

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

IN THE MATTER OF THE CLAIM OF

IBM WORLD TRADE CORPORATION

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU -2155

Decision No. CU-3231

Counsel for claimant:

Patterson, Belknap & Webb
By Robert M. Pennoyer, Esq.

Appeal and objections from a Proposed Decision entered October 30, 1968;
oral hearing requested.

Argument January 6, 1964 by Robert M. Pennoyer, Esq.

FINAL DECISION

Under date of October 30, 1968, the Commission issued a Proposed Decision certifying that claimant IBM WORLD TRADE CORPORATION suffered a loss in the amount of \$3,925,344.00 for the assets of its Cuban branch which were nationalized by the Government of Cuba on January 26, 1961.

Claimant objected to the Proposed Decision of the Commission and requested an oral hearing before the Commission which was held on January 6, 1971. Subsequently additional evidence concerning the value of the Data Processing Rental Machines was submitted and, at the hearing, oral testimony of Mr. Charles C. Townsend, Treasurer of the claimant company, and of Mr. John Hossack of the American Appraisal Company was presented with argument by Robert M. Pennoyer, Esq.

Based upon all the evidence of record, including the testimony of the witnesses, the Commission now finds that the claimant suffered a loss for its Data Processing Machines in an amount greater than the \$2,105,436.00 determined in the Proposed Decision. The amount of loss suffered by

claimant for the loss of these machines calculated in accordance with the terms of the 1956 Consent Decree entered in the United States District Court for the Southern District of New York is determined to be \$4,629,526.00 and the Commission concludes that the losses suffered by claimant within the meaning of Title V of the Act, on January 26, 1961 are as follows:

Cash	\$1,208,496.00
Accounts receivable	351,657.00
Inventory	95,920.00
Deferred assets and charges	18,720.00
Machinery and equipment	63,507.00
Office equipment	42,758.00
Maintenance parts	38,850.00
Data processing rental machinery	<u>4,629,526.00</u>
Total Loss	\$6,449,434.00

Accordingly, the Certification of Loss recited in the Proposed Decision is set aside and the following Certification of Loss will be entered, and in all other respects the Proposed Decision is affirmed.

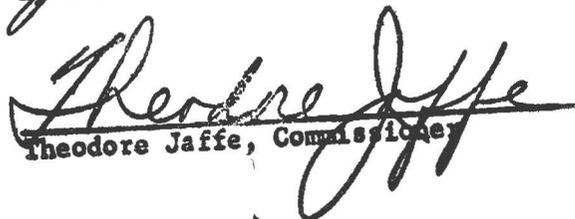
CERTIFICATION OF LOSS

The Commission certifies that IBM WORLD TRADE CORPORATION 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 Six Million Four Hundred Forty-Nine Thousand Four Hundred Thirty-Four Dollars (\$6,449,434.00) with interest thereon at 6% per annum from January 26, 1961 to the date of settlement.

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

JAN 20 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.

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

IN THE MATTER OF THE CLAIM OF

IBM WORLD TRADE CORPORATION

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU -2155

Decision No. CU 3231

Counsel for claimant:

Patterson, Belknap & Webb

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 \$7,866,167.00, was presented by IBM WORLD TRADE CORPORATION based upon the asserted loss of the assets of its branch establishment 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.

Claimant corporation, by an authorized officer, has certified that the claimant herein was organized in the State of Delaware and that at all times between 1960 and the presentation of this claim on April 26, 1967, all of its capital stock was owned by the International Business Machines Corporation. An officer of the International Business Machines Corporation has certified that at all times between January 1, 1961, and December 21, 1967, the date of his certificate, more than 50% of the outstanding capital stock of such corporation has been owned by nationals of the United States.

The evidence discloses that at all times pertinent to this claim less than 5% of the outstanding shares of stock of the International Business Machines Corporation was owned by persons residing outside of the United States. This 5% of the stockholders are assumed to be nationals of countries other than the United States. The Commission, therefore, finds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

Evidence of record shows that claimant owned and operated a branch office under the business name of IBM Cuba at No. 171 Calle 23 in Vedado, Havana, Cuba, engaged in the business of renting and selling IBM electric accounting machines, selling electric typewriters, time recorders, parts and supplies thereof, providing maintenance service for the machines sold or rented. Such branch office further operated a service bureau

which performed accounting and data processing service for customers and a printing plant for the production of punched cards.

