

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

IN THE MATTER OF THE CLAIM OF

FIRST NATIONAL CITY BANK

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU -2628

Decision No. CU -3835

Counsel for claimant:

Shearman & Sterling
By Robert Carswell, Esq.

FINAL DECISION

Under date of September 3, 1969, the Commission entered its Proposed Decision certifying a loss in favor of claimant in the amount of \$4,973,028.81 plus interest. Subsequently claimant advised the Commission that it had recovered a further amount of \$109,297.77 on account of said loss over and above the recoveries already deducted, as set forth in the Proposed Decision. Claimant also indicated that it had no objections to file in this matter.

Upon consideration of the foregoing, it is

ORDERED that a Final Decision be entered as follows:

The Commission now finds that the aggregate amount of claimant's recoveries was \$5,495,401.26, which must be deducted from claimant's loss in the amount of \$9,510,000.00. Accordingly, the Commission finds that the net loss sustained by claimant on September 17, 1960 with respect to its Cuban branches was \$4,014,598.74.

It is further

ORDERED that the certification of loss, as restated below, be entered and that the Proposed Decision be affirmed in all other respects.

CERTIFICATION OF LOSS

The Commission certifies that the FIRST NATIONAL CITY BANK 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 Million Eight Hundred Sixty-three Thousand Seven Hundred Thirty-one Dollars and Four Cents (\$4,863,731.04) with interest at 6% per annum from the respective dates of loss to the date of settlement.

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

NOV 14 1969

Theodore Jaffe

Theodore Jaffe, Commissioner

Sidney Freidberg

Sidney Freidberg, Commissioner

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PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of \$7,513,028.81 plus interest, representing the gross amount of \$12,899,132.30 less offsets of \$5,386,103.49, was presented by FIRST NATIONAL CITY BANK based upon asserted losses of certain real and personal property at its branch offices in various areas of Cuba, and other asserted losses of personal property.

Under Title V of the International Claims Settlement Act of 1949 [79 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, expropria

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, including documentation filed by claimant in its claim against the Chinese Communist regime under Title V of the Act, as amended (Claim No. CN-0440), establishes that claimant was organized under the laws of the United States, and that at all pertinent times more than 50% of claimant's outstanding capital stock was owned by nationals of the United States. An authorized officer of claimant has certified that at all times during the period April 9, 1950 to July 2, 1969 (date of said certification), more than 95% of claimant's outstanding capital stock was owned by persons with addresses in the United States. The Commission holds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

Cuban Branches

The record shows that claimant maintained eleven branches in Cuba, including six in Havana, four of which were leased premises, and one each in Santiago de Cuba, Manzanillo, Caibarien, Cardenas and Matanzas. The Commission finds on the basis of the evidence of record that in connection with these operations, claimant owned certain real and personal property at seven of the locations, and owned certain personal property at four of the premises where it had also made substantial improvements to its leaseholds.

On September 17, 1960, the Government of Cuba published in its Official Gazette Resolution No. 2, pursuant to Law 851, which listed as nationalized

the First National City Bank of New York, claimant's former name. The Commission, therefore, finds that claimant's real and personal property was nationalized by the Government of Cuba on September 17, 1960, as a result of which claimant sustained a loss within the meaning of Title V of the Act.

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." The Commission has concluded that this phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property and that it is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider; i.e., fair market value, book value, going concern value, or cost of replacement.

Claimant has computed its claim as follows:

Net Worth of Cuban branches including unremitted profits, as of August 23, 1960		\$ 5,961,037.41
Less net balance due Cuban branches from claimant		<u>1,491,735.34</u>
Net investment - book value		\$ 4,469,302.07
Excess of appraised value of real property, furniture, fixtures, etc. over book value		<u>1,718,418.83</u>
Net investment adjusted		\$ 6,187,720.90
Expenses incurred after August 23, 1960 as result of nationalization:		
Payments to Administrator	\$ 809,641.21	
Legal fees (estimated)	50,000.00	
Assignments from employees	<u>39,491.09</u>	
		<u>899,132.30</u>
		\$ 7,086,853.20
Goodwill and Going Concern value	\$12,000,000.00	
Less net investment adjusted	<u>6,187,720.90</u>	<u>5,812,279.10</u>
Total		<u>\$12,899,132.30</u>

In effect, claimant is asserting the loss of goodwill and going concern value in the amount of \$12,000,000.00, plus \$899,132.30 for expenses incurred after August 23, 1960 as a result of the nationalization by Cuba.

