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# U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms

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## ARTICLES

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Timothy Ashby\*

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#### I. INTRODUCTION

Misconceptions abound regarding U.S. certified claims against Cuba for properties taken by the Castro regime. Given the probability that the Obama administration may pursue a different Cuba policy than its predecessors, a realistic approach to resolution of the claims issue requires an objective understanding of the legal environment and options for settlement.

#### II. NATIONALIZATION OF U.S. ASSETS IN CUBA

Between 1959 and 1961, the Cuban government nationalized almost all U.S.-owned assets on the island. Such properties included 90% of all electricity generated in Cuba, the entire telephone system, most of the mining industry, oil refineries, bottling plants, warehouses, and over two million acres of land, including

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up to 80% of the rich traditional sugar lands. Expropriated assets also comprised hotels, commercial properties, private residences, artworks, insurance policies, bank accounts, and ships. As American corporate and private entities controlled two-thirds of the Cuban economy, this was the largest uncompensated taking of American property by a foreign government in history. These nationalizations were the primary cause of the U.S. embargo that has remained in place for nearly half a century.

Remarkably, the initial U.S. response was supportive of the first wave of agricultural nationalizations. In June 1959, U.S. Ambassador Philip Bonsal delivered a diplomatic note to the Cuban government recognizing "that under international law a state has the right to take property within its jurisdiction for public purposes in the absence of treaty provisions or other agreements to the contrary," and stated that the United States "understands and is sympathetic to the objectives" of the land reform program because it "can contribute to a higher standard of living, political stability and social progress."<sup>1</sup> However, the note also reminded the Cubans that the right to take foreign-owned property was coupled with an obligation to pay "prompt, adequate and effective compensation," and expressed "serious concern" regarding "the adequacy of the provision for compensation to its citizens whose property may be expropriated."<sup>2</sup>

The Cuban government responded promptly by a diplomatic Note dated June 15, 1959, recognizing its obligation under *Cuban* law (notably, rather than international law) to provide prompt and adequate compensation, but suggested that this could be delayed due to the country's "chaotic economic and financial situation," and the "imbalance in the balance of payments between the United States and Cuba."<sup>3</sup> The Cuban reply also made allusion to the MacArthur agrarian reform in Japan as a case model of provision of compensation in bonds. On October 12, 1959, the U.S. replied saying that Japanese bonds had been applied to Japanese landholders, not foreigners, and was therefore not a valid prece-

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1. U.S. Informs Cuba of Views on Agrarian Reform Law, 40 Dep't St. Bull. 958 (1959).

2. *Id.* at 958-59.

3. MICHAEL W. GORDON, *THE CUBAN NATIONALISATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 128-29 (William S. Hein & Co. 1976) (citing Rafat, *Legal Aspects of the Cuban Expropriation of American-Owned Property*, 11 St. Louis L.J. 45, 58 (1966)).

dent.<sup>4</sup> During the second wave of foreign asset nationalizations,<sup>5</sup> the Cuban government reiterated that it was too poor to pay compensation promptly or in cash, reinforcing their intent to primarily use bonds for settlement.<sup>6</sup>

Two principal Cuban laws enabled the expropriations. The first was the 1959 Agrarian Reform Act, which authorized compensation for property takings related to the sugar industry in the form of redeemable twenty-year "Agrarian Reform Bonds" with an annual interest rate not to exceed 4.5% to be financed out of the annual budget.<sup>7</sup> The second was Law 851 of 1960. This law authorized compensation for property takings of U.S. nationals in the form of thirty-year government bonds with an annual interest rate of 2%.<sup>8</sup> For real property, Cuban law allowed for compensation to include a 15% profit and actual expenses in addition to the base value for vacant residential lots, and a 12% profit for lots suitable for commercial use.<sup>9</sup>

Contrary to most published sources, Cuban law did not restrict compensation to bonds. Law number 588, which established the procedure for expropriating rural properties after the chaotic process of earlier takings stated, "payment to the owner is made by INRA [National Institute of Agrarian Reform] in cash, Agrarian Reform Bonds or certificates thereof."<sup>10</sup> Although no

4. *Id.* at 46.

5. Usually preceded by "intervention" – government takeover of the management of an enterprise while private ownership is maintained. Under international law, an act of intervention is usually not considered an illegal act unless it persists to the point that it results in *de facto* deprivation of the use of property by the owner.

6. GORDON, *supra* note 3, at 101. President Batista stole an estimated \$200 million from the national treasury, and the Castro government inherited a \$50 million budget deficit plus a \$1.4 billion national debt.

7. "The indemnification (for property expropriations) will be paid in negotiable bonds. To that end, a series of bonds of the Republic of Cuba will be issued in the amounts, terms and conditions that will be set at the appropriate time. The bonds shall be denominated 'Agrarian Reform Bonds' and will be regarded as government obligations. The issuance or issuances will have a term of twenty years, with an annual interest rate not to exceed four and a half percent (4-1/2%). The Republic's Budget for each year shall include the necessary amount to finance the payment of interest, amortization and expenses of the issuance." Ley de Reforma Agraria, 17 de mayo de 1959, 7 Leyes del Gobierno Provisional de la Revolución 135; Decreto No. 1426, 17 de mayo de 1959, GAC. OF., de 04.06.1959 art. 31.

