

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

IN THE MATTER OF THE CLAIM OF

GARCIA & DIAZ, INC.

Claim No.CU - 0940

Decision No.CU - 4637

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimant:

Bingham, Englar, Jones & Houston
By John L. Quinlan, Esq.

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amended amount of \$1,006,929.47, was presented by GARCIA & DIAZ, INC., based upon the asserted loss of its two subsidiaries in 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.

The record shows that claimant was organized under the laws of New York. An authorized officer of claimant has certified that at all pertinent times 100% of claimant's outstanding capital stock was owned by three stockholders, nationals of the United States. Evidence of record establishes that the said three stockholders have been nationals of the United States since birth. The Commission holds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

Ownership

The evidence includes affidavits from officials of claimant attesting to claimant's sole ownership of two Cuban corporations, Agencia Maritima Garcia & Diaz, Ltda. and Servicios Maritimos Habana, S.A.; a copy of a schedule claimant submitted with its 1960 Federal income tax return in which these two Cuban corporations were listed, inter alia, as wholly-owned subsidiaries of claimant; and copies of certain information returns (Form 2952) filed by claimant with its 1961 Federal income tax return in which it reported that the two Cuban corporations were its subsidiaries. On the basis of the foregoing, the Commission finds that claimant owned 100% stock interests in Agencia Maritima Garcia & Diaz, Ltda. and Servicios Maritimos Habana, S.A., hereafter called Agencia and Servicios, respectively.

The record shows that the subsidiaries were organized under the laws of Cuba, and therefore neither qualifies as a corporate "national of the United States" defined by Section 502(1)(B) of the Act as a corporation or

other legal entity organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, whose ownership is vested to the extent of 50 per centum 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.)

Loss

It appears from the record that Agencia and Servicios were carrying on business in Cuba as steamship agents and stevedores, respectively. Claimant states that its two subsidiaries were not nationalized, expropriated, intervened or otherwise taken by any specific or particular decree, law or resolution, or by any other single official or formal action of the Government of Cuba; and that the subsidiaries were not listed as nationalized, expropriated, intervened, or otherwise taken in any Cuban Official Gazette. A search of sources of information available to the Commission fails to disclose any such official action by the Government of Cuba. Nevertheless, claimant asserts a loss within the meaning of Title V of the Act on the basis of a constructive taking of its property by Cuba.

The question thus presented is whether the evidence adduced by claimant and/or its interpretation of a number of Cuban laws, upon which claimant relies, warrants the finding that claimant sustained a loss as contemplated by Title V of the Act.

It is asserted by claimant that the subsidiaries' properties were lost as a result of the actions of the Cuban Government beginning as of January 1, 1959, when the present Cuban regime came into power. Claimant has submitted a memorandum of law, dated October 6, 1967, from an attorney who had practiced law in Cuba from 1925 to 1961. Based upon his study of various statutes, decrees, resolutions, regulations and other measures enacted by the present Cuban Government since January 1, 1959, he concluded as follows:

On the basis of the foregoing review, any Cuban company organized under Cuban law and wholly owned by United States nationals which is engaged in providing shipping services or involved with trade, export and import, or other similar maritime activities, and which has not been specifically expropriated, intervened, or otherwise taken by the Cuban government, and continues to remain in business, must be considered as having been constructively expropriated by the Cuban government and as a complete loss to its owner to the same extent as though it had been expressly and directly expropriated pursuant to laws or resolutions specifically directed against it by reason of the operation of the aforesaid Cuban laws, resolutions and other measures under which the same company is legally required to remain in business until its assets have completely disappeared.

Moreover, claimant points to the legislative history of Title V of the Act to support its contention that the Congress intended the Act to cover the constructive nationalization of property by Cuba, as follows:

No special measures by the Castro government directed against the property of nationals of the United States are needed to show nationalization or confiscation when it is evident that a Cuban corporation owned by United States nationals is deprived of its management and assets by or with the concurrence of the Castro government. Constructive nationalization or confiscation could be shown as the actual result of such actions by the Castro government and should be sufficient grounds for a valid claim for loss of property under this act. (H.R. Rep. No. 706, 89th Cong., 1st Sess. 3-4 (1965).)

The Commission has carefully considered this matter. It notes that the Government of Cuba took over control of the shipping industry beginning with Law No. 84 of February 17, 1959. Other statutes relating to this industry were enacted in 1959, 1960 and 1961; however, they merely reinforced the control which the Government of Cuba already exercised. During the same period of time further restrictions resulted from various laws which, inter alia, prohibited the flow of currency out of Cuba and

restricted the withdrawals of funds from local Cuban bank accounts; and various other laws regulated the employment of workers and prohibited the discharge of employees, among other things.

The record clearly establishes that as a direct result of these various measures claimant was completely deprived of dominion and control over its two Cuban subsidiaries. Moreover, the subsidiaries were compelled to continue operations despite these adverse conditions which resulted in progressively reduced profits and a steady depletion of the subsidiaries' assets.