The essence of claimant's contentions is that the Commission should apply the going concern value method in determining its losses in Cuba. Claimant states that it has been operating some of its Cuban branches since the 1920's and has built up the intangible asset, goodwill, which under normal accounting procedures and pursuant to bank regulations could not be recorded in its books and records. It adds that the book values for such items as real property, furniture and fixtures, and equipment, etc. reflect only the net cost values after depreciation, whereas expert appraisals indicate much higher values for these items of property on the date of loss. For these reasons, claimant asserts, in effect, that the use of book value would neither be appropriate nor equitable.

The evidence of record sustains claimant's contentions regarding book value. Using 1959 as the typical and representative year because it was the last full year of its Cuban branches' operations, claimant has submitted a substantial amount of supporting documentation. Copies of balance sheets, profit and loss statements, and schedules, as well as analysis sheets prepared on the basis of claimant's books and records for its Cuban branches, establish that claimant's cost of land at seven locations was \$496,716.51, and remains recorded at that amount although nearly all of it was purchased in 1923 and 1924, approximately 36 years prior to the date of loss, during which time property values had risen substantially. It further appears that the original aggregate cost of the buildings owned by claimant on these sites was \$1,277,871.02, which is recorded in claimant's books at \$148,930.44, after depreciation, while the foundations and structures were currently insured in the aggregate amount of \$1,314,437.80.

The record includes appraisals (Exhibit 4) by an expert engineer and architect whose appraisals have been found reliable in other claims determined by the Commission under Title V of the Act. This expert has indicated

that all of the premises were maintained in good condition, were modernized, and most of the structures, including those rented by claimant, had been improved by the addition of air conditioning systems installed at claimant's expense. The aggregate appraisal of the real property owned by claimant, including the furniture, fixtures and equipment installed by claimant, as well as the improvements made to claimant's leaseholds, is set forth as \$2,740,000.00 on the date of loss. We note that this amount is slightly higher than the appraisals of these items of property made by claimant's employees at the eleven sites.

Claimant has suggested several methods for arriving at the going concern value of its eleven Cuban branches. In order to illustrate each method, claimant has submitted the following information concerning its Cuban operations:

(a) The net earnings for the years ending December 23, 1955 through December 23, 1959, and for the period ending August 23, 1960, which show such net earnings (rounded off) as \$699,000.00, \$1,074,000.00, \$950,000.00, \$1,021,000.00, \$1,011,000.00, and \$303,000.00, respectively (Exhibit 2).

(b) The aggregate net worth of the eleven Cuban branches for the same periods of time as under (a) above, adjusted to include claimant's internal appraisals of its land, buildings, furniture, fixtures, and equipment, which show such net worth (rounded off) as \$5,637,000.00, \$5,904,000.00, \$6,073,000.00, \$6,221,000.00, \$7,196,000.00, and \$7,679,000.00, respectively (Exhibit 3).

(c) A schedule indicating the results of a study made by claimant, which show the cost of acquisitions in 1959 and 1960 of Cuban branches by five American banks, from which claimant computed the percentage of book values which such acquisition costs represent, and averaged them to be 179.48% of the book values (Exhibit 5). With information available only as to three of those five American banks, claimant also derived the averaged multiple (14.2) of earnings of those three banks to the costs of the acquisitions (also in Exhibit 5).

(d) A table prepared by claimant which shows, with respect to five other American banks including claimant's, the ratio obtained by averaging the high and low market prices for the stock of these five banks in 1959 and dividing the result by the net earnings per share in 1959, indicating claimant as having the highest ratio, 15.1, and the average ratio as 13.3 (Exhibit 6).

(e) A schedule which shows four suggested methods of arriving at the going concern value of claimant's eleven Cuban branches (Exhibit 7), each one of which results in amounts in excess of the \$12,000,000.00 asserted by claimant as the going concern value of its Cuban branches.

Claimant's Exhibit 7 shows the following methods of valuations:

1. Applying the average percentage of acquisition cost of Cuban branches compared to book value, 179.48 (Exhibit 5), to claimant's adjusted net worth as of August 23, 1960 of \$7,679,000.00 (Exhibit 3), the result is \$13,782,000.00.