8. See Decreto de Ley No. 851, 6 de julio de 1960, GAC. OF., de 07.07.1960, p.16367-68.

9. Decreto de Ley No. 218, 7 de abril de 1959, GAC. OF., de 13.04.1959, p.6098-6102.

10. Letter from W.J. Miller Jr., General Manager, The Francisco Sugar Company, Francisco, Provincia de Camaguey, Cuba, (Nov. 2, 1959) (on file with the University of Florida, in Subject Files 1950-1962, Record Group IV, Braga Brothers Collection).

bonds were known to have been paid as compensation to U.S. nationals, the American owners of six expropriated sisal mills were reportedly paid \$1.3 million in cash with the balance (50%) promised in bonds.<sup>11</sup>

### III. VALUATION OF THE NATIONALIZED PROPERTIES

The Cuban Government used declared taxable value (the value of assets listed for tax purposes in October 1958) as the official value for compensation purposes.<sup>12</sup> This worked to the new Cuban government's advantage, as the value of the land was based on the owners' own assessment for tax purposes.<sup>13</sup> As can be imagined, declared values were very low, and the amount of indemnification calculated on this basis did not burden the public budget.<sup>14</sup> This value was deemed to be the peso equivalent of approximately \$1 billion.<sup>15</sup> All parties recognized that the market value of confiscated properties was much higher than the book value.<sup>16</sup> For example, Chase Manhattan Bank had a 1960 certified claim of \$7.5 million for eleven confiscated Cuban branches, the bulk of which claim was for expropriated securities rather than real estate. The last appraisal of any Chase branches was made in March 1960 and applied only to the Havana office. This appraisal valued the premises at \$165,000, and the necessary adjustment to bring the book value for that property to market was stated as \$54,800. Fidel Castro declared publicly that bond payments would range from \$15 to \$45 per acre, equating to just one-fourth of the 1958 value of rural agricultural properties.<sup>17</sup>

In 1960, during one of the largest of the multi-phased expropriations of sugar lands, the United Fruit Company informed the Cuban government that it valued its nationalized land at approximately \$90 million. In reply, the Cuban government asserted that the United Fruit lands were worth instead approximately \$17 mil-

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11. GORDON, *supra* note 3, at 83 n.53.

12. Ley de Reforma Agraria art. 29.

13. Decreto de Ley No. 588, 7 de octubre de 1959, GAC. OF., de 09.10.1959, p.22740-43 art. 6. Valuation of the land is made on the basis of the sales value declared by the owner to the municipality before October 10, 1958. *Id.*

14. MICHEL GUTELMAN, *L'AGRICULTURE SOCIALISEE A CUBA* (Francois Maspero 1967), reprinted in *AGRARIAN PROBLEMS AND PEASANT MOVEMENT IN LATIN AMERICA*, at 47 (Rodolfo Stavenhagen ed. 1970).

15. GORDON, *supra* note 3, at 76.

16. See E. W. Kenworthy, *U.S. Warns Cuba on Land Reform*, N.Y. TIMES, June 12, 1959, at 10.

17. *Confiscation!*, TIME MAG., June 1, 1959, at 11, available at <http://www.time.com/time/magazine/article/0,9171,811136-1,00.html>.

lion (in 1960 U.S. dollars). The Cubans therefore deemed the property to be worth approximately 19% or less than one-fifth of the amount claimed by the original owner.<sup>18</sup>

In late 1960, the U.S. embassy in Havana (which remained open until relations were broken in January 1961) was tasked by the State Department to provide a valuation of American assets in Cuba. The Embassy relied on book value as reported by owners of the assets, even though the State Department had earlier stated the value of U.S. property to be an estimated \$1 billion based on Cuban tax valuations.<sup>19</sup> In August 1961, the U.S. Commerce Department published the figure of \$956 million as the value of American property taken by the Cuban government.<sup>20</sup> This amount was published by the *Wall Street Journal*, *New York Times*, *Time Magazine* and other domestic and international media.

#### IV. THE U.S. CUBAN CLAIMS PROGRAM

In 1964, the U.S. Congress established a Cuban Claims Program, authorizing the Foreign Claims Settlement Commission (FCSC), a unit of the U.S. Justice Department, to consider claims of U.S. nationals against the government of Cuba for their property losses. The certification process was an *ex parte* evidentiary proceeding before the FCSC, and the claimant had to submit documentary evidence regarding the confiscated underlying assets in order to prove value. The FCSC evaluated the validity and amounts of property claims, and its findings were certified to the Secretary of State for possible use in future negotiations with the Cuban government.

Of the 8,816 claims filed, the FCSC certified 5,911 as valid and worth \$1.82 billion. Although the Cuban Claims Act did not expressly authorize the inclusion of interest in the amount allowed, the FCSC determined that simple interest at a 6% rate should be included as part of the value of the claims it certified.<sup>21</sup>

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18. Interview with Mark Entwistle, former Canadian ambassador to Cuba (Oct. 2, 2008).

19. GORDON, *supra* note 3, at 101 n.106.

20. Samuel Pizer & Frederick Cutler, *United States Assets and Investments Abroad: Private Capital Outflow at Peak in 1960 Earning Score Broad Advance*, SURV. CURRENT BUS. 20, 22-23 tbl.3 (1961).

