

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

IN THE MATTER OF THE CLAIM OF

MOA BAY MINING COMPANY
and
CUBAN AMERICAN NICKEL COMPANY

**Under the International Claims Settlement
Act of 1949, as amended**

Claim No. CU-2619
Claim No. CU-2573

Decision No. CU - 6049

Counsel for claimants:

Shearman & Sterling

PROPOSED DECISION

These claims against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amounts of \$98,005,000.00 and \$68,071,000.00, respectively, were presented by MOA BAY MINING COMPANY and CUBAN AMERICAN NICKEL COMPANY based upon the asserted losses 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 MOA BAY MINING COMPANY (MOA) and CUBAN AMERICAN NICKEL COMPANY (CUBAN AMERICAN) were organized under the laws of Delaware (Exhibits B and D), and that at all pertinent times more than 50% of the outstanding capital stock of MOA and CUBAN AMERICAN were owned by nationals of the United States. It further appears that at all times from November 23, 1955, when MOA was incorporated, to the date of filing all of MOA's outstanding capital stock was owned by CUBAN AMERICAN (Exhibit C). In turn, all of CUBAN AMERICAN's outstanding capital stock was owned from August 11, 1955, when CUBAN AMERICAN then known as Freeport Nickel Company was incorporated, to November 8, 1963, by Freeport Sulphur Company (Freeport), a corporation organized under the laws of Delaware (Exhibit E).

Ever since November 8, 1963, all of CUBAN AMERICAN's outstanding capital stock has been owned by the First National City Bank, Bankers Trust Company, Mellon National Bank and Trust Company, Chemical Bank New York Trust Company and The Bank of New York, all of which banks qualify as nationals of the United States within the meaning of Section 502(1)(B) of the Act (Exhibits G and H). An authorized officer of Freeport has certified that from November 16, 1959 to February 15, 1967, over 98.5% of Freeport's outstanding capital stock was owned by persons having addresses in the United States (Exhibit F; also see Claim of Freeport Sulphur Company, Claim No. CU-2625). The Commission holds that MOA and CUBAN AMERICAN are nationals of the United States within the meaning of Section 502(1)(B) of the Act.

Claimants assert the following losses:

MOA (CU-2619)

Loss of earnings, plant and equipment	\$88,349,000.00
Loss of earnings from reinvestment of excess cash	<u>9,656,000.00</u>
Total	<u><u>\$98,005,000.00</u></u>

CUBAN AMERICAN (CU-2573)

Loss of earnings, plant and equipment	\$60,809,000.00
Loss of earnings from reinvestment of excess cash	<u>7,262,000.00</u>
Total	<u><u>\$68,071,000.00</u></u>

Stockholder and Creditor Claims

MOA and CUBAN AMERICAN state that they filed their claims on their own behalf; on behalf of CUBAN AMERICAN as stockholder and creditor of MOA; on behalf of other creditors of MOA; on behalf on the said five banks in their respective capacities as stockholders and creditors of CUBAN AMERICAN; and on behalf of other creditors of CUBAN AMERICAN.

Section 505(a) of the Act provides that a claim under section 503(a) of the Act, based upon an ownership interest in any corporation, association, or other entity which is a national of the United States shall not be considered.

The Commission finds that the claim of CUBAN AMERICAN as a stockholder of MOA and the claims of the banks as stockholders of CUBAN AMERICAN are barred by the express provisions of Section 505(a) of the Act because MOA and CUBAN AMERICAN qualify as nationals of the United States. Accordingly, those claims are denied. (See Claim of Mary F. Sonnenberg, Claim No. CU-0014, 25 FCSC Semiann. Rep. 48 [July-Dec. 1966].)

The record indicates that the following concerns have joined the claims herein as creditors of CUBAN AMERICAN:

First National City Bank
Bankers Trust Company
Mellon National Bank and Trust Company
Chemical Bank New York Trust Company
The Bank of New York

Republic Steel Corporation
United States Steel Corporation
McLouth Steel Corporation
Jones & Laughlin Steel Corporation
General Motors Corporation
Ford Motor Company

Section 505(a) of the Act further provides that a claim under Section 503(a) based upon a debt or other obligation owing by any corporation, association, or other entity organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico shall be considered only when such debt or other obligation is a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

The Commission has previously held that a claim based upon a debt of an entity qualifying as a United States national may not be considered unless the debt was a charge on property taken by the Government of Cuba. (See Claim of Anaconda American Brass Co., Claim No. CU-0112, 1967 FCSC Ann. Rep. 60.)

It is neither alleged nor does the record show that any of the debts upon which the aforesaid creditors base their claims were charges on any properties taken by the Government of Cuba. The Commission is therefore precluded from considering their claims.

However, it is contended by MOA and CUBAN AMERICAN that the legislative history of the Act indicates that it was not intended that Section 505(a) should exclude claims of banks, insurance companies, financial institutions or other entities based upon debts or other obligations.

