

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

IN THE MATTER OF THE CLAIM OF

OTIS ELEVATOR COMPANY

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU - 1566

Decision No. CU - 6297

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, for \$477,619.27 is asserted by OTIS ELEVATOR COMPANY based upon the asserted ownership and loss of the assets of its Havana branch.

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.

The evidence of record discloses that the claimant, OTIS ELEVATOR COMPANY, was organized under the laws of the State of Maine and that at all times pertinent to this claim at least 99% of the outstanding capital stock of the claimant corporation was owned by OTIS ELEVATOR COMPANY of New Jersey, a New Jersey corporation. A certification of an officer of Otis Elevator Company of New Jersey establishes that at least 99% of the outstanding stock of Otis Elevator Company of New Jersey was owned by shareholders who reside in and are presumed to be nationals of the United States. The Commission finds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

The claimant was engaged in the installation and servicing of elevators and escalators in Cuba. It operated through a branch office (not a subsidiary) registered as Compania De Elevadores Otis (CEO), at Ayeslaran 14, Havana, Cuba. The Commission finds that CEO was intervened by the Government of Cuba on December 23, 1959. Thereafter it was listed as nationalized by the Government of Cuba Resolution 3, on October 24, 1960, pursuant to Cuban Law 851.

Claim is asserted for the following losses:

Machinery, equipment, vehicles, parts, furniture, fixtures	\$ 58,522.59
Inventories of elevator parts and materials for sales and servicing	103,515.02
Miscellaneous investments	95.89
Cash	19,771.38
Intercompany debt owed by CEO	19,474.04

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Accounts Receivable	\$188,796 .49
Incompleted sales and service contracts	<u>87,443.86</u> \$477,619.27

Incompleted Sales and Service Contracts

A part of this claim, in the amount of \$87,443.86, is listed as incompleted sales and service contracts. The record, however, reflects that of this total amount, \$57,943.86 consists of \$44,077.86 for new sales contracts and \$13,866.00 for service contracts. Claimant has listed this category as estimated profit on incompleted sales and service contracts. The balance sheet evidences that this category consisted of customers to whom claimant had sold equipment or serviced equipment over a period of many years and against whom there was an outstanding balance due to claimant. These items are here treated as accounts receivable not estimated profits. Accordingly, accounts receivable less reserve are, asserted as \$245,707.35.

The remaining balance, in this category, in the amount of \$29,500.00, is based upon the asserted loss of money due to claimant's inability to perform on a contract because of the intervention by the Government of Cuba of the properties of both parties to the contract.

By contract dated November 10, 1958 claimant agreed to manufacture, sell, supply and deliver to a customer in Cuba all machinery and material for the installation and erection of four elevators and two dumbwaiters in a hospital in Havana, to supervise the erection thereof and to repair, and service the equipment. As later modified, the purchase price was \$130,000.00, payable to wit: A down payment of 25% (\$32,500.00) and balance of \$97,500 due in partial payments. The down payment was made on December 9, 1958. In January 1959 the customer was intervened by the Government of Cuba and in December 1959 claimant was intervened. On January 15, 1960 claimant advised its customer it could not carry out the contract. A demand for the return of the deposit was made. Court action in the State of New York was instituted by the plaintiff customer. The matter was settled for \$29,500.00 on May 5, 1961 and legal action was discontinued.

Claimant now seeks the amount of \$29,500.00 as an additional loss due to the intervention of its branch office.

Evidence in support of this part of the claim is meager. It was asserted by the said customer that claimant never manufactured any of the equipment, subject of the contract, nor made any delivery thereof; in addition, claimant disclaimed any responsibility for the supervision of any installation of equipment by persons purporting to be employees of claimant in Cuba.

The record is not clear on what grounds claimant claims this \$29,500.00 as a loss. It has not been established that the Government of Cuba took this down payment. Claimant lost no property such as equipment which could not be or is not included in its present claim before the Commission.

If the loss of property is asserted as contractual rights based on a loss of profits from the performance of the contract then the evidence to date fails to establish how the amount of \$29,500.00 constitutes anticipated profits. The Commission has consistently followed the accepted rule of international law that where losses are conjectural, speculative and not susceptible of accurate determination, they must be denied.

From the foregoing it is clear that with respect to this item claimant has failed to establish a loss of property that is certifiable within the meaning of the Act and, accordingly, this part of the claim is denied.

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, right, 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 evaluation of nationalized property. It is designed to strengthen that

standard by giving specific bases of valuation that the Commission shall consider.

In support of the asserted values, the record contains a copy of the balance sheet of the Hayana branch of claimant corporation as of December 31, 1959, including copies of supporting documents signed by the intervenor and accountant.

Upon consideration of the entire record, the Commission finds that the valuation most appropriate to the property and equitable to the claimant is that shown in this balance sheet, with the aforementioned adjustments to the accounts receivable which now reflects the following:

Assets

Cash in Cuban banks and office	\$ 19,771.38
Accounts Receivable less reserve	245,707.35
Inventory	103,515.02
Equipment less depreciation	33,432.87
Miscellaneous Investments less reserve	95.89
Deferred Charges	<u>1,043.30</u>
	\$403,565.81

The balance sheet reflects the value of the assets of the Cuban branch of OTIS ELEVATOR COMPANY. The Commission in this regard has consistently not reduced the value of the assets of an American corporation doing business through a branch in Cuba by any liabilities in its determinations under Title V of the Act except those subject to set-off as debts owing to the Government of Cuba. The reason is that the claimant may remain liable for the debts. (See Claim of Simmons Company, Claim No. CU-2303, 1968 FCSC Ann. Rep. 77.) Accordingly, no deduction is made for the items of liabilities shown on the balance sheet. The Commission concludes that claimant suffered a loss in the amount of \$403,565.81 by reason of the intervention of its branch office on December 23, 1959.

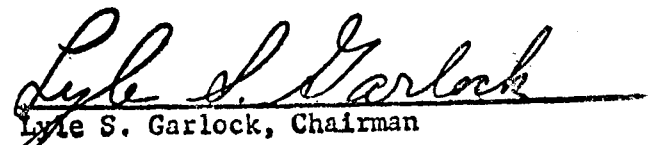
The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim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

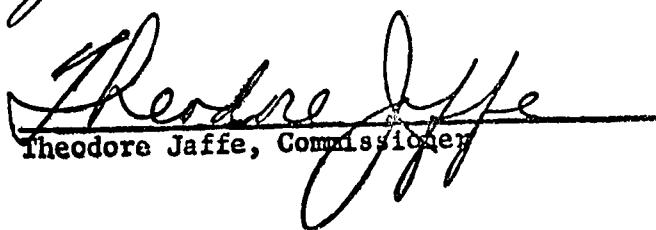
CERTIFICATION OF LOSS

The Commission certifies that OTIS ELEVATOR COMPANY 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 Four Hundred Three Thousand Five Hundred Sixty-Five Dollars and Eighty-One Cents (\$403,565.81) with interest at 6% per annum from December 23, 1959 to the date of settlement.

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

AUG 4 1971


Lyle S. Garlock, Chairman


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 (1970).)

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