21. FOREIGN CLAIMS SETTLEMENT COMM'N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM 127 (1972), available at [http://www.usdoj.gov/fcsc/cubanclaimsreport\\_1of2.pdf](http://www.usdoj.gov/fcsc/cubanclaimsreport_1of2.pdf).

## V. CUBA'S LEGAL POSITION ON U.S. CLAIMS

The Cuban Government has never repudiated the U.S. claims although it has consistently stated that it does not recognize the property claims of Cuban exiles in the United States.<sup>22</sup> Cuba recognizes its obligation under international law to provide compensation to U.S. nationals whose assets were taken. However, it does not recognize the FCSC valuation or the interest allowance.<sup>23</sup> Cuba's policy is that it stands "ready to negotiate, on an equal footing, compensation for approximately 6,000 U.S. businesses and citizens affected by the nationalization legislation and to seek an arrangement that would also take into account the extremely serious economic and human damage inflicted on Cuba by the blockade."<sup>24</sup>

The Cuban government's position is that the nationalization carried out after the 1959 revolution was not confiscation. Under Cuban law, confiscation is deemed to be an accessory penalty stemming from an offence in which the perpetrator is held accountable through his property, and hence, no compensation is provided. On the contrary, nationalization is considered an act stemming from an economic claim on grounds of public utility, social or national interest or popular benefit, and is to be accompanied by appropriate compensation as provided for in Cuba's Constitution. Accordingly, U.S. property in Cuba was held to be nationalized rather than confiscated and therefore compensable.<sup>25</sup>

## VI. SETTLEMENT ATTEMPTS

The decades-old question has been: if the Cuban government recognizes the validity of the U.S. claims, why has it not met the requirement under international law for "prompt, adequate and effective" compensation, thereby removing legal encumbrances on the nationalized assets? The U.S. government's position is that Cuba has never been serious about compensating American own-

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22. *Ley de Reafirmación de la Dignidad y Soberanía (Ley 80)*, 24 de diciembre de 1996, 36 I.L.M. 472 (1997). For the complete text of *Ley 80* online see <http://www.cubavbloqueo.cu/cubavbloqueo/leyantidoto.htm>.

23. *Ley de la Inversión Extranjera (Ley 77)*, 5 de Septiembre de 1995, available at [http://www.icap.cu/medidas/inversion\\_extranj.html](http://www.icap.cu/medidas/inversion_extranj.html); see also Matias F. Travieso-Diaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, 37 GEO. WASH. INT'L L. REV. 885 (2005).

24. WTO, Minutes of the Feb. 1, 2002 Meeting of the WTO Dispute Settlement Body, available at [http://www.wto.org/english/news\\_e/news02\\_e/dsb\\_01feb02\\_e.htm](http://www.wto.org/english/news_e/news02_e/dsb_01feb02_e.htm).

25. *Id.*

ers of expropriated properties. In reality, the Cuban government has made repeated attempts to settle the claims, but the U.S. government has refused to negotiate and has intervened in attempts by private claimants to negotiate a settlement.

In September 1959, representatives of owners of the largest U.S. sugar properties in Cuba met in Washington DC with U.S. government officials. The meeting was called to discuss the offer of Agrarian Reform Bonds as compensation for their nationalized assets. The sugar interests were advised that the U.S. government considered the offer of bonds to be inadequate, especially as the expropriated properties had not been properly valued and no bonds had been printed. Reportedly, a senior government official suggested that the bonds offer be rejected, as the Castro regime could not remain in power for long.<sup>26</sup> Corporate counsel present expressed the concern that accepting bonds would constitute an accord and satisfaction, which could render the assets irretrievably lost even if the Cuban government was overthrown. The participants agreed not to deal with the Cubans and promised to keep the meeting secret.<sup>27</sup>

However, following this meeting some major U.S. sugar companies continued to consider whether to accept bonds as compensation. For example, in early November 1959, attorneys representing American Sugar Company (subsequently Amstar Corporation), Manati Sugar Company, Francisco Sugar Company, and United Fruit Company met to discuss the need to answer shareholders' concerns that they had not pursued legal remedies "as far as we can." One approach suggested was to accept the bonds "on account" – i.e. as security for a claim rather than compensation for nationalized assets. It was concluded that if all judicial remedies were exhausted they would "probably decide to accept the bonds stating that they [did] so under duress." However, because the doctrine of payment under protest was "apparently not well developed under Cuban law," it was agreed that no final decision could be taken until it was better understood "what the Cuban law is on taking these bonds in payment."<sup>28</sup> In the end, no bonds were taken in compensation by U.S. claimants.

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26. Indicating that the "Operation 40" program of subversive operations against Cuba was already being planned.

27. Interviews with members of the Joint Corporate Committee on Cuban Claims (Sept. 27, 2006, Mar. 4, 2007, Nov. 18, 2007).

28. Memorandum from Francisco Sugar Company, Re: Agrarian Reform (Nov. 2, 1959) (on file with the University of Florida, Subject Files 1950-1962, Record Group IV, Braga Brothers Collection).



In early December 1959, Cuba's Foreign Minister indicated that his government was willing to commence negotiations regarding compensation for nationalized U.S. properties.<sup>29</sup> The U.S. rebuffed this overture, probably because by this time the CIA was actively planning to depose Fidel Castro.