Upon consideration of the entire record, the Commission holds that the actions of the Government of Cuba with respect to the two subsidiaries, which were engaged in the maritime industry, constituted a constructive taking of the two subsidiaries, resulting in a loss within the meaning of Title V of the Act. In the absence of evidence to the contrary, the Commission further finds that the loss occurred on February 17, 1959.

Value

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 evaluation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

Originally, claimant had computed its claim on the basis of the values of the assets of the two subsidiaries as indicated in the balance sheets as of December 31, 1958. It had stated that 1958 was the last year in which the subsidiaries were able to function under normal economic and competitive conditions in Cuba and that the use of later years for the purpose of

valuation would be inequitable. Accordingly, it had claimed the following, as set forth in an affidavit of February 15, 1968 from one of claimant's authorized officers:

Agencia

Current Assets (cash, etc.)	\$326,130.18
Accounts Receivable	348,281.61
Furniture, etc.	6,377.11
Improvements	<u>5,940.00</u>
	\$686,728.90

Servicios

Current Assets (cash, etc.)	\$ 59,243.17
Investments	93,300.00
Furniture, etc.	4,973.36
Deposits	<u>40.00</u>
	<u>157,556.53</u>
Total	\$844,285.43
	<u> </u>

An examination of Agencia's balance sheet as of December 31, 1958, upon which the claim was based originally, indicated that the asset, accounts receivable, in the amount of \$348,281.61 was dubious. The accountant's accompanying note read as follows:

On this account the Company will have to suffer a substantial and as yet undetermined loss due to the fact that the debtor organization is in the process of liquidation.

It further appeared from Agencia's balance sheet as of December 31, 1959 that the said account was no longer carried on the books, and that the aggregate amount of Agencia's assets were then \$287,087.10.

This matter was brought to claimant's attention, and an explanation was requested. In addition, the Commission suggested the submission of evidence establishing the net annual earnings for Agencia and Servicios for periods of time prior to 1958. By letter, dated September 23, 1969, claimant stated that it will revise its claim to eliminate Agencia's account receivable in the amount of \$348,281.61.

Under date of February 3, 1970, claimant amended its claim by increasing its asserted loss to \$1,006,929.47. Claimant also submitted schedules prepared by a firm of accountants in support of its contention that the going concern values of Agencia and Servicios were \$568,186.78 and \$438,742.69, respectively, aggregating the claimed amount, \$1,006,929.47. In addition to the schedules in which the said values were computed (Schedule B for Agencia and Schedule C for Servicios), claimant submitted copies of balance sheets as well as profit and loss statements for these two subsidiaries covering the years 1953 through 1968 (Schedules B-1 and B-2 for Agencia and Schedules C-1 and C-2 for Servicios). Claimant's submission was accompanied by the following explanatory notes:

The total loss is comprised of the following:

1. The net worth of the subsidiaries at December 31, 1958, the date of the constructive expropriation.
2. The estimated net profits of the subsidiaries for the years ended December 31, 1959 through December 31, 1969 had the constructive expropriation not occurred.
3. The estimated loss of earnings, calculated at an annual rate of 6%, on the estimated net profits of the subsidiaries for the years ended December 31, 1959 through December 31, 1969.

The calculations are based on the following assumptions:

1. That the average of the profits earned during the five years prior to the constructive expropriation are representative of profits which could have normally been anticipated for future years.
2. That, consistent with the practice followed in the preceding years, annual dividends equal to the prior year net earnings of the companies would have been paid to the stockholders in subsequent years; and, that these dividends would have been subject to a 6% Cuban tax.
3. That earnings derived from these companies could have been invested at an annual earnings rate of 6%.

With respect to the elements which assertedly comprise the above total loss, claimant's computations result in the following:

1. The net worth or book values of Agencia and Servicios as of December 31, 1958 were \$93,212.01 and \$130,165.60, respectively. (It is noted that this asserted book value for Agencia reflects the elimination of the dubious account receivable.)
2. The estimated net profits of the two subsidiaries for the ten-year period ending on December 31, 1969 were \$348,974.56 and \$226,718.47, respectively.
3. The estimated losses of interest on the estimated net profits were \$126,000.21 for Agencia and \$81,858.62 for Servicios.

The Commission finds no valid basis for determining the amount of claimant's loss by means of the suggested method. In effect, claimant is contending that it would be inequitable to evaluate its loss on the basis of book values alone, in which contention the Commission fully concurs. However, the Commission is constrained to reject the contention that claimant's loss should include the "estimated" net profits of the two subsidiaries for the ten-year period ending December 31, 1969. Inasmuch as the date of loss herein was found to be February 17, 1959, any earnings thereafter obviously would belong to the Government of Cuba and not to claimant. The Commission has held that claims for future earnings are not within the purview of Title V of the Act. (See Claim of Robert L. Cheaney and Marjorie L. Cheaney, Claim No. CU-0915; Claim of Ford Motor Company, Claim No. CU-3072.) Insofar as interest is concerned, the Commission is allowing interest, as indicated hereafter, on the amount of claimant's loss at the rate of 6% per annum from the date of loss to the date of settlement.

