

P-#12 -

Sight Draft
Contract intervention

See also #6
short form

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

IN THE MATTER OF THE CLAIM OF

THE SCHWARZENBACH HUBER COMPANY

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU-0019
Decision No. CU- 21

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, for \$1,710.72 was presented by The Schwarzenbach Huber Company, based upon the asserted loss of payment for merchandise shipped to Cuba.

Under Section 503 of the International Claims Settlement Act of 1949, as amended (64 Stat. 12; 69 Stat. 562; 72 Stat. 527; 78 Stat. 1110; 79 Stat. 988) the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. That section 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

- (a) . . . 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 504 of the Act provides, as to Ownership of Claims, that

- (a) A claim shall not be considered under section 503(a) of this title unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss and if considered shall be considered only to the extent the claim has been held by one or more nationals of the United

States continuously thereafter until the date of filing with the Commission.

Section 502(1) of the Act defines the term "national of the United States" as . . . (B) 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. . . .

An officer of the claimant corporation has certified that the claimant was organized in the State of New Jersey and that at all times between 1956 and presentation of this claim on June 11, 1965, more than 50% of the outstanding capital stock of the claimant has been owned by United States nationals. The Commission finds, therefore, that claimant is a national of the United States within the meaning of Section 502(1) (B) of the Act.

Pan American Forwarders, Inc. (FCSC Claim No. CU-0257) was the forwarder of goods which THE SCHWARZENBACH HUBER COMPANY shipped to Cuba, and which are the subject of the SCHWARZENBACH claim. The record contains a copy of the SCHWARZENBACH invoice No. SA-15892 of September 1, 1959 reflecting the sale to "Tiendas Flogar, S.A.," of Havana, Cuba, of goods totalling \$1,591.06. Freight, shipping and insurance fees increased the total to \$1,710.72. The terms were 60 days sight through The Trust Company of Cuba. "Tiendas Flogar, S.A.," paid \$1,710.72 to The Trust Company of Cuba on collection No. 124849, on November 4, 1959. This is set out in a letter of October 8, 1960 from the consignee to claimant.

Additionally, the record includes a letter of November 9, 1960 from The Trust Company of Cuba, to claimant, in which it is stated that the collection was paid [by the consignee] and that The Trust Company of Cuba was still awaiting a dollar reimbursement release from the Exchange Board, a Cuban Government agency. Claimant avers that it has not received the funds.

On September 29, 1959, there was published in the Cuban Official Gazette, Cuban Law No. 568, which is drafted in the most general terms. This Law, in its preamble, refers to Law 13 of December 23, 1948 which organized the Currency Stabilization Fund, granting it the license to regulate the international exchange. Law 568 proceeds to describe wrongful acts in the field of international exchange which adversely affected the national economy. Specifically, Law 568 then enumerated instances declared to be monetary offenses (Article 1), and provided punishment for the instigator (Article 2).

Paragraph (6) of Article 1 designates as an offense, inter alia, the transferring of funds abroad, by any means, whatever might be the origin of the funds, except in authorized cases, or those which the Currency Stabilization Fund might authorize, through the channels of an associated bank or entity authorized by the National Bank of Cuba. The second paragraph of Article 2 increases the penalty if the offense be committed by an officer of a bank or other juridical person.

On October 13, 1960 the Government of Cuba published in the Official Gazette Law No. 891, concerning the banking structure of Cuba. Article 12 thereof dissolved the Currency Stabilization Fund and transferred its functions to the National Bank of Cuba.

It is clear that channels existing for effecting transfer of funds to a lawful creditor abroad required authorization from a Cuban Government agency, to be effected as designated by the National Bank of Cuba.

The Commission has ascertained, through examination of a number of claims against the Government of Cuba, presented to it, that many consignees had paid their drafts to designated banks in Cuba for transfer to claimants in the United States, and that the matters came to a standstill at this point. The Cuban banks have frequently informed claimants, as in the case at hand, that permission has been sought, and

is awaited, to transfer the funds, but the transfers have not been approved. The Trust Company of Cuba later became an agency of the National Bank of Cuba.

The demands by the Cuban Government on the consignee in implementation of Law 568 included, among other things, information and evidence as to the Cuban agent's commission; independent audit of consignee's accounts as well as an audit of the auditor's accounts; explanation of deductions; explanation of length of time in passage; complete list of consignee's accounts payable. In some instances compliance with these demands would cost the consignee more than the amount to be transferred to the consignor, with the result that consignee, having paid his debt, was deterred from complying with the demands of the Cuban Government.