Cuban settlement efforts persisted. In a Note dated February 29, 1960, Cuba proposed that full negotiations on bilateral issues, including compensation for expropriation, should begin through diplomatic channels with the condition that, while these were going on, the U.S. government should not adopt any unilateral measures that might prejudice negotiations or cause damage to Cuba, her people, or her economy.<sup>30</sup> An *ad hoc* Cuban negotiating delegation had already been appointed by Castro to go to Washington "with full powers" for these talks. The U.S. government formally refused this condition by Note the same day declaring that the U.S. "must remain free, in the exercise of its sovereignty, to take whatever steps it deems necessary." Throughout 1959 and 1960 the consistent Cuban reply to all U.S. protests about agrarian confiscations reiterated the offer to use bonds as compensation, while the U.S. continued to demand immediate cash payment.<sup>31</sup>

In March 1964 Fidel Castro made a secret offer to the U.S. government via the Swiss ambassador to pay \$1 billion in compensation for expropriated American properties and to release all political prisoners in exchange for restoring the Cuban sugar quota.<sup>32</sup> While this offer made it as far as the White House, it was dismissed without any acknowledgment to the Cuban government. Despite the fact that the offer followed both the failed Bay of Pigs Operation and the Cuban Missile Crisis (which resulted in a U.S. pledge not to invade Cuba), the U.S. government's internal position was "Castro won't last," and thus settling the claims would prevent the restitution of U.S. assets when the Cuban government was toppled.

During the author's service with the U.S. Commerce Depart-

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29. GORDON, *supra* note 3, at 83.

30. The Cuban government was probably aware through the Soviet KGB that U.S. clandestine operations against Cuba were being planned at this time.

31. Interview with Mark Entwistle, former Canadian ambassador to Cuba (Oct. 2, 2008).

32. *Outstanding Claims Against Cuba: Hearing Before the H. Subcomm. on Int'l Econ. Policy and Trade and on Inter-Am. Aff. of the Comm. on Foreign Aff.*, 96th Cong. 9 (1979) (statement of John A. Cypher, Jr., Assistant to the President, King Ranch, Inc., and member of the Joint Corporate Committee on Cuban Claims).

ment from 1987 to 1990 he regularly met with Cuban government representatives on official business. During these sessions the Cuban government expressed its interest in negotiating a settlement of U.S. claims for nationalized assets. These gestures were reported to and discussed with the National Security Counsel and the Department of State, but were deemed not worthy of an official response.<sup>33</sup>

In the 1990s several private owners of U.S. Certified Claims visited Cuba under licenses from the U.S. Treasury Department to negotiate compensation with the Cuban government. While the Cubans reportedly negotiated in good faith, the deals were aborted due to political pressure from the U.S. government. These negotiations support the proposition that the Cuban government is willing to negotiate with private claims owners outside of a state-to-state bilateral settlement mechanism.

More recently, Cuba's Law Number 80 of 1996 reaffirmed, "the disposition of the Government of the Republic of Cuba, expressed in the nationalization laws implemented more than thirty five years ago, in relation to the adequate and just compensation for the expropriated goods of persons and corporations which had U.S. citizenship or nationality at that time . . ." While stating that "the compensation claims for the nationalization of said properties should be examined," the law links this to "compensation to which the Cuban State and People have a right . . . as a result of damages caused by the blockade" and "all types of aggression by the U.S. Government" (which the Cubans consider to include the Bay of Pigs invasion and various covert operations such as the bombing of a *Cubana* airliner by CIA-linked anti-Castro exiles in 1976).<sup>34</sup>

Cuba also expropriated the assets of most U.S. allies during the 1960s.<sup>35</sup> These nationalizations were eventually compensated, generally for a fraction of the original value of the properties. For example, Spanish claims were valued at \$350 million but were ultimately settled for about \$40 million in 1994, nearly thirty

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33. The author served as Director of the Office of Mexico and the Caribbean, Bureau of International Economic Policy, International Trade Administration, U.S. Department of Commerce.

34. Ley de Reafirmación de la Dignidad y Soberanía (Ley 80), 24 de diciembre de 1996, 36 I.L.M. 472 (1997).

35. All of which currently have normal relations with Cuba, including large-scale investments.

years after nationalization took place.<sup>36</sup> When Cuba and Canada settled the compensation claims in a government-to-government lump sum agreement in 1980, Cuba paid only CAD \$875,000 (approximately US \$736,750 in 1980 dollars), payable by check in installments over several years.<sup>37</sup> By any valuation, the settlement amounted to a mere fraction of a cent as a symbolic gesture, the cash value of which was diminished even further by deferred payment over time.

## VII. STATUS OF THE CLAIMS UNDER US LAW

Under Title V of the International Claims Settlement Act of 1949, provision was only made for the Foreign Claims Settlement Commission to determine the validity and amounts of any individual and corporate U.S. claims against Cuba. The Commission was required to certify its findings to the Secretary of State for "*possible use*" (emphasis added) in future settlement negotiations with the Government of Cuba.<sup>38</sup> Claims are certified in terms of money damages owed by the Cuban government and do not purport to represent interests in, or to be secured by, any particular property - real or personal, tangible or intangible - situated in Cuba or owned or possessed by the Cuban government or Cuban nationals. A U.S. certified claim is a *chose in action*: an intangible personal property right recognized and protected by the law, which has no existence apart from recognition given by the law, or which confers no present possession of a tangible object.<sup>39</sup>

In July 2008 the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) issued a Notice stating that it "regards" an FCSC-certified claim against Cuba as property in which Cuba has an interest, the sale or transfer of which would be generally prohibited without OFAC authorization. It is reasonable to assume that the OFAC Notice was a politically motivated attempt by the Bush Administration to "chill" claims acquisition transactions across the board. The OFAC Notice constituted a

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36. See *Cuba to Compensate Spaniards for Property Seizures*, REUTERS, Feb. 15, 1994, available at LEXIS, World Library, Textline File.