The record includes a memorandum by the representative of IBM Cuba, dated January 30, 1961, in which he states that he left Cuba on January 21, 1961, and at that time there were circulating rumors that the intervention of the IBM Cuba by the Government of Cuba was imminent. The record also contains the statement of August 2, 1961, of the former sales representative of IBM Cuba, in which he states that the representatives of IBM Cuba had left Cuba on January 20, 1961; and that on January 26, 1961, the Cuban Minister of Labor pronounced the intervention of the IBM World Trade Corporation at No. 171 Calle 23 in Vedado, Havana, in Resolution No. 90 and appointed an interventor to manage the business on behalf of the Government of Cuba. There is also on record a memorandum of July 19, 1961, by the former manager of IBM Cuba, reciting a report from the claimant's legal counsel in Cuba, to the effect that he was unsuccessful in obtaining a copy of the resolution ordering the intervention of IBM Cuba, but it was known to have occurred because "the management abandoned the business".

It is known to the Commission that Cuban Law No. 647 (Official Gazette 224, November 25, 1959) authorized the Minister of Labor to order the intervention of enterprises. (See Claim of Parke, Davis & Company, Claim No. CU-0180, 1967 FCSC Ann. Rep. 33.)

In view of the foregoing, the Commission finds that claimant's branch enterprise in Cuba was intervened by the Government of Cuba on January 26, 1961, pursuant to the provisions of Law No. 647 (supra). It is noted by the Commission that subsequently the claimant corporation, identified as IBM Corporacion de Comercio Mundial, was listed as nationalized by the Government of Cuba on August 8, 1961, by Resolution No. 4 issued pursuant to Cuban Law No. 890.

Based on the foregoing, the Commission finds that claimant sustained a loss within the meaning of Title V of the Act on January 26, 1961, when its branch enterprise in Vedado, Havana, Cuba, was intervened by the Government of Cuba.

Petty cash:			
Havana office	2,000.00		
Santiago de Cuba office	<u>200.00</u>		
			2,200.00
Cash deposit for imports (Trust Co.):			
INRA	16,908.21		
BANSESCU	28,250.00		
HACIENDA-AUDITORIA	41,475.00		
Flat-bed press	<u>26,578.00</u>		
			<u>113,211.21</u>
			P1,208,495.77

This statement is verified by bank statements and copies of the cash certificates on record. The substantial amount of cash is explained by claimant as resulting from Cuban Government restrictions prohibiting the transfer of peso amounts in form of United States dollars to the United States. The Commission takes notice of the fact that the Cuban legal provisions on foreign exchange control culminated in the passage of Law 568 of September 29, 1959, having the principal objective of preventing transfer of funds from Cuba to the United States.

(2) Accounts receivable

Accounts receivable from customers	P403,790	
Sundry debtors	<u>5,615</u>	
		409,405
Less reserve for doubtful accounts	<u>57,748</u>	
		P351,657

This portion of the loss is supported by records prepared by IBM Cuba as of December 31, 1960, listing accounts receivable. The sundry debtor item is the same as it is on the November, 1960, balance sheet and its supporting schedule. The amount of reserve for doubtful accounts is an estimate based upon prior experience of IBM Cuba and it is comparable with the reserve of P52,749 listed on the November, 1960, balance sheet.

(3) Inventory

The amount of P95,920 is supported by the November 1960 balance sheet of IBM Cuba and is described as representing original cost less depreciation. This amount appears to be reasonable as compared with the amount of P104,254 for the same item on the October, 1960, balance sheet of IBM Cuba.

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.

