

# RESOLVING U.S. EXPROPRIATION CLAIMS AGAINST CUBA: A VERY MODEST PROPOSAL

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One of the most important bilateral issues that needs to be addressed by the United States and the Cuban is the resolution of outstanding claims of U.S. nationals<sup>1</sup> for the uncompensated expropriation of their assets in the early years of the Cuban Revolution. Although members of other groups also experienced uncompensated expropriations, their claims are neither recognized

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1. The term "U.S. nationals" means in the claims context those natural persons who were citizens of the United States at the time their properties in Cuba were seized by the Cuban Government, as well as corporations or other entities organized under the laws of the United States and 50% or more of whose stock or other beneficial interest was owned by natural persons who were citizens of the United States at the time the entities' properties in Cuba were taken. See 22 U.S.C. § 1643a(1) (1994). Individuals and entities meeting this definition were eligible to participate in the Cuban Claims Program established by Congress in 1964 to determine the amount and validity of their claims against the Cuban government for the uncompensated taking of their properties after January 1, 1959. See 22 U.S.C. § 1643 (1994).

under current U.S. law nor suitable for inclusion in the claims resolution process discussed here.<sup>2</sup>

Resolution of the expropriation claims issue may be difficult while the current Socialist regime is in power in Cuba. While Cuban officials have from time to time expressed a willingness to discuss settlement of the claims with the United States, such willingness is usually expressed in the context of setting off those claims against Cuba's alleged right to recover from the United States hundreds of billions of dollars in damages due to the U.S. trade embargo and other acts of aggression against Cuba.<sup>3</sup> To date, the Cuban government has given no indication

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2. These groups include former Cuban nationals who are now citizens or permanent residents of the United States, current Cuban nationals who are on the island or abroad, and U.S. nationals who for some reason failed to gain certification of their expropriation claims under the Cuban Claims Program. See Rolando H. Castañeda & George P. Montalván, Transition in Cuba: A Comprehensive Stabilization Proposal and Some Key Issues, in 3 ASCE, **Cuba in Transition** 11, 25 (1993), available at <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v03-casmon1.pdf> [hereinafter ASCE-3]. The facts surrounding all those sets of expropriations are similar, as is Cuba's failure to provide compensation to any of those groups of claimants. Id. But these categories of claimants would also compete for the very limited resources that would be available at this time to provide remedies to the claimants. Id. Also, it has been asserted that there is no legal or moral basis for providing a remedy for property losses and not compensating those who have suffered all manner of torts at the hands of the Cuban Government—"involuntary or uncompensated work, unjust imprisonment, loss of life or limb, loss of loved ones, physical or psychological abuse and harassment by agents of the state, discontinuance of pension payments, etc." Id. Even the authors, however, conclude that the cost of providing compensation for tort claims "defies imagination," and argue that no remedies should be provided for either tort or property claims. Id. at 25, 30.

3. This position is expressly set forth in Article Three of Cuba's Law 80 of 1996, which reads in relevant part:

The claims for compensation for the expropriation of U.S. properties in Cuba nationalized through that legitimate process, validated by Cuban law and international law referred to in the preceding article, may be part of a negotiation process between the Government of the United States and the Government of the Republic of Cuba, on the basis of equality and mutual respect. The indemnification claims due to the nationalization of said properties shall be examined

that it is prepared to negotiate without preconditions a potential settlement of the U.S. expropriation claims.<sup>4</sup> But a serious effort will eventually need to be undertaken by the main interested parties—the governments of the two countries—to address the expropriation claims issue. It thus merits consideration of how the process of resolving the claims can be started.<sup>5</sup>

The uncompensated expropriation of U.S. nationals' assets in Cuba was one of the leading causes of the deterioration in relations between the two countries in the early 1960s and the

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together with the indemnification to which the Cuban state and the Cuban people are entitled as a result of the damages caused by the economic blockade and the acts of aggression of all nature which are the responsibility of the Government of the United States of America.

Ley Número 80: Ley de Reafirmación de la Dignidad y Soberanía Cubanas [Law 80: Law on the Reaffirmation of Cuban Dignity and Sovereignty] art. III, **Gaceta Oficial** (Dec. 24, 1996, Extraordinary Edition), available at <http://www.cuba.cu/gobierno/antidoto.htm>; see also Cuba: Reaffirmation of Cuban Dignity and Sovereignty Act, 36 I.L.M. 472 (1997) (providing English translation). In addition, “on May 5, 2000, the Civil and Administrative Court of Law at the Havana Provincial People’s Court rendered Judgment no.47 on Civil Case number [one], pursuant to the lawsuit of the People of Cuba vs. the Government of the United States, for financial damages inflicted on Cuba, filed by the country’s social and mass organizations.” Lawsuit against the United States for Financial Damages, CubavsBloqueo (2013), <http://www.cubavsbloqueo.cu/en/lawsuit-against-united-states-financial-damages>. The court found that the damages resulting from the trade embargo and other U.S. attacks on Cuba’s economic and social targets resulted in damages of over \$121 billion U.S. dollars. “The Court ordered the U.S. Government to pay reparations and compensation to the Cuban people for this amount.” Id.