37. Agreement Relating to the Settlement of Canadian Claims, Can.-Cuba, June 26, 1981, 1981 Can. T.S. No. 18.

38. The portion of this statute relating to Cuban claims is codified at 22 U.S.C. §§ 1643-1643 et seq., though a number of Cuban claims certified in 2005-06 were processed under a different provision, 22 U.S.C. § 1623(a)(1)(C). U.S. Department of Justice, Foreign Claims Settlement Commission: Cuban Claims Programs, <http://www.usdoj.gov/fcsc/cubanclaims.htm> (last visited Mar. 5, 2009).

39. See 73 C.J.S. *Property* § 5 (2008).

general and unsolicited regulatory interpretation by a federal agency and is not U.S. law *per se*.

A review of the enabling legislation discloses no direct delegation of authority to Justice or Treasury to promulgate specific regulations. If this analysis is correct, the 31 C.F.R § 515 regulations are interpretative, not legislative. Hence, their validity is subject to the Supreme Court's *Chevron* test: they need not amount to an abuse of administrative discretion and therefore are tested by the lower standard of reasonableness.<sup>40</sup> Such an interpretation by OFAC hardly seems reasonable, given a 1981 decision by the Supreme Court regarding U.S. certified claims. In *Dames & Moore v. Regan*, the Court stated that "[t]he claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property."<sup>41</sup> Thus by analogy, it would appear that claims against Cuba are not in themselves property in which Cuba has an interest. The OFAC Notice also contradicts a contemporary policy statement by the Chairman of the FCSC that "[i]t is not illegal to sell or purchase these claims."<sup>42</sup>

### VIII. HELMS-BURTON AND EXECUTIVE BRANCH AUTHORITY

The 1996 Libertad Act (hereinafter "Helms-Burton"<sup>43</sup>) is the controlling legislation regarding U.S.-Cuban relations.<sup>44</sup> Title III of Helms-Burton states:

(B) Notwithstanding any other provision of law, and for purposes of this title only, any claim against the Cuban Government shall not be deemed to be an interest in property the transfer of which to a United States national required before the enactment of this Act, or requires after the enactment of this Act, a license issued by, or the permission of, any agency of the United States<sup>45</sup>

Although Title III *per se* is currently suspended by the U.S. Presi-

40. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

41. 453 U.S. 654, 675 (1981).

42. Billy House, *U.S. Wary of Push to Buy Claims to Confiscated Property in Cuba*, TAMPA TRIB., June 17, 2008, available at <http://www2.tbo.com/content/2008/jun/17/naspeculators-seeking-to-purchase-cuba-claims/> (quoting Mauricio Tamargo, Chairman of the US Foreign Claims Settlement Commission, U.S. Department of Justice).

43. U.S. Senator Jesse Helms (R-North Carolina) and U.S. Representative Dan Burton (R-Indiana) co-sponsored Helms-Burton on February 9, 1995.

44. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton), Pub. L. No. 104-14, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021-6091 (2000)).

45. *Id.* at § 302(a)(7)(B).

dent, the Executive suspension is considered to refer to the provision that permits American nationals with claims to compensation for property expropriated by Cuba, under certain conditions, to bring suit in U.S. courts against persons who "traffic" in such property. This does not invalidate the legislative intent to exempt Certified Claims against Cuba from the licensing requirement.

The OFAC Notice regarding the licensing requirement for U.S. Certified Claims could presumably be rescinded by the Executive Office of the President. In 1999, Ambassador James Dobbins, National Security Council (NSC) Senior Director for Interamerican Affairs in the Clinton administration said that in the NSC's interpretation Helms-Burton merely delineated where a president could alter embargo-related licensing as required.

Phillip Brenner reported, "Helms-Burton codified the embargo and at the same time, it codified the President's licensing power. That is, it codified a process by which there was an embargo to which exceptions could be granted on a case-by-case basis by the President."<sup>46</sup> Richard Nuccio, another senior Cuban policy advisor in the Clinton Administration stated:

When President Clinton signed the Helms-Burton law, his administration issued a statement saying that it does not restrict the right of the executive branch to make foreign policy. In its own view, the administration has the legal authority to make any changes in the embargo that involve regulatory powers, and that is just about everything.<sup>47</sup>

## IX. OPTIONS FOR SETTLEMENT

Holders of U.S. Certified Claims against Cuba will likely have only three options for settlement:

1. Litigation in a Cuban court
2. Bilateral Property Claims Settlement Tribunal
3. Special Purpose Funds

### A. *Litigation in a Cuban Court*

While Cuban law would allow a U.S. citizen to bring an action for compensation in a Cuban court, current U.S. regulations would

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46. Philip Brenner, *Washington Loosens the Knot*, 32 NACLA REPORT ON THE AM. 1, 42 (1999).

47. Richard Nuccio, *US Policy Toward Cuba is Schizophrenic*, BUS. WK., Oct. 27, 1999, available at <http://www.businessweek.com/bwdaily/dnflash/oct1999/nf91027d.htm>.

require an OFAC license for travel to Havana for this purpose. Even if a license were granted, the claim holder would be required to engage local counsel and endure a lengthy and expensive litigation process to establish legal rights to compensation, followed by valuation of the claim by the Cuban government. If the action proved successful, the plaintiff would almost certainly receive bonds in compensation for the assets taken half a century ago. Under current U.S. law, it would be illegal to receive Cuban sovereign bonds as payment, as these would be deemed “an interest in Cuban property.”<sup>48</sup>

### B. *Bilateral Property Claims Settlement Tribunal*

Under Article 2 of the U.S. Constitution, the President has the authority to settle U.S. Certified Claims with the Republic of Cuba on behalf of any American claimant, for any amount and under any terms whatsoever.<sup>49</sup> Federal courts have held this “Doctrine of Espousal” to effectively supersede the Fifth Amendment prohibition against the taking of private property without due process of law or just compensation, to be binding upon the claimants, and to be the sole remedy even when the amount is a fraction of the certified value.<sup>50</sup>

The U.S. government has rarely negotiated a settlement that truly meets the requirement under international law for “prompt, adequate and effective” compensation for expropriation by a foreign government.<sup>51</sup> Precedent shows that U.S. courts defer to the Executive Branch’s prerogative to sacrifice *bona fide* fair compensation to claimants in order to normalize diplomatic relations with the expropriating foreign government.<sup>52</sup>

Of all the past forty-three claims settlement programs concluded by the US government, very few provided compensation for the full certified amount of the confiscated asset – and none paid

48. See 31 C.F.R. § 515.311(a) (2003).

49. RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES § 213 (1981); see also *Dames & Moore v. Regan*, 453 U.S. 654, 679-81 (1981).

50. See *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 247 (Cl. Ct. 1983), *aff’d*, 765 F.2d 159 (Fed. Cir. 1984).

51. See BURNS H. WESTON ET AL., *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995* 77 (The Procedural Aspects of Int’l Law Monograph Series Vol. 23 1999); Matias F. Travieso-Diaz, *Alternative Recommendations for Dealing with Confiscated Property in Post-Castro Cuba*, in CUBA TRANSITION PROJECT: EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA: TWO VIEWS 63 (2003), available at [http://ctp.iccas.miami.edu/Research\\_Studies/Expropriated%20Properties.pdf](http://ctp.iccas.miami.edu/Research_Studies/Expropriated%20Properties.pdf).

52. See *Shanghai Power*, 4 Cl. Ct. at 247-48.

the full amount of interest.<sup>53</sup> Except in one instance – Vietnam – none of the post-1975 international settlement agreements provide for any interest – not even nominal interest – from either the date of claim accrual or the date of settlement to the date of final redress. “Such interest as has been paid to claimants appears to have been made in the sole discretion of the national claims commissions charged to adjudicate their claims, sometimes under the color of international legal principle.”<sup>54</sup>

In October 2007 the U.S. government issued a report recommending a model for a property claims settlement mechanism between Cuba and the United States.<sup>55</sup> Such a Bilateral Property Claims Settlement Tribunal would be similar to the Iran-U.S. Claims Tribunal, an international arbitral tribunal located in the Hague, which took many years to resolve outstanding claims for assets nationalized by Iran.

Bilateral settlement negotiations with Cuba would similarly be a protracted process.<sup>56</sup> The Cuban government emphatically does not agree with the valuations of the FCSC, which were not established in adversarial proceedings. FCSC certification consisted of administrative hearings in which only the claimants introduced evidence on the extent and value of their losses.<sup>57</sup> The total amount certified by the FCSC is almost double the \$956 million book value of all U.S. investments in Cuba as reported in 1961.

Cuban emphasis on using declared taxable value as an appraisal basis would find support not only in the published report by the Bureau of Economic Analysis but also in decisions by U.S. federal courts. For example, in *Banco Nacional de Cuba v. Chase Manhattan Bank*, Chase argued that the value of its expropriated assets (branches in Cuba) should be applied to set off the amount of a claim against it by the Cuban government for unpaid

53. See U.S. DEPARTMENT OF JUSTICE, FOREIGN CLAIMS SETTLEMENT COMM., 2006 ANN. REP. Section IV: Table of Completed Programs, available at <http://www.usdoj.gov/fcsc/06rpt/section6.htm>; *id.*, at Section I.B., available at <http://www.usdoj.gov/fcsc/06rpt/annrep06.htm> (“In most programs, the amount of funds available to pay the Commission’s awards is limited, often resulting in pro rata payments of awards.”).

54. See WESTON, *supra* note 51, at 81.

55. U.S. AGENCY INT’L DEV. ET. AL. REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES 38 (2007) [hereinafter USAID REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS].

