)

Accordingly, the Commission concludes that the amount of losses arising from shipments of goods to the Cuban consignees shall be increased by interest thereon at the rate of 6% per annum from the dates on which the losses occurred, to the date on which provisions are made for the settlement thereof, as follows:

On \$159,562.55 from September 29, 1959
On 1,000.00 from October 15, 1959
On 486.27 from December 13, 1959
On 1,000.00 from December 15, 1959
On 702.50 from December 18, 1959
On 203.12 from February 3, 1960
On 426.50 from February 15, 1960
On 1,626.10 from February 27, 1960
On 1,250.30 from March 11, 1960

TOTAL

\$166,257.34

CERTIFICATION OF LOSS

The Commission certifies that SMITH, KIRKPATRICK & COMPANY, INC., 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 One Hundred Sixty-Six Thousand Two Hundred Fifty Seven Dollars and Thirty-Four Cents (\$166,257.34) 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

JUN 19 1968

Leonard V. B. Butcher

Leonard V. B. Butcher, Chairman

Theodore Jaffe

Theodore Jaffe, Commissioner

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, 32 Fed. Reg. 412-13 (1967).)