4. Matías F. Travieso-Díaz, Alternative Recommendations for Dealing with Expropriated U.S. Property in Post-Castro Cuba, in 12 **ASCE, Cuba in Transition** 101, 101 (2002) [hereinafter Alternative Recommendations for Dealing with Expropriated U.S. Property in Post-Castro Cuba]

<sup>5</sup>Since the resumption of diplomatic relations between the United States and Cuba effective July 1, 2015, representatives of the two countries have been meeting to discuss a possible resolution of the expropriation claims issue. See, e.g., Frances Robles, *Cuba and U.S. to Discuss Settling Claims on Property*, *New York Times*, Dec. 5, 2015 at A4.

imposition of the U.S. embargo on trade with Cuba, which remains in place to this date.<sup>6</sup> The outstanding expropriation claims is recognized as one of the main obstacles to the re-establishment of normal relations between the United States and Cuba, and current steps to improve ties can only achieve limited progress until the issue is seen as resolved or, at least, demonstrable progress is made towards such a resolution.<sup>7</sup>

The resolution of outstanding property claims is also a pre-condition to major foreign capital flow into Cuba.<sup>8</sup> As long as property titles remain unsettled, foreigners may perceive investing in Cuba as a rather risky proposition (which is true for other reasons as well) and may be discouraged from stepping into the country.<sup>9</sup>

There are two additional reasons why resolution of the outstanding property claims of U.S.

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6. President Kennedy officially imposed the trade embargo in February 1962. See Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962). Previously, authorization had been suspended for most industrial export licenses to Cuba. 43 **Dept. State Bull.** 715 (1960). President Eisenhower had also reduced the quota of Cuban sugar in the U.S. market to zero. See Proclamation No. 3383, 25 Fed. Reg. 13131 (Dec. 21, 1960). Other laws enacted in the 1960–62 period imposed additional trade restrictions. Joint Corp. Comm. on Cuban Claims, Key Events – US Property Claims, **Certified Cuban Claims**, [http://www.certifiedcubanclaims.org/key\\_events.htm](http://www.certifiedcubanclaims.org/key_events.htm) (last visited Feb. 1, 2016). Therefore, by the time President Kennedy proclaimed a total trade embargo, trade between the United States and Cuba was already essentially cut off. See id. For a chronology of key events in the imposition of the trade embargo. Id.

7. Alternative Recommendations for Dealing with Expropriated U.S. Property in Post-Castro Cuba, *supra* note 4, at 102.

8. Id.

9. All countries in Central and Eastern Europe that implemented schemes to settle expropriation claims experienced a great deal of initial uncertainty over property rights. This uncertainty discouraged potential investors and has delayed privatization efforts. **Cheryl W. Gray et al., Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe** 4 (World Bank Discussion Paper No. 209, 1993).

nationals must be a matter of high priority.<sup>10</sup> First, U.S. laws require resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted and foreign aid can resume.<sup>11</sup> Second, apart from any legal requirements, resolution of U.S. nationals' expropriation claims has been since the days of President Kennedy's administration one of the stated political conditions for the full normalization of relations between the United States and Cuba.<sup>12</sup> These factors demand the eventual negotiation of an agreement between the United

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10. Alternative Recommendations for Dealing with Expropriated U.S. Property in Post-Castro Cuba, *supra* note 4, at 102.

11. Section 620(a)(2) of the Foreign Assistance Act of 1961 prohibits U.S. assistance to Cuba until Cuba has taken "appropriate steps under international law standards to return to United States nationals, and to entities no less than fifty percent beneficially owned by United States citizens, or provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after January 1, 1959, by the government of Cuba." 22 U.S.C. § 2370 (a)(2) (1994). Also, the LIBERTAD Act, or Helms-Burton Law, includes as a precondition to declaring that a "democratically elected government" is in power in Cuba (thereby authorizing the provision of significant economic aid to Cuba and the lifting of the U.S. trade embargo) that Cuba has made "demonstrable progress in returning to United States citizens (and entities which are fifty percent or more beneficially owned by United States citizens) property taken by the Cuban Government from such citizens and entities on or after January 1, 1959, or providing full compensation for such property in accordance with international law standards and practice." See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. ch. 69A §§ 6062(b)(2)(B), 6064, 6066(6) (1996)). The Helms-Burton Law further expresses the "sense of Congress" that "the satisfactory resolution of property claims by Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba." Id. 22 U.S.C. ch. 69A § 6067(d).

12. See, e.g., Lisa Shuchman, U.S. Won't Ease Embargo Against Cuba, Official Says, **Palm Beach Post**, Apr. 29, 1994, at 5B (quoting Dennis Hays, then Coordinator of Cuban Affairs, U.S. Dep't of State, as saying that before the United States lifts the trade embargo against Cuba, the expropriation of American-owned property by the Cuban Government will have to be addressed); Frank J. Prial, U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba, **N.Y. Times**, Nov. 25, 1992, at A1 (quoting Alexander Watson, then Deputy U.S. Rep. to the United Nations, as stating in an address to the General Assembly of the United Nations that the United States chooses not to trade with Cuba because "among other things Cuba, 'in violation of international law, expropriated billions of dollars' worth of private property belonging to U.S. individuals and has refused to make reasonable restitution.'"). While there has been relatively little recent explicit discussion of the claims issue in U.S. Government circles, there is no doubt that both the Executive and Congress will insist on resolution of the claims. See, Background Briefing, U.S. Dep't of State (July 17, 2015),

States and Cuba towards the resolution of the expropriation claims of U.S. nationals.

By contrast, no bilateral issues require that Cuba provide a remedy to other claimants for the expropriation of their assets by the Cuban Government.<sup>13</sup> Therefore, the resolution of those expropriation claims can proceed on a separate track, and may be handled by Cuba as a domestic political and legal issue.<sup>14</sup>

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<http://iipdigital.usembassy.gov/st/english/texttrans/2015/07/20150720316695.html#axzz3gcntrXV>; Julie Hirschfeld Davis, As U.S. and Cuba Relations Warm, Property Claims Issue Is Revived, N.Y. Times, July 20, 2015, at A10. Accordingly, it is reasonable to anticipate that the claims issue will continue to be included in future bilateral talks between the United States and Cuba.

13. **Matías F. Travieso-Díaz, Inst. for Cuban and Cuban-Am. Studies, Univ. of Miami**, Alternative Recommendations for Dealing with Confiscated Properties in Cuba, in **Confiscated Properties in a Post-Castro Cuba: Two Views** (2003) [hereinafter Alternative Recommendations for Dealing with Confiscated Properties in Cuba].
14. Many Cuban nationals whose properties were seized by the Cuban Government subsequently moved to the United States and became U.S. citizens. Some of these Cuban-Americans have advocated being added to the U.S. claimants class (so they can be included in an eventual U.S.-Cuba settlement) or, alternatively, being recognized as not bound by an agreement between the United States and Cuba and being permitted to pursue their claims in U.S. courts. See, e.g., Alberto Diaz-Masvidal, Scope, Nature and Implications of Contract Assignments of Cuban Natural Resources (Minerals and Petroleum), in 4 **ASCE** 54–62 (1994). There is some precedent for including through ad hoc legislation the claims of individuals who were not U.S. citizens at the time of the expropriations in the settlement of U.S. claims against another country. Such an inclusion would require legislation amending the Cuban Claims Act along the lines of a bill that was passed by Congress in 1955 to include individuals who were U.S. citizens as of August 1955 in the U.S. war claims against Italy. See 22 U.S.C. § 1641c. There may be political pressures emanating from the Cuban-American community in the United States to have such legislation enacted, particularly if it does not appear likely that the Cuban American claimants will find adequate redress under a parallel claims resolution program that is instituted in Cuba. Enactment of such legislation, however, will almost certainly be opposed by the existing certified U.S. claimants, whose share of a lump settlement would be decreased if the claimant class was enlarged and (as is likely to be the case) the negotiated settlement amount was less than 100% of the certified value of the claims. In addition, such legislation would raise

The discussion that follows proposes a series of steps that can be implemented sequentially over a period of years to address the expropriation claims of U.S. nationals, should Cuba decide it wants to resolve the issue. While a number of claim resolution proposals have been advanced,<sup>15</sup> these do not fully consider the economic and political conditions in which Cuba will find itself when it decides to deal with the problem or the practical limitations posed by those conditions. The steps described here can be initiated within a relatively short period of time and without the disbursement of extremely large amounts of money.

## I. HISTORICAL SUMMARY

### A. Synopsis of Cuba's Expropriations

Cuba seized the properties of U.S. and other foreign nationals on the island starting in 1959, with the bulk of the expropriations taking place in the second half of 1960.<sup>16</sup> The process started in 1959 with the takeover of agricultural and cattle ranches under the Agrarian Reform Law;<sup>17</sup> reached a critical stage in July 1960 with the promulgation of Law 851, which authorized the expropriation of the property of U.S. nationals;<sup>18</sup> was carried out through several resolutions in

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numerous questions, including its potential inconsistency with well-settled international law principles under which a state can only act to protect the interests of those who were nationals of that state at the time the adverse action was taken. See D.W. Greig, *International Law* 530–31 (2d. ed. 1976).

15. See, e.g., Creighton Univ. School of Law & Dep't of Political Sci., *Report On The Resolution Of Outstanding Property Claims Between Cuba & The United States* (2007). A survey of the proposals that have been presented for addressing the expropriation claims is presented in Jesus V. Bu Marcheco, *Demandas de Propiedad Entre Cuba y Los Estados Unidos--Una Revisión de la Literatura* (2014), available at <http://ssrn.com/abstract=2392782>.

16. For a detailed description of the process by which Cuba expropriated the assets of U.S. nationals, see Michael W. Gordon, *The Cuban Nationalizations: The Demise of Property Rights in Cuba* 69–108 (1975).

17. Ley de Reforma Agraria [First Agrarian Reform Law], *Gaceta Oficial* (June 3, 1959); see also *First Agrarian Reform Law, Truman Edu.*, [http://revolutions.truman.edu/cuba/aboutme.htm#\\_ftnref2](http://revolutions.truman.edu/cuba/aboutme.htm#_ftnref2) (last updated June 4, 2014).

18. Ley No. 851, del 6 de julio de 1960 [Law 851 of Nationalization of July 6, 1960], *Gaceta Oficial* (July 7, 1960); see also *Cuba.*

the second half of 1960, again directed mainly against properties owned by U.S. nationals, although those of other foreign nationals were also taken;<sup>19</sup> and continued through 1963, when the last U.S. companies still in private hands were expropriated.<sup>20</sup> In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items were seized at various times between 1959 and 1968.<sup>21</sup>

The laws issued by the Cuban Government to implement the expropriations of the holdings of U.S. nationals contained undertakings by the state to provide compensation to the owners. Nevertheless, no compensation was ever paid.<sup>22</sup>

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Nationalization Law, July 6, 1960, 55 **Am. J. Int'l L.** 822, 822–24 (1961) (providing English translation).

19. Resolution No. 1, **Gaceta Oficial** (Aug. 6, 1960); Resolution No. 2, **Gaceta Oficial** (Sept. 17, 1960); Laws Nos. 890 & 891, **Gaceta Oficial** (Oct. 13, 1960); Resolution No. 3, October 24, 1960. For a listing of laws, decrees and resolutions by means of which Cuba's expropriations of the assets of U.S. nationals were implemented, see **Foreign Claims Settlement Comm'n, Final Report of the Cuban Claims Program 78–79** (1972) [hereinafter 1972 **FCSC Report**], available at <http://www.justice.gov/sites/default/files/fcsc/docs/final-report-cuba-1972.pdf>.

20. Gordon, *supra* note 15, at 105–106.

21. See, e.g., Nicolás J. Gutiérrez, Jr., The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba (1994) (Address at the American Bar Association's 1994 Annual Meeting, New Orleans, La.), reprinted in 1 **Latin Am. Bus. L. Alert** 5 (1994).

22. Law 851 of July 6, 1960, which authorized the nationalization of the properties of U.S. nationals, provided for payment for those expropriations by means of thirty-year bonds yielding two percent interest, to be financed from the profits Cuba realized from sales of sugar in the U.S. market in excess of three million tons at no less than 5.75 cents per pound. The mechanism set up by this law was illusory because the United States had already virtually eliminated Cuba's sugar quota. See Proclamation No. 3355, 25 Fed. Reg. 6414-01 (July 8, 1960) (reducing Cuba's sugar quota in the U.S. market by ninety-five percent). Nonetheless, the inclusion of this compensation scheme in the law constituted an explicit acknowledgment by Cuba of its obligation to indemnify the U.S. property owners for their losses.



## B. The U.S. Claims Certification Program

In 1964, the U.S. Congress established the Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States (FCSC) was given authority to determine the validity and amount of claims by U.S. nationals against the Government of Cuba for the taking of their property since January 1, 1959.<sup>23</sup> The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims by U.S. corporations (1,146) and individual citizens (7,670).<sup>24</sup> It certified 5,911 of those claims, with an aggregate amount of \$1.8 billion;<sup>25</sup> denied 1,195 claims, with an aggregate amount of \$1.5 billion; and dismissed without consideration (or saw withdrawn) 1,710 claims.<sup>26</sup>

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23. 22 U.S.C. §§1643–43m (1994).

24. 1972 FCSC **Report**, *supra* note 18, Ex. 15.

25. *Id.* The value of the certified Cuban claims exceeds the combined certified amounts of all other claims validated by the FCSC for expropriations of U.S. nationals' assets by other countries (including the Soviet Union, China, East Germany, Poland, Czechoslovakia, Hungary, Vietnam, and others). **Foreign Claims Settlement Comm'n, 1994 Annual Report 146 (1994)** [hereinafter 1994 FCSC **Report**]. The combined certified amounts from expropriations by all other countries is approximately \$1.24 billion. FOREIGN CLAIMS SETTLEMENT COMMISSION 2013 ANNUAL REPORT at 50 (1994).

The total amount certified by the FCSC is almost double the \$956 million book value of all U.S. investments in Cuba through the end of 1959, as reported by the U.S. Department of Commerce. Jose F. Alonso & Armando M. Lago, A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba, in 3 **ASCE, Cuba in Transition** 168, 201 (1993). The valuation of the U.S. nationals' expropriation claims has never been established in an adversary proceeding. The FCSC certification process involved administrative hearings in which only the claimants introduced evidence on the extent and value of their losses. *See* 45 C.F.R. pt. 531.

26. 1972 FCSC **Report**, *supra* note 18, Ex. 15. It should be noted that in 2005, pursuant to a request from then Secretary of State Condoleezza Rice, the FCSC conducted a Second Cuban Claims Program, whose purpose was to effect the adjudication and

Of the \$1.8 billion in certified claims, over 85% (about \$1.58 billion) corresponded to 898 corporate claimants, and the rest (about \$220 million) was spread among 5,013 individual claimants.<sup>27</sup> There were only 131 claimants—ninety-two corporations and thirty-nine individuals—with certified claims of \$1 million or more; only forty-eight claimants, all but five of them corporations, had certified claims in excess of \$5 million.<sup>28</sup> These figures show that the U.S. claimants fall into two general categories: a small number of claimants (mostly corporations) with large claims, and a very large number of claimants (mainly individuals) with small claims.

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 six percent rate should be included as part of the value of the claims it certified. Applying such interest rate on the outstanding \$1.8 billion principal yields a present value, as of July 2015, of approximately \$8 billion. This amount does not include the value of the claims that were disallowed for lack of adequate proof, nor those that were not submitted to the FCSC during the period specified in the statute.

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certification by the FCSC of claims for uncompensated taking of United States nationals' property by the Cuban government that arose after May 1, 1967, and were not adjudicated in the original Cuban Claims Program. Completed Programs—Cuba, FCSC, <http://www.justice.gov/fcsc/claims-against-cuba> (last visited Feb 15, 2016). The FCSC received a total of five new claims, denied three of them, and certified the other two claims in the total principal amounts of \$51,128,926.95 and \$16,000.00, respectively.

Id.

27. 1972 FCSC **Report**, supra note 18, Ex. 15.

28. Id.

## II. LEGAL BASES FOR U.S. NATIONALS' EXPROPRIATION CLAIMS

The expropriation claims by U.S. nationals are based on well-established principles of international law that recognize the sovereign right of states to expropriate the assets of foreign nationals in the states' territory, but require "prompt, adequate and effective" compensation to aliens whose property is expropriated.<sup>29</sup> The "prompt, adequate and effective" compensation formulation was coined in 1938 by U.S. Secretary of State Cordell Hull.<sup>30</sup> Under current practice, the "prompt" element of the Hull formula means payment without delay.<sup>31</sup> The "adequate" element means that the payment should reflect the "fair market value" or "value as a going concern" of the expropriated property.<sup>32</sup> The "effective" element is satisfied when the

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29. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983), aff'd, 765 F.2d 159 (Fed. Cir. 1984); **Restatement (Second) of Foreign Relations Law** §§ 185–90 (1965). U.S. courts have held that Cuba's expropriations of the assets of U.S. nationals violated international law because Cuba failed to provide adequate compensation, and because it carried the expropriations out in a discriminatory manner against U.S. nationals and conducted them for purposes of retaliation against the U.S. Government. *Banco Nacional de Cuba v. Sabbatino*, 193 F.Supp. 375, 384 (S.D.N.Y. 1961), aff'd, 307 F.2d 845 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 398 (1964); *Banco Nacional de Cuba v. Farr*, 272 F.Supp. 836, 838 (S.D.N.Y. 1965), aff'd, 383 F.2d 166, 184–85 (2d Cir. 1967). For a more general discussion, see Gordon, supra note 15, at 109–152.

30. A shorthand sometimes used for the Hull formula is that of "just compensation," meaning "in the absence of exceptional circumstances . . . an amount equivalent to the value of the property taken . . . paid at the time of the taking . . . and in a form economically usable by the foreign national." Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 A.J.I.L. 474, 475 (1991); **Restatement (Third) of Foreign Relations Law** § 712 (1987).

31. **Ibrahim F. I. Shihata, Legal Treatment of Foreign Investment: The World Bank Guidelines** 163 (1993).

32. **Alan C. Swan & John F. Murphy, Cases and Materials on the Regulation of International Business and Economic Relations** 774–76 (1991). Shihata explains the "adequacy" element of compensation as follows: "Compensation will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known." Shihata, supra note 30, at 61. Shihata goes on to define fair market value as the amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the

payment is made in the currency of the alien's home country, in a convertible currency (as designated by the International Monetary Fund), or in any other currency acceptable to the party whose property is being expropriated.<sup>33</sup> Cuba has clearly failed to satisfy its obligations under international law with respect to providing compensation for the properties it seized from U.S. nationals.<sup>34</sup>

### III. A VERY MODEST PROPOSAL FOR ADDRESSING U.S. NATIONALS' EXPROPRIATION CLAIMS

#### A. Introduction

Any proposal for the resolution of the U.S. nationals' expropriation claims against Cuba must recognize the objectives that a claims program needs to achieve, the fundamental differences between the various types of property subject to claims, and the practical limitations that will be encountered by the Cuban government as it seeks to provide remedies to U.S. (and possibly domestic) expropriation victims.<sup>35</sup> The interaction between these factors adds a significant

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period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors. *Id.* at 161–162.

33. *Id.* at 163.

34. It has been the conclusion of U.S. courts and legal scholars that at least some of the expropriations of the assets of U.S. nationals, such as those arising from Law 851 of July 6, 1960, were contrary to international law on the additional grounds that they were ordered in retaliation against actions taken by the United States to eliminate Cuba's sugar quota, and because they discriminated against U.S. nationals. Although the expropriations were contrary to international law for one or more reasons, they were legally effective in transferring title to the assets to the Cuban state, and therefore the breach of Cuba's international law obligations must be seen as giving rise to a duty by Cuba to provide compensation to the former owners of the properties, but not necessarily to an inescapable obligation to provide restitution of the property to them.

35. Matías F. Travieso-Díaz, *The Laws and Legal System of a Free-Market Cuba: A Prospectus for Business* 74 (Quorum

degree of complexity to the problem.

There are also fundamental differences among the property interests covered by the claims, which suggests that certain remedies may be better suited for some types of property than for others.<sup>36</sup> For example, restitution of residential property may be extremely difficult, both from the legal and political standpoints;<sup>37</sup> on the other hand, monetary compensation may be an inadequate remedy where the property is unique, such as in the case of beach-front real estate in a resort area.

Cuba will also be confronted with political and financial limitations to its ability to provide certain remedies. A settlement that results in huge financial obligations over a long period of time may be resisted politically by, among others, the Cuban generations that have come of age after the expropriations occurred. The discussion that follows will seek to identify how these factors come into play with regard to the remedies that may be provided.

## **B. Cuban Claims Settlement Precedents**

It is instructive to examine the precedent of the settlement agreements that Cuba has negotiated with other countries for the expropriation of the assets of their nationals.<sup>38</sup> Those

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Books, 1996) [hereinafter Travieso-Díaz, **Laws and Legal System**]

36. Id.

37. See Juan C. Consuegra-Barquín, Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law, 46 **Rutgers L.R.** 873 (1994) (discussing the difficulties that a Cuban government will face in seeking to provide remedies for residential property expropriations.)

38. Cuba has entered into settlement agreements with five foreign countries for the expropriation of the assets of their respective nationals in Cuba: France, on March 16, 1967; Switzerland, March 2, 1967; United Kingdom, October 18, 1978; Canada, November 7, 1980; and Spain, January 26, 1988. See El Proceso de Expropiación e Indemnizaciones en Cuba, **CubavsBloqueo**, <http://www.cubavsbloqueo.cu/> (last visited Feb. 28, 2015); see also Michael W. Gordon, The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations other than the United States, 5 U. **Miami Inter-Am. L. Rev.** 457 (1973). Under those settlements, claims were settled at a fraction of the assessed value of the expropriated assets.

agreements have five important facts in common: (1) all were negotiated over long periods of time; (2) none adhered to the “Hull Formula” and, in particular, none implemented the “adequacy” standard, in that they were lump sum, country-to-country settlements that did not equal the amounts claimed by the nationals for the loss of their properties; (3) the payments were made in installments, rather than all at once; (4) the payments were in either the currency of the country advancing the claims or, as was the case with Spain and Switzerland, in trade goods as well as currency; and (5) all agreements were negotiated between Cuba and the state that representing the claimants, without claimant participation.<sup>39</sup>

While these precedents are not controlling, they are indicative of the kinds of terms that Cuba may seek if monetary compensation is the standard used for the negotiations. Clearly, an agreement with the United States patterned after these historical precedents would provide only a fraction—perhaps a small fraction—of the amounts sought by the claimants.

### **C. The Process of Government-to-Government Negotiations**

The President of the United States has wide, but not plenary, power to settle claims against foreign governments for the uncompensated taking of property belonging to U.S. citizens.<sup>40</sup> The U.S. Department of State, under authority delegated by the President, acts on behalf of U.S.

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The Spanish claims, for example, were valued at \$350 million but were ultimately settled for about \$40 million. Even this limited amount was not paid until 1994, six years after the claims were settled and three decades after the claims accrued.

39. *Alternative Recommendations for Dealing with Expropriated U.S. Property in Post-Castro Cuba*, *supra* note 4, at 106–07.

40. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *Shanghai Power*, 4 Cl. Ct. at 245. The President's authority is limited by the rarely exercised power of Congress to enact legislation requiring that a settlement seen as unfavorable be renegotiated. *See Dames & Moore*, 453 U.S. at 688–689 & n.13.

claimants in the negotiation of their claims with an expropriating foreign country.<sup>41</sup> Under the “doctrine of espousal,” the negotiations conducted by the Department of State are binding on the claimants, and the settlement that is reached constitutes their sole remedy.<sup>42</sup>

In most agreements negotiated in the past, the United States and the expropriating country have arrived at a settlement involving payment by the expropriating country to the United States of an amount that is a fraction of the total estimated value of the confiscated assets.<sup>43</sup> The settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest, although a 1992 settlement with Germany over East Germany’s expropriations of U.S. nationals’ assets did include the payment of simple interest at the approximate annual rate of three percent from the time the U.S. properties were taken.<sup>44</sup>

Under standard practice, U.S. claimants may not “opt out” of the settlement reached by the U.S. Government. Dissatisfied claimants are barred from pursuing their claims before U.S. courts or in the settling country.<sup>45</sup> This traditional settlement agreement process would not appear to be adequate to satisfy the expectations of the parties in the Cuban situation.

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41. See *Dames & Moore*, 453 U.S. at 680 & n.9 (listing ten settlement agreements reached by the U.S. Department of State with foreign countries between 1952 and 1981).

42. *Id.* at 679–80; *Asociacion de Reclamantes v. United States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); **Richard B. Lillich & Burns H. Weston, International Claims: Their Settlement by Lump Sum Agreements** 6 (Charlottesville: Univ. of Va. Press 1975).

43. For example, the United States settled its nationals' claims against the People's Republic of China for \$80.5 million, which was about 40% of the \$197 million certified by the FCSC. *Shanghai Power*, 4 Cl. Ct. at 239; see also *Agreement on the Settlement of Claims, U.S.-China.*, May 11, 1979, 18 I.L.M. 551 (1979).

44. Letter from Ronald J. Bettauer, Assistant Legal Adviser for Int’l Claims and Inv. Disputes, U.S. Dep’t of State, to claimants (May 29, 1992); *Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Settlement of Certain Property Claims, U.S.-Ger.*, May 13, 1992, T.I.A.S. No. 11,959.

45. See, e.g., *Shanghai Power*, 4 Cl. Ct. at 248–49.

The amount of the outstanding certified claims by U.S. nationals is so large that it would likely outstrip Cuba's ability to pay a significant portion of the principal, let alone interest. In addition, Cuba already has a very large external debt.<sup>46</sup> Any additional obligations to U.S. claimants would only exacerbate Cuba's debt situation. For those reasons, a traditional settlement involving payments to all claimants adding up to a large sum of money, even if payment is spread out over time, would likely place Cuba in difficult financial straits and be unacceptable.

#### **D. Proposed Approach**

The very modest approach proposed here recognizes that it will not be feasible to address all pending claims at the same time or in the same manner. Accordingly, the claim resolution process would proceed in three separate stages of increasing complexity, spread over a significant period of time. The goal of the process is to provide a remedy to the greatest possible number of claimants, and accommodate as much as possible the needs and desires of the rest.<sup>47</sup>

##### **1. Stage One: Lump Sum Payments to Individual and Corporate Claimants with Claims of \$1.5 Million or Less**

The total amount of the top 100 claims certified by the FCSC (not including interest) is \$1,635,211,668, with the remaining 5,811 claims totaling \$164,336,899.<sup>48</sup> All but the top 100 claims are for amounts of \$1.5 million or less.<sup>49</sup> This means that if funds could be made

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46. Cuba's external debt is \$25 billion, a staggering 40.6% of the country's Gross Domestic Product. The World Factbook—Cuba, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html> (last updated Feb. 25, 2016).

47. It is important to recognize that the approach proposed here, like any other that is developed by the Executive and agreed to by Cuba, would probably have to be endorsed by Congress before it can be implemented.

48. 1972 FCSC Report, *supra* note 18, Ex. 15.

49. *See id.*



available in the amount of \$165 million, it would be possible to fully compensate the vast majority of the claimants for the principal amount of their certified losses (but no interest) and would provide compensation for essentially all residential, farming and small enterprise losses.<sup>50</sup> Alternatively, funds in the amount of \$293 million would compensate all but the top fifty certified claimants, and would cover the principal all certified claims under \$5 million.<sup>51</sup>

One potential source of funds for such lump payments could be blocked Cuban assets under the control of the U.S. Government. As of the end of 2014, the U.S. Treasury Department reported that there were blocked assets valued at \$270.33 million in which either Cuba or a Cuban national has an interest.<sup>52</sup>

But many of these assets are likely to be unavailable or belong to third parties.<sup>53</sup> Therefore, it would first be necessary to ascertain the true ownership of the assets, and then shelter—through new legislation—those that belong to Cuba from those raising claims, under legislation passed by Congress in 1996 and 2000, of personal injury or death as the result of actions by the Cuban

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50. Residential property and small farms are good candidates for a compensation remedy because such a remedy avoids the potential need to dispossess current occupants to those properties, who may have acquired legal rights to them and whose eviction might be politically untenable; *see* Consuegra-Barquín, *supra* note 30, at 909–12. In addition, owners of residential or small farming property in a foreign country may be generally less likely to desire restitution of those assets over fifty years after they were taken.

51. A 100% level of recovery would greatly exceed the recovery level in all other "lump sum" settlements negotiated by the United States under the International Claims Settlement Act programs. *See* 1994 FCSC **Report**, *supra* note 24, at 146. On the other hand, providing fifty percent compensation for the certified principal of all but the top 100 claims would call for payment of only \$83 million.

52. Office of Foreign Assets Control, Terrorist Assets Report Calendar Year 2014, **Treasury Dep't**, <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2014.pdf> (last visited Feb. 17, 2016).

53. Miami Lawyer: Blocked Cuban Assets are Dwindling, **Along the Malecon**, (Jan. 8, 2011), <http://alongthemalecon.blogspot.com/2011/01/miami-lawyer-blocked-cuban-assets-are.html>.

Government.<sup>54</sup> To the extent the frozen assets are unavailable, Cuba will need to identify some other source of funds to satisfy the lump-sum payment portion of any settlement of U.S. national expropriation claims.

## 2. Stage Two: Private Claimant-to-Cuba Negotiations

### a. Direct Negotiations

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54. The Foreign Sovereign Immunities Act of 1976 protects, subject to specified exceptions, the property of foreign states or their agencies and instrumentalities from damages claims by private parties. 28 U.S.C. §§ 1602–11 (2012). One of the exceptions to this immunity permits suits against certain foreign states (including Cuba) for terrorist acts or provision of material support thereto. *Id.* §1605(a)(7). Under that provision (known as the Terrorist Act Exception) and a counterpart provision in the criminal code, U.S. nationals have the right to recover treble damages, plus attorneys' fees, for injuries to person, property or business incurred as a result of international terrorism. But the Terrorist Act Exception also allows the President to waive the ability to execute any judgments that are obtained in such a suit against blocked assets of the foreign government. *Id.* §1610(f)(3). In 2000, however, Congress enacted the “Victims of Trafficking and Violence Protection Act of 2000.” Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections) (2000). Section 2002 of the Act allows plaintiffs holding certain judgments against Cuba to recover against blocked Cuban assets. *Id.* § 2002. The legislation was intended to permit recovery of judgments awarded to the families of the Brothers to the Rescue pilots whose planes were shot down by Cuba in 1996. *See* Jonathan Groner, Payback Time: Pushed by Terror Victims, Bill to Ease Seizure of Assets from Rogue Nations Gains Ground, **Legal Times**, June 5, 2000, available at <https://advance.lexis.com/document/?pdmfid=1000516&crd=6f1f1189-4ca1-4746-89e2-5cc61b7cf0f0&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A52N1-GW61-JBYY-254C-00000-00&pddocid=urn%3AcontentItem%3A52N1-GW61-JBYY-254C-00000-00&pdcontentcomponentid=8008&pdteaserkey=sr0&ecomp=74fhk&earg=sr0&prid=c8f0f8c7-f68c-47ed-90e8-41ce6c1c9bf1>; *see also* *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239 (S.D. Fl., 1997). The *Alejandro* court allowed the recovery of \$187 million in compensatory and punitive damages which, under the 2000 legislation, could be recovered against Cuba’s blocked assets. Since the *Alejandro* case was decided, a number of court judgments have awarded damages to claimants against Cuba under the 2000 law, and the frozen Cuban assets have been periodically depleted. *See* **Jennifer K. Elsea, Cong Research Serv., RL31258, Suits Against Terrorist States by Victims of Terrorism** 12 (2008), available at <https://www.fas.org/sgp/crs/terror/RL31258.pdf>.

As a second step in the claims settlement process, the top fifty or 100 U.S. claimants would be authorized to obtain relief directly from Cuba for their expropriation claims.<sup>55</sup> This relief would be sought in direct, individual negotiations between the claimants and the Cuban Government under the sponsorship and oversight of the U.S. Government. Claimants would waive their right to receive any lump-sum settlement proceeds and instead negotiate directly with the Cuban Government for restitution of their expropriated assets, investment concessions, payments in commodities other than cash, or compensation by means of state obligations.<sup>56</sup> While there is no direct precedent for such a procedure and the U.S. courts have ruled that individual claimants have no right to negotiate directly with the debtor government,<sup>57</sup> in the case of Cuba such a

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55. Any of the over 5800 claimants that could receive a lump sum distribution under Stage One could arguably waive their right to receive such a settlement and join the participants in Stages Two or Three, but given the relatively limited amounts at stake they would be unlikely to do so unless they were interested in remedies other than monetary payments, such as restitution of real or residential property. Conversely, some of the 100 certified claimants excluded from the lump sum settlement might challenge the process on various legal grounds, including the argument that the framing of the lump sum settlement and their exclusion from the settlement constitutes a taking without just compensation of property in violation of the Fifth Amendment to the United States Constitution. The ultimate disposition of those arguments would be in the hands of the courts, but as the U.S. Supreme Court found in Dames & Moore, where articulating a settlement process is “a necessary incident to the resolution of a major foreign policy dispute between our country and another” and where “Congress [has] acquiesced in the President's action,” the President has the power to settle such claims in the manner he deems suitable. 453 U. S. at 688.

56. In November 2000, a task force of former U.S. Government officials and other public figures established by the Council on Foreign Relations issued a report that recommended a number of initiatives to prepare for a transition in bilateral relations between the United States and Cuba. The task force, headed by former Assistant Secretaries of State for Inter-American Affairs Bernard W. Aronson and William D. Rogers, recommended among other steps resolving expropriation claims by licensing American claimants to negotiate settlements directly with Cuba, including equity participation in Cuban enterprises. See CFR Cuba Task Force Urges Significant Changes in U.S. Policy, Council on Foreign Relations, [http://www.cfr.org/Public/media/pressreleases2000\\_112900.html](http://www.cfr.org/Public/media/pressreleases2000_112900.html). The U.S. Government has not authorized such direct negotiations in the past.

57. See Dames & Moore, 453 U. S. at 686–90.

flexible settlement may prove to be in the best interest of all parties.<sup>58</sup> The sorts of potential negotiated remedies are briefly discussed below.

## b. Restitution

### (1) Direct Restitution

Restitution of the actual property that was confiscated (direct restitution) would be the solution that some U.S. corporate claimants might prefer. Some types of expropriated property, e.g. large industrial installations, may lend themselves readily to direct restitution because the identity of the former owners is likely to be uncontested and the extent of the ownership rights may be easy to establish.

But direct restitution may be difficult to implement even for readily identifiable property because the ability to grant restitution of the actual property seized by the Cuban Government may be negated by a variety of circumstances. The property may have been destroyed or substantially deteriorated; it may have been subject to transformation, merger, subdivision, improvement, or other substantial changes; it may have been devoted to a use that may not be easily reversed or which may have substantial public utility; or its character may be such that the state decides for policy reasons not to return to its former owners. In such cases, some form of

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58. There are indications that at least some major U.S. claimants would be interested in alternative methods to settle their claims. *Amstar Says, Let's Make a Deal*, **Cuba News**, Jan. 1996, at 6. There is also precedent for such flexibility. The U.S. settlement agreement with Germany, for example, allows U.S. nationals to forego their portions of the settlement amount and instead pursue their claims under Germany's program for the resolution of claims arising from East Germany's expropriations. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Settlement of Certain Property Claims, *supra* note 43, at art. 3; 57 Fed. Reg. 53175, 53176 (November 6, 1992).

compensation would need to be given.

In addition, in the last twenty years Cuba (through state-owned enterprises) has entered into a number of joint ventures with foreign, non-U.S. investors.<sup>59</sup> Many of these ventures involve property that was expropriated from U.S. and Cuban nationals.<sup>60</sup> In deciding whether to provide direct restitution of those properties to the U.S. claimants, the Cuban Government must balance the rights and interests of the former owners against those of third-parties who have invested in Cuba. Also, the rights of any other lessors, occupants, or other users of the property would have to be taken into account in deciding whether direct restitution should occur.

Where direct restitution is the appropriate remedy, a number of matters will have to be worked out between Cuba and the U.S. claimants. For example, Cuba may want to impose restrictions or requirements on the claimants' use of the property, or on their ability to transfer title for a certain period of time after restitution. Also, a potentially complex valuation process may need to be undertaken if the property has been improved since being expropriated. In some instances, an agreement will need to be reached in advance on the recovering owner's responsibility for the environmental reclamation of the property, to the extent that ecological impacts from operation of the facility have occurred or are expected to occur in the future. Many other issues are likely to come up in individual cases.

Cuba may also decide to impose a "transfer tax" or equivalent fee on the restitution transaction.<sup>61</sup> The purposes of such tax would be to raise funds for other aspects of the program, and to ensure that settlement of the claim by restitution does not leave a claimant in a better position than that of other claimants who have availed themselves of other forms of recovery.

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59. Travieso-Díaz, **Laws and Legal System**, *supra* note 34, at 76.

60. *Id.*

61. *Id.*

## (2) