

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

IN THE MATTER OF THE CLAIM OF

PEPSICO, INC.

Claim No. CU 3596

Decision No. CU 5841

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimant:

W. Perry Keats, Esq.

Appeal and objections from a Proposed Decision entered on September 16, 1970; oral hearing requested.

Oral hearing held on February 17, 1971.

FINAL DECISION

Under date of September 16, 1970, the Commission issued its Proposed Decision certifying a loss in favor of claimant in the amount of \$267,875.11 plus interest. The certification was based on real property and a debt due from Embotelladora Antillana, S.A., of Cuba. Portions of the claim were denied as follows:

1. Claim for \$1,000.00 based upon a 100% stock interest in Compania Pepsi-Cola de Cuba, S.A. (Cuban subsidiary) was denied because the stock had no value on the date of loss, the Cuban subsidiary being insolvent.
2. Claims for \$2,124,550.00 and \$229,565.00, respectively, based upon debts owed by the Cuban subsidiary to claimant directly, and to claimant indirectly through a wholly-owned Canadian subsidiary, were denied because the Cuban subsidiary's assets were not sufficient to liquidate its current liabilities.

Claimant objected to the denial of these portions of its claim and requested an oral hearing which was held on February 17, 1971.

At the hearing counsel for claimant urged that while the Cuban subsidiary was insolvent claimant's overall Cuban operations were profitable and, therefore, had a going concern value. Counsel was

granted a period of time within which to further document his contention. Subsequently counsel submitted the supporting material, consisting of an affidavit of April 16, 1971, from claimant's controller, international division, and two appended schedules.

● Affiant recites that Cuba was considered as one foreign market, and therefore, investments therein and returns therefrom, whether directly or indirectly through other entities, should be measured as one unit, the entities being mere technical vehicles for operations in that market. The two schedules dealt with claimant's Cuban operations and with its Argentine operations, the latter one having been submitted for the purpose of illustrating that claimant regarded its foreign markets as single units.

The schedule for claimant's Cuban operations covers the period 1945 through 1959; and shows with respect to each year the sales, costs, profit or loss, parent's (claimant's) profit on sales to the Cuban market, and profit or loss on total operations.

That schedule discloses that claimant's Cuban subsidiary had net profits only during 1945, 1946 and 1947, in the amounts of \$12,189.00, \$9,782.00 and \$825.00, respectively. During all of the following years through 1959, the Cuban subsidiary sustained substantial net losses.

It further appears from that schedule that the total picture is not greatly improved even when claimant's own profits are considered. Thus, the schedule discloses that claimant's total operations in Cuba resulted in substantial net losses during 1949, 1950, 1954, 1955, 1957, 1958 and 1959, and net losses of \$5,562.00 during 1948. For the entire period from 1945 through 1959, the net losses aggregated \$1,461,641.00 while the net profits aggregated \$539,178.00, resulting in an excess of net losses over net profits in the amount of \$922,463.00.

In a footnote to that schedule, claimant's controller explains that during 1957 and 1958 claimant introduced a new six-ounce bottle in the Cuban market, which involved substantial production and promotion expenses thereby causing "extraordinary" losses in 1957 and 1958. Nevertheless, the record

reflects that even in other years, as noted, there were substantial net losses exceeding by far the net gains during the profitable years.

Upon consideration of the entire record, the Commission finds no valid basis for concluding that claimant's total Cuban operations were profitable, that they had a going concern value as asserted by counsel for claimant. Accordingly, the Proposed Decision of September 16, 1970, is affirmed in all respects.

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

MAY 19 1971


Lyle S. Garlock, Chairman


Theodore Jaffe, Commissioner

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

IN THE MATTER OF THE CLAIM OF

PEPSICO, INC.

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU-3596

Decision No. CU **5841**

Counsel for claimant:

F. Mendez-Capote, Esquire

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, was presented by PEPSICO, INC. based upon the asserted loss of certain real and personal property 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 PEPSICO, INC., formerly known as Pepsi-Cola Company, was organized under the laws of Delaware (Exhibits 1 and 2), and that at all pertinent times more than 50% of its outstanding capital stock was owned by nationals of the United States (Exhibit 3). An authorized officer of claimant has certified that as of December 27, 1967, at least 98% of claimant's outstanding capital stock was owned by persons having 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.

The evidence establishes that at all pertinent times claimant owned all of the outstanding capital stock of Compania Pepsi-Cola de Cuba, S.A., a Cuban corporation (Exhibits 6 and 7), and of Pepsi-Cola International Ltd., a Canadian corporation (Exhibits 4 and 5), hereafter called the Cuban subsidiary and the Canadian subsidiary, respectively. It further appears from the evidence of record that the Cuban subsidiary was engaged in the bottling, distribution and sale of the beverage "Pepsi-Cola" in Cuba, and that it maintained plants at Santiago de Cuba, Cienfuegos and Havana, Cuba. The Canadian subsidiary supplied the Cuban subsidiary with concentrate for the beverage, and provided advertising promotion, materials and other managerial services which were carried on the books as intercompany accounts.

By means of three contracts, dated November 7, 1959, the Cuban subsidiary sold its three plants in Cuba. The plants at Santiago de Cuba and at Cienfuegos were sold (Exhibits 8 and 9) to Pepsi-Cola Metropolitan Bottling Company, Inc., claimant's wholly-owned American subsidiary, which claim will be decided on its own merits (Claim No. CU-3597). The plant at Havana was sold (Exhibit 13) to the Canadian subsidiary. According to affidavits from two of claimant's controllers, dated March 16, 1970 and April 30, 1970, the proceeds of those sales - \$839,792.52 for the first two plants, and \$232,115.11 for the Havana plant - were offset by reductions in debts the Cuban subsidiary owed to the purchasers.

Claimant asserts the following losses:

Direct Ownership

Stock of the Cuban subsidiary	\$ 1,000.00
Debts due from the Cuban subsidiary	<u>2,124,550.00</u>
Total	<u>\$2,125,550.00</u>

Indirect Ownership through Canadian Subsidiary

Land	\$ 63,055.00
Buildings, less reserve of \$61,418.00	169,060.00
Debts due from the Cuban subsidiary	229,565.00
Debts due from Embotelladora Antillana, S.A., a Cuban Corporation	<u>35,760.00</u>
Total	<u>\$497,440.00</u>

The total amount claimed is therefore \$2,622,990.00.

On the basis of the entire record, the Commission finds that claimant owned certain property in Cuba, discussed in detail below.

In its Official Gazette of July 7, 1961, the Government of Cuba listed as nationalized the Cuban subsidiary (Exhibit 15); and on August 8, 1961 Embotelladora Antillana, S.A. was listed in the Cuban Official Gazette as nationalized (Exhibit 16).

Cuban Subsidiary

Claimant asserts the loss of \$1,000.00, representing its original investment in the Cuban subsidiary, and a further loss of \$2,124,550.00, representing the aggregate amount of debts due from the Cuban subsidiary.

In support of these portions of the claim, claimant has submitted a copy of an audited balance sheet as of December 31, 1959 for the Cuban subsidiary. One of claimant's controllers (affidavit of March 16, 1970) states that claimant had received balance sheets for the Cuban subsidiary for the months of January, February, March and April, 1960, but that all of the records relating to claimant's Cuban operations, other than the balance sheet as of December 31, 1959, had been destroyed in a fire on April 1, 1964. Affiant states that while certain of the current assets would change from day to day, the financial condition as a whole would remain about the same as shown in the balance sheet as of December 31, 1959.

The balance sheet for the Cuban subsidiary as of December 31, 1959 shows the following, the Cuban peso being on a par with the United States dollar:

<u>Assets</u>	
Cash	\$145,423.67
Due for capital stock subscription	<u>19,000.00</u>
Total Assets	<u>\$164,423.67</u>

Liabilities and Capital

Notes payable	\$100,000.00	
Accrued taxes	<u>81,011.92</u>	\$ 181,011.92
Due parent		2,124,549.79
Due Canadian subsidiary		<u>229,564.67</u>
	Total Liabilities	\$2,535,126.38

Capital Stock

200 shares at \$100.00 per share \$20,000.00

Deficit:

January 1, 1959	\$2,134,678.00		
Loss in 1959	<u>256,024.71</u>	<u>(2,390,702.71)</u>	<u>(2,370,702.71)</u>

Total Liabilities and Capital \$ 164,423.67

Apart from the fact that claimant owed the Cuban subsidiary \$19,000.00, the balance sheet clearly shows that the Cuban subsidiary was hopelessly insolvent. Accordingly, the Commission finds that on June 30, 1961, the date of loss, claimant's stock interest in the Cuban subsidiary had no value. Therefore, the portion of the claim based on claimant's stock interest is denied.