Upon consideration of the entire record, the Commission finds that the valuation most appropriate in this case and equitable to the claimant is the amount resulting from capitalizing the average annual net earnings of the two subsidiaries at 10% to arrive at the going concern values of the subsidiaries.

The Commission finds that the values of the two subsidiaries as going concerns should be based upon the capitalization of their average annual net earnings for the five-year period ending December 31, 1958.

The record shows that the net earnings of the two subsidiaries for that five-year period were as follows:

	<u>Agencia</u>	<u>Servicios</u>
1954	\$ 34,241.72	\$ 35,443.04
1955	31,247.65	19,488.46
1956	25,826.83	18,211.05
1957	34,325.62	19,020.67
1958	<u>43,107.99</u>	<u>17,468.52</u>
Totals	<u>\$168,749.81</u>	<u>\$109,631.74</u>

The average annual net earnings of Agencia and Servicios were, therefore, \$33,749.96 and \$21,926.35, respectively. Accordingly, the values of these two subsidiaries as going concerns on February 17, 1959, the date of loss, were \$337,499.60 and \$219,263.50, respectively.

Inasmuch as the values of Agencia and Servicios as going concerns are based upon their earnings capacities, the Commission holds that the excess of liquid assets, such as cash and accounts receivable, over current liabilities constituted additional factors to be considered in determining the overall values of the two subsidiaries. The record shows that as of December 31, 1958 Agencia and Servicios owned cash and accounts receivable as follows, after elimination of the uncollectible accounts receivable in the amount of \$348,281.61 which claimant had withdrawn from consideration:

	<u>Agencia</u>	<u>Servicios</u>
Cash	\$310,284.11	\$ 55,443.18
Accounts Receivable	645.00	3,266.66
Debit balance New York Agency	<u>15,201.07</u>	_____
Totals	<u>\$326,130.18</u>	<u>\$ 58,709.84</u>

The debt due Agencia from the New York Agency in the amount of \$15,201.07 obviously could not have been taken by the Government of Cuba

and therefore cannot constitute a loss within the meaning of Title V of the Act. The Commission therefore finds that as of February 17, 1959 Agencia owned cash and accounts receivable in the aggregate amount of \$310,929.11, and that Servicios owned cash and accounts receivable in the aggregate amount of \$58,709.84. It further appears that the current liabilities of Agencia and Servicios, as shown by their balance sheets as of December 31, 1958, were \$186,930.21 and \$9,923.13, respectively. Accordingly, the excess of their liquid assets over their current liabilities were \$123,998.90 (Agencia) and \$48,786.71 (Servicios).

The Commission therefore finds that the overall values of Agencia and Servicios on February 17, 1959, the date of loss, were \$461,498.50 and \$268,050.21, respectively, and concludes that claimant sustained a loss in the aggregate amount of \$729,548.71.

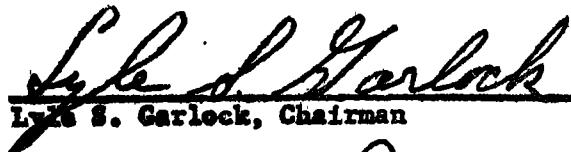
The Commission has decided that in certification of losses on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation,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

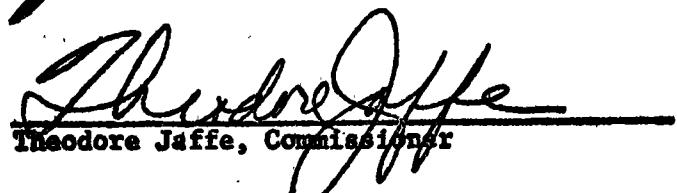
CERTIFICATION OF LOSS

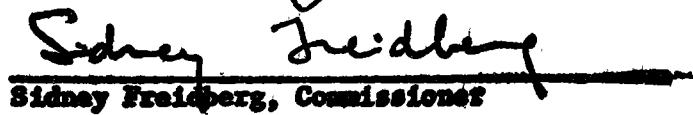
The Commission certifies that GARCIA & DIAZ, INC. suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Seven Hundred Twenty-Nine Thousand Five Hundred Forty-Eight Dollars and Seventy-One Cents (\$729,548.71) with interest thereon at 6% per annum from February 17, 1959 to the date of settlement.

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

18 MAR 1970


Lytle S. Garlock
Lytle S. Garlock, Chairman


Theodore Jaffe
Theodore Jaffe, Commissioner


Sidney Freidberg
Sidney Freidberg, 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).)