Claimant lists its losses as follows:

(1) Cash	\$ 1,208,496
(2) Accounts receivable (net)	351,657
(3) Inventory (net)	95,920
(4) Deferred assets and charges	18,720
(5) Machinery and equipment (net)	63,507
(6) Office equipment (net)	42,758
(7) Maintenance parts (net)	38,850
(8) Data processing rental machines	5,881,949
(9) Invoice clearing	127,167
(10) Increase in net investment January 1-26, 1961	<u>37,143</u>
	\$ 7,866,167

Among other documentation, claimant submitted a Comparative Balance Sheet of November 25, 1960; and a Reconstructed Balance Sheet of December 31, 1960, prepared by a senior accountant of claimant's parent corporation, the IBM Corporation in New York, on the basis of various records and reports forwarded by the branch office in Vedado, Havana, to the parent corporation in New York in the regular course of business prior to January 26, 1961, the date of loss.

(1) Cash

This item of the claim is detailed in the Statement of Cash Balance as of December 31, 1960, prepared by IBM Cuba, as follows:

Bank balances in Havana banks:	
The First National City Bank of New York, Havana branch	P184,059.51
The Royal Bank of Canada, Havana branch	5,039.70
The Trust Co. of Cuba	<u>403,985.35</u>
	P593,084.56
Cash certificates:	
Ten certificates issued by The Trust Co. of Cuba, total	500,000.00

(4) Deferred assets and charges

The amount of P18,720 is supported by the November 1960 balance sheet prepared by IBM Cuba.

(5) Machinery and equipment

The property, the loss of which is claimed under such heading, consisted chiefly of a card-printing plant, maintenance plant, and motor vehicles. The amount of P63,507 is the result of P76,846, the cost of acquisition, less a depreciation of P13,339, and is supported by the November 1960 balance sheet of IBM Cuba.

(6) Office equipment

The sum of P42,758 results from the acquisition cost of P60,661 as shown on the November 1960 balance sheet of IBM Cuba less a depreciation of P17,903. Inasmuch as the machinery and office equipment (the items here and under (5)) would have been purchased from outside sources, the cost of acquisition less depreciation appears to be the reasonable, fair value of such properties at the time of their loss.

(7) Maintenance parts

The amount of P38,850 is established by the balance sheet of November 1960 which lists maintenance parts at P43,627 with a depreciation reserve of P4,777. Contrary to claimant's contention, the Commission finds that maintenance parts are subject to depreciation just as well as the machinery for which they were made.

(8) Data processing rental machinery

The chief contention of the claimant centers around the valuation of the data processing rental machinery. In essence, claimant argues that the original book value of the machines did not represent their fair value even at the time they were capitalized. It further argues that for the purposes of this claim the fair value of such machines would be their sale price as of 1959, depreciated by an average of 50.55% and the net result increased by the addition of estimated freight charges and Cuban custom duties. Claimant's computation is as follows:

Aggregate sales price of machines	P6,944,255	
Depreciation of 33.33%	<u>2,314,729</u>	
		P4,629,526
Estimated freight charges		228,060
Estimated Cuban custom duties		<u>1,024,363</u>
		P5,881,949

This argument was already met by the Commission in connection with the claimant's claim filed under Section 202(a), Title II of the War Claims Act of 1948, as amended, for certain losses sustained during World War II. In its Final Decision, issued on such claim, the Commission affirmed its previous finding that the loss of claimant's machines and equipment should be calculated not on the basis of replacement cost, but on the basis of cost less depreciation. (Claim of IBM World Trade Corporation, Claim Nos. W-7358-W-7367, Dec. No. W-17015.) Accordingly, the Commission finds that the valuation most appropriate to the property and equitable to the claimant is the cost of production.

The next question which has to be answered is the amount of depreciation to be deducted from the original cost of production.

A detailed report of December 31, 1960, prepared by IBM Cuba, indicating the machines, their age, cost of production, and amount of depreciation, shows that, except in a few minor instances, the claimant corporation depreciated the subject machines at the rate of 15% per annum. As a result of such fast depreciation a substantial number of machines were already completely depreciated well prior to December 31, 1960. Since evidence of record shows that most of such completely depreciated machines were rented to customers and provided profit for the claimant or was available for such purposes, the Commission is of the opinion that the fair and equitable rate of depreciation for the subject machines is 7.5% per annum or one-half of the rate used by claimant. Such rate of depreciation will provide and assign a fair value to all of the rental machines except machines of 1947 or older, which are deemed by the Commission as obsolete and of no value, and a few machines,

completely depreciated although dated during the period from 1955 to 1959, having an inconsequential total value.