This issue was considered by the Commission in the course of determining the debt claim of a bank under Title V of the Act. The Commission held as follows:

Finally, we find no merit in the claimant's contention that the legislative history of the Act exempts banks from the operation of Section 505(a). This was considered previously by the Commission and rejected in the Proposed Decision [1968 FCSC Ann. Rep. at 64] wherein the Commission found that the language of the section itself is quite clear and contains no exception in favor of banks. (See Claim of The First National Bank of Boston, Claim No. CU-2268, Final Decision entered February 26, 1969, 1969 FCSC Ann. Rep. 33.)

For all of the foregoing reasons, the claim of CUBAN AMERICAN and the claims of the creditors based upon debts due either from CUBAN AMERICAN or MOA are denied.

Claim No. CU-2573 (CUBAN AMERICAN)

CUBAN AMERICAN asserts a loss of \$68,071,000.00 by virtue of a contract dated January 19, 1959 between MOA and CUBAN AMERICAN (Exhibit M) relating to certain mining concessions in Cuba owned by MOA.

The agreement of January 19, 1959 provides for the sale of MOA's ores (nickel-cobalt concentrates) to CUBAN AMERICAN pursuant to certain conditions. The contract was to continue for a period of five years, and MOA was to receive 60% of the net income derived from the sale of MOA's ores after being refined by CUBAN AMERICAN. It appears that CUBAN AMERICAN financed its project by loans from the five banks which, since November 8, 1963, have been CUBAN AMERICAN's sole stockholders.

Upon consideration of the entire record, the Commission finds that CUBAN AMERICAN owned no proprietary interest in any of MOA's mining concessions or related properties in Cuba. Insofar as those concessions and properties are concerned, the only rights that CUBAN AMERICAN possessed stemmed from the contract of January 19, 1959, and that contract merely provided for the sale of extracted ores to CUBAN AMERICAN.

Loss of Earnings, Plant and Equipment:

CUBAN AMERICAN asserts a loss in the aggregate amount of \$60,809,000.00, representing the loss of earnings based on the contract of January 19, 1959, and the discounted depreciated value of its plant and equipment in the United States.

It appears that in anticipation of that contract, CUBAN AMERICAN acquired in 1957 from Freeport certain real property in Louisiana (Exhibit L). During 1957, 1958, 1959 and 1960, CUBAN AMERICAN caused to be constructed on the property in Louisiana certain facilities for refining nickel-cobalt concentrates.

Inasmuch as CUBAN AMERICAN owned no interest in MOA's properties in Cuba, no property belonging to CUBAN AMERICAN was taken by Cuba. Moreover, since CUBAN AMERICAN's plant and equipment were in the United States, the Commission finds that being outside the jurisdiction of Cuba, these assets could not have been taken by Cuba. Accordingly, the portion of CUBAN AMERICAN's claim for the asserted loss of earnings, plant and equipment is denied.

Loss of Earnings from Reinvestment of Excess Cash:

CUBAN AMERICAN asserts a loss of \$7,262,000.00, representing the estimated earnings it would have derived from the investment of cash available as a result of its operations in the United States pursuant to the contract of January 19, 1959. The Commission finds that this portion of the claim also is not covered by the Act. Moreover, it appears that this portion of the claim is entirely speculative, covering estimated earnings from reinvestments over a 22-year period. (See Claim of Metro-Goldwyn-Mayer, Inc., Claim No. CU-2225.) Accordingly, this portion of the claim is denied.

Claim No. CU-2619 (MOA)

The evidence establishes and the Commission finds that pursuant to certain agreements and other instruments executed in 1957 and 1959, MOA acquired certain mining concessions situated in the vicinity of Baracoa, Oriente Province, Cuba, in the northeastern part of Cuba known as Moa Bay (Exhibit I). These concessions were duly recorded with Cuban authorities.

The Commission further finds that MOA caused to be constructed in that area an extensive plant and appurtenant facilities to support its mining operations in Moa Bay. The record includes copies of audited balance sheets and other financial statements for MOA as of various dates in 1959, 1960 and 1961 (Exhibits J and K), which indicate the extent of MOA's investments in such facilities in Cuba.

On the basis of the entire record, the Commission finds that MOA sustained a loss within the meaning of Title V of the Act when its facilities were intervened by the Government of Cuba on August 19, 1960 pursuant to

Resolution No. 4579 issued by the Ministry of Labor under Law 647 of November 24, 1959.

Loss of Earnings, Plant and Equipment:

The aggregate amount asserted by MOA on account of loss of earnings, plant and equipment is \$88,349,000.00. The Commission holds this portion of the claim to be based upon the value of MOA's mining concessions and properties that were intervened by the Government of Cuba on August 19, 1960.

(See Claim of Howard E. Holtzman et al., Claim No. CU-2168.)

The evidence includes a detailed, technical report of MOA's mining concessions in Cuba, prepared in May 1956 by Eugene P. Pfleider, Consulting Mining Engineer, on the basis of drilling and exploration, the sampling of extracted ores, and analyses of the samples (Exhibit O). Thereafter another study of the concessions was made by Sanderson & Porter, independent engineers. Their detailed report, dated March 6, 1957 (Exhibit P), concludes with the statement, inter alia, that "measured currently economic ore reserves . . . are sufficient to support an annual production of 50,000,000 pounds of nickel and 4,400,000 pounds of cobalt for about 22 years." Appended to that report is a letter of February 20, 1957 from Eugene P. Pfleider, revising his May 1956 Ore Reserve Report (Exhibit O) upward on the basis of sampling more ores extracted from 150 new holes.