2. Applying the average multiple (14.2) of earnings of acquired banks to costs of acquisition (Exhibit 5), the results are \$14,356,000.00 when using claimant's net earnings in 1959, i.e. \$1,011,000.00 (Exhibit 2); and \$14,867,000.00 when using its adjusted net earnings in 1959, asserted to be \$1,047,000.00, including additional earnings attributable to the Cuban operations, which additional earnings are not supported by the evidence of record.

3. Applying the price/earnings ration of 15.1, asserted to be the appropriate one for claimant (Exhibit 6), to the net earnings and the asserted adjusted net earnings, as in paragraph 2 above, the results are \$15,266,000.00 and \$15,809,000.00, respectively.

4. Applying the average price/earnings multiple of 13.3 (Exhibit 6), to the same net earnings and asserted adjusted net earnings of claimant, the results are \$13,446,000.00 and \$13,925,000.00, respectively.

Claimant's suggestions have been carefully considered in the light of the entire record. The Commission finds methods 1 and 2 inappropriate inasmuch as it is clear (see paragraph 14 of affidavit of William T. Loveland,

claimant's Vice President, dated May 26, 1967) that the acquisitions of Cuban branches by the five American banks were unique and involved factors that are not established as comparable to claimant's Cuban branches. Accordingly, any conclusions drawn from such information would be speculative. In view of this and because here we do not have available percentages of profit of the Cuban branches as compared to the total profit of the entire organization of claimant the rationale of our decision in The Claim of The First National Bank of Boston, Claim No. CU-2268, also would not apply to this situation.

The Commission finds that the valuation most appropriate to the property and equitable to the claimant in this case is the going concern value, derived by capitalizing the average net earnings after Cuban taxes of claimant's Cuban branches during the years 1955 through 1959, prior to 1960 when Cuba's nationalization decrees had caused reductions in normal earnings. It is concluded, however, that the capitalization multiples suggested by claimant, 15.1 for claimant or the average, 13.3 (employed in methods 3 and 4), are inappropriate because they were computed from certain statistics relating to the operations of five American banks, whereas this claim involves bank branches in Cuba. From other information available to the Commission, it appears that the average multiple for three Latin-American banks was 9.9 in 1960, there being no data available for Cuban banks. (See Claim of Julius J. Shepard, Claim No. CU-0407, Amended Proposed Decision issued on April 30, 1969; reaffirmed in Claim of General Dynamics, Claim No. CU-2476.)

Having fully considered this entire matter, the Commission holds that the value of claimant's eleven Cuban branches should be computed on the basis of the branches' average net earnings after Cuban taxes for the period 1955 through 1959, capitalized at 10%.

As indicated above, the net earnings of claimant's eleven Cuban branches were \$699,000.00, \$1,074,000.00, \$950,000.00, \$1,021,000.00 and \$1,011,000.00, for the years 1955 through 1959, or an average annual net profit after deductions for Cuban taxes of \$951,000.00. Accordingly, the Commission finds that the aggregate value of claimant's eleven Cuban branches on September 17, 1960, the date of loss, was \$9,510,000.00.

Section 506 of the Act provides:

In determining the amount of any claim, the Commission shall deduct all amounts the claimant has received from any source on account of the same loss or losses.

The record shows that claimant's loss has been offset partially by recoveries and credits. United States Treasury bonds in the amount of \$3,000,000.00 had been held by claimant's branches in Cuba and were included among claimant's assets that were taken by Cuba on September 17, 1960. These bonds were due to mature on September 15, 1961 and bore interest at 2-3/4%. It appears from the record that subsequent to the maturity date of the bonds, claimant received duplicate bonds in the face amount of \$3,000,000.00 plus accrued interest in the amount of \$38,111.41, which had been included in the financial statements for claimant's Cuban branches.

The evidence also establishes that Banco Nacional de Cuba, an agency of the Government of Cuba, had on deposit with claimant a credit balance in the amount of \$2,293,367.65, and that claimant had recovered other funds in the amount of \$54,624.43 which it stated should be applied to offset its claim against Cuba.

Accordingly, the aggregate amount of the offset, \$5,386,103.49, must be deducted from the amount of loss. The Commission therefore finds that the net loss sustained on September 17, 1960 with respect to this portion of the claim was \$4,123,896.51.