56. Settlement of U.S. nationalization claims against China and Vietnam took approximately nine years each.

57. See 45 C.F.R. part 531. See generally MATIAS F. TRAVIESO-DIAZ, THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA: A PROSPECTUS FOR BUSINESS (1996).

letters of credit – thus the court addressed the issue of valuation of such assets.<sup>58</sup> Chase argued that the value of its expropriated branches should include “going concern value” (i.e., a premium over the net asset or “book value” which takes into account future earnings and good will). Although the Circuit Court specifically acknowledged that the FCSC ruled that Chase had a valid claim for “going concern value,” it did not agree and nonetheless held that such ruling “takes insufficient account of the acknowledged state of the Cuban economy following the revolution.” In short, “adequate” compensation owing Chase under international law did not include add-ons over net asset value – and as such the correct value was something close to book value.<sup>59</sup>

Cuba has two major counterclaims against the United States. By Cuban law, the Cuban counterclaims must be considered part of the settlement negotiation process.<sup>60</sup> It is probable that U.S. negotiators, under pressure from the Obama administration and the business lobby to quickly reach a settlement so that relations with Cuba could be normalized, would agree to use the original book value figure of \$956 million. State Department negotiators would consider the fact that many of the original U.S. corporate losses – which account for the bulk of the monetary value of the claims - were written off long ago.

Settlement would probably be paid pro rata, and could be in twenty five-year “compensation bonds” paying 2% interest per annum.<sup>61</sup> The Cubans could plausibly argue that bonds are accepted internationally as compensation for nationalized properties; the Harvard Draft Convention on International Responsibility states that payment in bonds of a “fair market value. . . and bearing a reasonable rate of interest. . . and the interest is paid promptly,” is acceptable when the purpose for which the property was taken was “the furtherance of a general program of economic and social reform.”<sup>62</sup> This purpose was specifically recognized by the U.S. government at the time of the nationalizations.

58. 658 F.2d 875 (2d Cir. 1981).

59. *Id.* at 893.

60. Ley de Reafirmación de la Dignidad y Soberanía (Ley 80), 24 de diciembre de 1996, 36 I.L.M. 472 (1997) art. 3.

61. Ley de la Inversión Extranjera (Ley 77), 5 de Septiembre de 1995, available at [http://www.icap.cu/medidas/inversion\\_extranj.html](http://www.icap.cu/medidas/inversion_extranj.html); see also Diaz & Musa, *supra* note 23, at 890 n.31 (Cuba’s approach, as set forth in Article 3 of Law 77, is that such compensation would be “made in freely convertible currency” and in an amount “equal to the commercial value [of the asset] established by mutual agreement.”).

62. Harvard Draft Convention on International Responsibility of States for Injuries to Aliens art.10, para. 4, Apr. 15, 1961, Louis B. Sohn & R.R. Baxter Rep.



The Net Present Value (NPV) of Cuban “compensation bonds” would probably be worth only a fraction of the certified value of the claims. Cuba has one of the world’s worst bond ratings – Caa1 (discount rate range from 15-20%). The NPV of these “compensation bonds,” using a discount rate of 15%, would be roughly 8.30% of the original certified value of the claims (or 8.3 cents on the dollar).

While the Federal government has the constitutional authority to settle claims, it may not necessarily choose to do so. In 2007, the Bush administration stated the following:

The United States has always recognized that all property claims issues would have to be resolved by a democratic government of Cuba. In other words, the United States would not have a direct or immediate role in that. What the United States has done is compiled lists of people, U.S. citizens who have property claims that they would like to be able to present once a transition has taken place. But ultimately, those property claims will be determined by a democratic government in Cuba.<sup>63</sup>

## X. SPECIAL SITUATIONS FUNDS

If OFAC changes its position on requiring licenses for the transfer of claims, claim holders may consider sales to international special situation funds (specializing in distressed debt) for a premium over what they could reasonably expect to receive in a bilateral settlement negotiated by the U.S. government.

While the U.S. Certified Claims against Cuba are not sovereign debt *per se*, they can be compared to Cuban convertible currency debt. Today, Cuban government debt dating from the beginning of the 1959 revolution is grouped in a class of debt instruments known as “hyper-exotics” that are thinly traded on the international bond market. This tiny sector of the international bond market is highly illiquid, with under \$1 billion of turnover per quarter, representing less than 0.1% of emerging market debt. Like distressed corporate debt, hyper-exotics can offer spectacular returns. One example is the legal action brought by U.S. hedge fund Elliott Associates against Peru. This action occurred after Elliott purchased \$11.8 million in distressed Peruvian debt

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63. Carlos M. Gutierrez, Secretary of Commerce & Thomas A. Shannon, Assistant Secretary of State for Western Hemisphere, Briefing On Cuba Policy, Washington, D.C., U.S. Dept. of State (Oct. 24, 2007), available at [http://www.commerce.gov/NewsRoom/PressReleases\\_FactSheets/PROD01\\_004585](http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_004585).

and forced settlement for almost \$58 million after threatening to attach payments Peru made to other creditors through Euroclear, a settlements system based in Belgium.<sup>64</sup>

Cuba has experienced similar legal actions: when Fidel Castro returned to Havana following his visit to the September 1960 session of the United Nations General Assembly, he had to use a hastily borrowed Soviet aircraft because the Cuban plane he arrived in had been seized on U.S. soil under a court order issued in Miami against Cuban debts. This was the beginning of many such seizures over the years, including Cuban state shipping vessels and bank accounts.<sup>65</sup>

The annualized returns from successful debt and claims speculation can be more than 300%.<sup>66</sup> Vietnam is a prime example. In the early 1990s the country's hard currency debt traded at 4 cents per dollar of face value. By 1996, the Hanoi government had normalized relations with the U.S. and reached a preliminary agreement with the London Club of private creditors. Over this period, including repayment of past due interest, an initial investment of 4 cents in Vietnamese sovereign debt appreciated to 100 cents. Other politically induced distressed debt bonanzas include Serbia, whose rehabilitation from international pariah status saw a five-fold increase in its debt's market value, and Iraq, whose bond prices have tripled since October 2002.