On the basis of the foregoing evidence, the Commission finds that MOA's proven ore reserves were sufficient to produce 50,000,000 pounds of nickel and 4,400,000 pounds of cobalt annually for 22 years.

The said agreement of January 19, 1959 between MOA and CUBAN AMERICAN (Exhibit M) provided for the sale to CUBAN AMERICAN of all the ores extracted from MOA's mining concessions. CUBAN AMERICAN agreed to refine the ores and sell them to its customers. In consideration thereof, MOA was to receive 60% of the net profits derived from the sale of the refined ores. That contract was to terminate on June 30, 1965. It further appears that MOA had made certain arrangements with the Cuban Treasury Department, pursuant to which

its income for Cuban tax purposes was to be 60% of such net profits until June 30, 1965 and 65% of such net profits thereafter.

On the basis of the evidence of record (Exhibits N and R), the Commission finds that the net amounts to be derived from the sale of the refined ores were \$0.726 per pound for nickel after sales adjustments, and \$2.00 per pound for cobalt until June 30, 1965. Thereafter, the prices would be \$0.726 per pound of nickel and \$1.50 per pound of cobalt until the end of the 22-year term, June 30, 1982, when the ores would be exhausted.

The Commission therefore finds that the gross value of the refined ores was \$45,100,000.00 per year for the period ending June 30, 1965, and thereafter at the rate of \$42,900,000.00 for the remaining period. MOA's computations also include the liquidated value of its plant and equipment as of the end of the 22-year term in the amount of \$11,600,000.00, which is found to be fair and reasonable. The evidence (Exhibit J) includes copies of audited balance sheets and other financial statements covering MOA's Cuban operations. The balance sheet as of September 30, 1960, closest to the date of loss, shows that MOA owned land in Cuba valued at \$5,041,021.38, and plant, equipment and related facilities valued at \$59,395,791.97 after depreciation of \$1,051,016.72.

MOA had applied to the Internal Revenue Service for a Necessity Certificate to permit it to rapidly depreciate its Cuban assets pursuant to the Internal Revenue Code. A detailed report (Exhibit K) submitted in support of MOA's application to the Internal Revenue Service shows that its actual expenditures for facilities in Cuba aggregated \$55,527,455.18.

The record (Exhibit R) shows that the aggregate income to be derived from the sales of the refined ores over the 22-year period plus the liquidated value of MOA's plant and equipment was \$622,485,000.00. The Sanderson & Porter report (Exhibit P) shows that the aggregate cost of extracting and refining the ores was \$19,700,000.00 per year. Of that amount, MOA's operating costs were \$11,857,000.00 per year until 1965 and \$12,055,000.00 thereafter, aggregating \$264,418,000.00 for the entire 22-year period. Thus MOA's gross income after operating costs aggregated \$358,067,000.00.

It further appears that interest on loans to finance MOA's operations would aggregate \$9,816,000.00, and that the aggregate amount of Cuban taxes would be \$104,012,000.00 for the 22-year period. Accordingly, the net amount MOA would have derived for the entire period would be \$244,239,000.00. MOA's computations (Exhibit R) also provide for discounting the resulting aggregate net income and the liquidated value of its plant and equipment to arrive at the net worth of its Cuban operations on the date of loss. On this basis, MOA's losses were computed to be \$88,349,000.00.

Upon consideration of the entire record, the Commission finds that MOA's valuations are fair and reasonable. The Commission therefore finds that the aggregate value of MOA as an operating company on August 19, 1960, the date of loss, was \$88,349,000.00.

Loss of Earnings from Reinvestment of Excess Cash:

MOA asserts the loss of \$9,656,000.00 for earnings it would have accumulated as a result of investing excess cash derived after payment of all charges and obligations appurtenant to its Cuban operations. In making this computation, MOA estimated the amounts that would become available at the end of each of the 22 years, after payment of all expenses and repayment of the principal amounts of anticipated loans. The results thus obtained were then considered by MOA to be capable of earning 3% per year compounded, and that amount was discounted at a 12% rate to arrive at the amount claimed.

As stated with respect to CUBAN AMERICAN's claim for a similar loss, this item of claim appears to be entirely speculative. The Commission finds no valid basis for estimating over a 22-year period how much, if any, capital would become available for reinvestment. Moreover, there is no sound basis for supposing that such capital would be reinvested and would earn the amount estimated by MOA.

Upon consideration of this portion of MOA's claim, the Commission finds that it is speculative and is not supported by the evidence of record. Accordingly, this portion of the claim is denied.


The Commission has decided that in certifications of loss 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 MOA BAY MINING 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 Eighty-eight Million Three Hundred Forty-Nine Thousand Dollars (\$88,349,000.00) with interest at 6% per annum from August 19, 1960 to the date of settlement.

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

FEB 3 1971


Lyle S. Carlock, 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 (1970).)

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CU-2573