Although the Commission recognizes the sovereign authority of a nation to control its national economy and to this end regulate foreign exchange, nevertheless it also recognizes that the law must have that genuine intention and it must not contravene international law. The Commission has held in other programs that a prohibition against transfer of funds outside of a country is an exercise of sovereign authority which, though causing hardship to non-residents having funds within the country, does not give rise to an international claim. (See the Claim of George Evanoff, Claim No. BUL-1005, 10 FCSC Semiann. Rep. [Jan.-June 1959] 17; and the Claim of Ilie Muresan, Claim No. RUM-30,211, supra, at 111.) There are also numerous decisions concerning the fact that a currency reform resulting in the devaluation of a nation's currency is an exercise of sovereign authority which does not give rise to a cause of action. (See the Claim of Irene Hill Mascotte, Claim No. HUNG-20,435, supra, at 28.) There are as well those cases in connection with currency reform which hold that as long as there is no discrimination between nationals and aliens, no claim under international law arises. (See the Claim of Karolin Furst, Claim No. CZ-1381, 17 FCSC Semiann. Rep.

[July-Dec. 1962] 199; and the Claim of Herbert S. Hale, Claim No. PO-1011, 15 FCSC Semiann. Rep. [July-Dec. 1961] 32.)

It is not sufficient that the regulation of foreign exchange be the ostensible purpose when in reality the law has been enacted or is utilized for a purpose not in accord with international law. In this connection B.A. Wortley states "It has been rightly suggested that 'a State incurs no liability for depreciating its currency or restricting its transfer abroad', but that 'unduly oppressive measures' might be in a different category.² In Re Claim by Helbert Wagg & Co., Ltd., ([1956] 1 All E.R. 129; [1956] 2 W.L.R. 183) it became quite clear that foreign exchange control may be spoliatory in its effects and held to be illegal and unenforceable abroad." (See Wortley, Expropriation in Public International Law, Cambridge, 1959, p. 107.) Wortley's note 2 (above) concerns a discussion of devaluation (E. Lauterpacht, I. & C.L.Q., vol. V (1956), p. 427). However, Lauterpacht has referred to a passage in the opinion in the Wagg case, "This court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is, a law passed with the genuine intention of protecting its economy in times of national stress and for that purpose regulating (inter alia) the rights of foreign creditors, and is not a law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations. The title and expressed purpose of such legislation are not conclusive upon the point." (Note by Lauterpacht, supra, p. 306).

After having considered this matter, 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 its sovereign authority to regulate its foreign exchange. Rather, the Commission concludes that the application of this law insofar as the rights of claimant are concerned, constituted an intervention by the Government of Cuba into the contractual rights

which, in effect, resulted in the taking of American-owned property within the meaning of Section 503(a) of the Act.

Accordingly, in the instant claim the Commission finds that claimant's property was lost as a result of the intervention by the Government of Cuba and that, in the absence of evidence to the contrary, the loss occurred on November 5, 1959, the day after the collection was paid to The Trust Company of Cuba.

The Commission has decided that in payment of losses on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be allowed at the rate of 6% from the date of loss to the date of settlement (See the Claim of American Cast Iron Pipe Company, FCSC Claim No. CU-0249.)

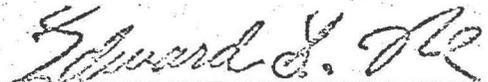
Accordingly, the Commission concludes that the amount of the loss sustained by claimant shall be increased by interest thereon at the rate of 6% per annum from November 5, 1959, the date on which the loss occurred, to the date on which provisions are made for the settlement thereof.

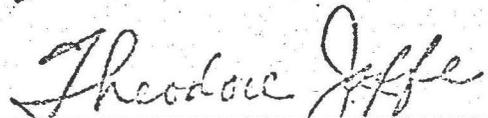
CERTIFICATION OF LOSS

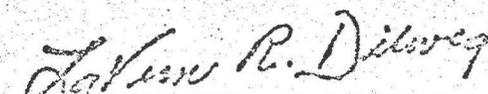
The Commission certifies that THE SCHWARZENBACH HUBER COMPANY suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of One Thousand Seven Hundred Ten Dollars and Seventy-two Cents (\$1,710.72), with interest thereon at 6% per annum from November 5, 1959, to the date of settlement.

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

30 NOV 1966


Edward D. Re, Chairman


Theodore Jaffe, Commissioner


LaVern R. Dilweg, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 20 days after service or receipt of notice of this Proposed Decision upon the expiration of 30 days after such service or receipt of notice, the decision will be entered as the Final Decision of the Commission, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g) (1964))

THIS DECISION WAS ENTERED AS THE COMMISSION'S
FINAL DECISION ON 13 JAN 1967

Francis Anderson
Clerk of the Commission