Applying these principles to the facts of this case, the Commission finds that the value of the data processing rental machinery was on January 26, 1961, the date of loss, as follows:

<u>Cost of production of machines</u>	<u>Year of Manufacture</u>	<u>Value on January 26, 1961</u>
P 4,793	1948	2.5% or P 119
17,737	1949	10.0% " 1,773
40,643	1950	17.5% " 7,112
90,852	1951	25.0% " 22,713
124,742	1952	32.5% " 40,541
173,488	1953	40.0% " 69,395
<u>72,735</u>	1954	47.5% " <u>34,549</u>
P524,990		P176,202
<u>-176,202</u>		

P348,788 is the amount of depreciation for machines dated 1948-1954, completely depreciated in claimant's books.

The applicable depreciation for rental machines still in process of depreciation is one-half of P929,274, the amount of depreciation appearing in claimant's books, or P464,637 since the fair rate of depreciation is 7.5% or one-half of the rate of 15% used by the claimant.

Data processing rental machinery

Cost of production		P2,960,090
Depreciation:		
Obsolete machinery (1947 and older)	P 34,451	
For machines aged 1948-1954	348,788	
For machines still in process of depreciation	464,637	
Machines aged 1955-1960 but completely depreciated	<u>6,778</u>	
		<u>854,654</u>

Value of rental machines on date of loss: P2,105,436

The Commission takes notice that the freight, insurance, and custom duties incidental to the importation of the subject rental machines which were lost on January 26, 1961, were already recovered by the claimant because under the rental agreement when a customer initially leased a data processing machine he was required to pay all such import charges in addition to the monthly rental fee. Under international law the

claimant is entitled to prompt and adequate compensation for the loss of its property taken. It is, however, not entitled to insist on the continuation of its business operation in the country which nationalized or intervened its property. The Commission, accordingly, finds that there is no justification to increase claimant's loss with the amounts necessary to cover the estimated cost of freight, insurance, and Cuban custom duties, needed to import new machines to Cuba in order to continue its business operations as prior to the date of loss.

(9) Invoice clearing

It is stated by claimant that the "arrived at" amount of \$127,167, designated as "invoice clearing", in effect represents additional assets of IBM Cuba which claimant is "unable to classify" due to lack of sufficient financial data. The Commission is constrained to hold that a loss cannot be certified for unidentified property. Accordingly, this portion of the claim is denied.

(10) Increase in net investment during January 1-26, 1961

It is alleged by claimant that it is reasonable to assume that its investment in Cuba would have increased during the period from January 1 to January 26, 1961, by the estimated amount of \$37,143.00. The Commission finds that this portion of the claim is based upon asserted loss of prospective earnings. Consequently, it is denied for the reasons stated above in detail in connection with item (8) of the claim.

Summary of losses

(1) Cash	P1,208,496
(2) Accounts receivable	351,657
(3) Inventory	95,920
(4) Deferred assets and charges	18,720
(5) Machinery and equipment	63,507
(6) Office equipment	42,758
(7) Maintenance parts	38,850
(8) Data processing rental machinery	<u>2,105,436</u>
	P3,925,344

The Commission has ruled that on August 9, 1961, the value of the Cuban peso was at par with the United States dollar. (See Claim of Dorothy G. O'Kieffe, Claim No. CU-1242, Dec. No. CU-876.) Accordingly, the Commission finds, in view of the foregoing, that the claimant sustained a loss on January 26, 1961, in the total amount of \$3,925,344.00 within the meaning of Section 503(a) of the Act for reason of intervention of its branch office in Vedado, Havana, by the Government of Cuba on such date.

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 it is so ordered.

CERTIFICATION OF LOSS

The Commission certifies that IBM WORLD TRADE CORPORATION 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 Three Million Nine Hundred Twenty-Five Thousand Three Hundred Forty-Four Dollars (\$3,925,344.00) with interest thereon at 6% per annum from January 26, 1961, to the date of settlement.

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

OCT 30 1968

Leonard v. B. Sutton

Leonard v. B. Sutton, Chairman

Theodore Jaffe

Theodore Jaffe, Vice Chairman

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).)