Cuban debt turns over just under \$1 billion per year and has a high sensitivity to U.S. relations: in February 1994 prices trebled to 33 cents on hopes that President Clinton would promote a Vietnamese-style reconciliation and subsequently tumbled back to 8 cents. Demand for Cuban debt similarly rose when Fidel Castro fell ill in 2006 and ceded power to his brother Raul.

Cuba's debt was \$16 billion at the end of 2006, of which the majority of obligations are in default.<sup>67</sup> The price range quoted for Cuban debt on European exchanges is wide. Trade debt is quoted as low as 2% of face value, whereas medium-term loans currently

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64. Joseph D'Allegro, *Collecting on Peru's Sovereign Debt*, GLOBAL FIN., Jan. 2001, available at [http://findarticles.com/p/articles/mi\\_qa3715/is\\_200101/ai\\_n8945559](http://findarticles.com/p/articles/mi_qa3715/is_200101/ai_n8945559).

65. See *supra* text accompanying note 5.

66. *A Victory by Default?: Argentina's Successful Debt Restructuring*, ECONOMIST, Mar. 4, 2005.

67. After remaining stable at around \$11 billion from 2000 through 2002, Cuba's foreign debt increased to \$12 billion in 2003, \$13.8 billion in 2004 and \$16 billion by the close of 2006. Cuba does not recognize nonconvertible currency debt owed to the former Soviet Union.

trade at up to 17% of face value.<sup>68</sup> A possible “benchmark” to use in valuing U.S. Certified Claims is Cuban Unrestructured Debt, representing various types of claims. These types of obligations are currently trading on the London market at between 5.5% and 11% of face value.<sup>69</sup> Due to their similar risk factors to debt instruments, Cuban claims would probably trade at a steep discount to their nominal value.

A special situations fund would have to acquire a large aggregate amount of claims and hold them until a time in the future — a “window of opportunity” — when it could settle the claims via a debt-for-equity or debt-for-property swap with the Cuban government. Cuba is known to have negotiated at least two debt-for-asset swaps with private concerns (Mexican and Argentine) to settle sovereign debt purchased at a steep discount. The fund would have to legally remove the claims from U.S. jurisdiction to (a) counter the risk that the U.S. Government could take the claims from private owners under the Doctrine of Espousal and settle them arbitrarily in the frenzy to quickly normalize relations with Cuba; and (b) to allow the fund to accept Cuban property as compensation, which is currently prohibited to U.S. nationals unless authorized by OFAC.

## XI. CONCLUSION

The precedent of U.S. claims programs suggests that the federal government will eventually enter into bilateral settlement negotiations with Cuba as part of a broader diplomatic effort to normalize relations. While Helms-Burton and other sanctions legislation would present a legal impediment for the Cuban government (which will probably not be “democratic” in the U.S. sense, but will likely follow the Vietnamese or Chinese model of a one-party, officially socialist state with a market economy), such laws could be repealed or amended.<sup>70</sup>

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68. Courtesy of Jurriaan Braat, Manager, Omni Bridgeway Emerging Markets Limited, London (Apr. 16, 2008).

69. Courtesy of Mr. Stephen Monks, Managing Director, Exotix Ltd., London (Sept. 17, 2007).

70. U.S. law defines the criteria for a democratic Cuban government as one that “results from free and fair elections conducted under internationally recognized observers; has permitted opposition parties ample time to organize for such elections and permitted full access to the media to all candidates; shows respect for civil liberties and human rights; has made demonstrable progress in establishing an independent judiciary; is moving towards establishing a market-oriented economic system; and has made or is committed to making constitutional changes that would

Cuba has no realistic means of paying cash compensation to settle U.S. claims unless the negotiated amount was a mere pittance to achieve an accord and satisfaction under international law. According to Ambassador Stuart Eisenstat, former U.S. Secretary of State for Economic, Business and Agricultural Affairs, and Special Envoy for Property Claims in Central and Eastern Europe, who was President Clinton's special envoy on Cuba: "Settling the thousands of claims pending against Cuba should not be much of an obstacle to normalization -when that day finally comes. Given Cuba's poor economic state, any compensation received by claimants may be little more than token payments."<sup>71</sup>

In the end, owners of U.S. Certified Claims against Cuba (including corporate successors in interest and grandchildren of the original private claimants) would probably receive Cuban bonds of minimal value in compensation whether they pursue the time and expense of litigation in a Cuban court, or wait for the U.S. government to settle on their behalf. The optimal solution for all stakeholders may be a private sector settlement via a special situations fund that avoids contentious and protracted diplomatic negotiation.

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ensure regular free and fair elections." Cuban Democracy Act of 1992, 22 U.S.C. § 6007(a) (1992).

71. Ambassador Stuart Eisenstat, Speaking on Cuban Claims, National Public Radio (June 9, 2007).