Other Losses Asserted

1. Commercial Credits

The record establishes and the Commission finds that claimant's Cuban branches had authorized with the approval of claimant certain commercial credits, covered by certain funds in Cuba in the amount of \$809,641.21. It further appears from the record that the Cuban authorities took these special funds upon nationalization of the Cuban branches. Subsequently, documents evidencing these credits were presented to claimant in New York and claimant was obliged to and did honor them. The Commission,

therefore, finds that claimant sustained a loss on September 17, 1960 within the meaning of Title V of the Act in the amount of \$809,641.21 on account of the said commercial credits.

2. Legal Fees

Claimant states that it suffered a loss of \$50,000.00 (estimated) for legal fees, resulting from the nationalization of claimant's Cuban branches.

The Commission has held that claims for attorney's fees and expenses involved in contesting Cuba's taking of American-owned property are not within the purview of Title V of the Act. (See Claim of E. R. Squibb & Sons Inter-American Corporation, Claim No. CU-2469, and Claim of Mathieson Pan-American Chemical Corporation, Claim No. CU-2470.) Accordingly, the portion of the claim based upon legal fees is denied.

3. Assignments From Employees

The record shows that six of claimant's United States national employees who had been stationed at claimant's Cuban branches, owned certain personal effects, automobiles and other personalty, having an aggregate value of \$39,491.09.

Law 989, published in the Cuban Official Gazette on December 6, 1961, by its terms effected a confiscation of all goods, chattels, rights, shares, bonds and other securities of persons who fled from Cuba. The Commission finds that this law applied to claimant's said six employees who had left Cuba before that date, and concludes that all of the properties owned by these employees in Cuba were taken by the Government of Cuba on December 6, 1961 pursuant to Law 989. (See Claim of Floyd W. Auld, Claim No. CU-0020, 25 FCSC Semiann. Rep. 55 (July-Dec. 1966).)

The Commission finds on the basis of the evidence of record that claimant compensated these six employees for the full values of their properties, \$39,491.09, and received assignments from them in consideration of such payments. The record shows that assignments to claimant in the amount of \$27,301.10 were executed prior to December 6, 1961, the date of loss, and that assignments in the aggregate amount of \$12,189.99

were executed by three of these employees, after December 6, 1961, the date of loss, as follows:

<u>Date</u>	<u>Amount</u>
December 19, 1961	\$ 2,624.40
December 22, 1961	3,255.50
February 14, 1962	<u>6,310.09</u>
Total	<u>\$12,189.99</u>

Accordingly, the Commission finds that claimant succeeded to and sustained losses within the meaning of Title V of the Act in the aggregate amount of \$39,491.09 with respect to this portion of the claim.

Recapitulation

The Commission concludes that claimant sustained losses as follows:

<u>Item of Property</u>	<u>Amount</u>
11 Cuban branches	\$4,123,896.51
Commercial credits	809,641.21
Assignments	<u>39,491.09</u>
Total	<u>\$4,973,028.81</u>

The Commission has decided that in the 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.

The Commission concludes, however, that with respect to the assignments executed after the date of loss, interest should be allowed only from the respective dates of the assignments when claimant acquired those interests. (See Claim of Estate of Julius S. Wikler, Deceased, Claim No. CU-2571.)

Accordingly, interest will be included as follows:

<u>From</u>	<u>On</u>
September 17, 1960	\$4,933,537.72
December 6, 1961	27,301.10
December 19, 1961	2,624.40
December 22, 1961	3,255.50
February 14, 1962	<u>6,310.09</u>
Total	<u>\$4,973,028.81</u>

CERTIFICATION OF LOSS

The Commission certifies that the FIRST NATIONAL CITY BANK succeeded to and 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 Million Nine Hundred Seventy-three Thousand Twenty-eight Dollars and Eighty-one Cents (\$4,973,028.81) 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

SEP 3 1969

Leonard v. B. Sutton
Leonard v. B. Sutton, Chairman

Theodore Jaffe
Theodore Jaffe, Commissioner

Sidney Freidberg
Sidney Freidberg, Commissioner

NOTICE TO TREASURY: Claimant may be the subject of other certifications of losses in Claim Nos. CU-2626, CU-2627 and CU-2629.

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).)