The record shows that the Cuban subsidiary was indebted to claimant in the amount of \$2,124,549.79. The Commission has held that a debt due from a nationalized Cuban enterprise which is insolvent constitutes a loss within the meaning of Title V of the Act. (See Claim of The Goodyear Tire and Rubber Company, Claim No. CU-0887.) Furthermore, the Commission has certified such a loss particularly when the assets of the nationalized enterprise are sufficient to cover the debt. (See Claim of Honeywell Inc., Claim No. CU-2678.)

For the purposes of this decision, the Commission finds that the assets of the Cuban subsidiary amounted to \$145,423.67 because the debt of \$19,000.00 due from claimant, while constituting an asset otherwise, could not have been taken by the Government of Cuba. The balance sheet clearly shows that the Cuban subsidiary's current liabilities, in the amount of \$181,011.92, exceeded its total assets. The Commission therefore finds that any loss claimant may have sustained on the basis of the debts due from the Cuban subsidiary did not result from the nationalization or other taking of claimant's property by the Government of Cuba. Accordingly, the portion of the claim based on a debt in the amount of \$2,124,549.79 is denied.

Canadian Subsidiary

The Commission has held that claims based on indirect ownership of property in Cuba or debts due from nationalized Cuban corporations generally are within the purview of Title V of the Act. (See Claim of Avon Products, Inc., Claim No. CU-0072, Amended Proposed Decision, 1967 FCSC Ann. Rep. 35; and Claim of United Merchants & Manufacturers, Inc., Claim No. CU-0759, Amended Proposed Decision, id. at 52.)

Based on the evidence of record, the Commission finds that the Canadian subsidiary owned certain land and buildings in Havana, Cuba, which formerly belonged to the Cuban subsidiary. The Commission further finds that said properties were taken by the Government of Cuba on July 7, 1961.

The record shows that the Canadian subsidiary paid \$232,115.11 for the land and improvements on November 7, 1959. The Commission therefore finds that the value of said properties on July 7, 1961, the date of loss, was \$232,115.11, and concludes that claimant sustained a loss in that amount.

For the reasons stated with respect to the debt of \$2,124,549.79 due claimant from the Cuban subsidiary, mutatis mutandis, the portion of the claim based on a debt of \$229,564.67 due the Canadian subsidiary from the Cuban subsidiary is denied.

Other Debts

On the basis of the evidence of record, the Commission finds that the Cuban corporation, Embotelladora Antillana, S.A., owed the Canadian subsidiary debts aggregating \$35,760.00 for purchases which remained unpaid.

As noted above, Embotelladora was nationalized by the Government of Cuba on August 8, 1961. The Commission therefore finds that claimant sustained a loss in the amount of \$35,760.00 on August 8, 1961.

Recapitulation

Claimant's losses are summarized as follows:

<u>Item of Property</u>	<u>Date of Loss</u>	<u>Amount</u>
Improved real property	July 7, 1961	\$232,115.11
Debt from Embotelladora Antillana, S.A.	August 8, 1961	<u>35,760.00</u>
Total		<u>\$267,875.11</u>

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 dates 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 as follows:

<u>FROM</u>	<u>ON</u>
July 7, 1961	\$232,115.11
August 8, 1961	<u>35,760.00</u>
Total	<u>\$267,875.11</u>

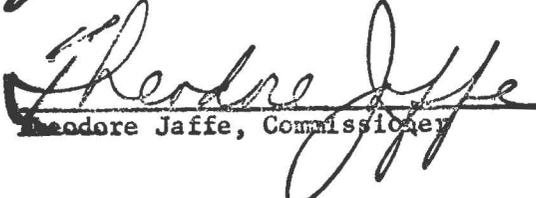
CERTIFICATION OF LOSS

The Commission certifies that PEPSICO, INC. suffered a loss, as a result of the 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 Two Hundred Sixty-seven Thousand Eight Hundred Seventy-five Dollars and Eleven Cents (\$267,875.11) 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 16 1970


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, 32 Fed. Reg. 412-13 (1967).)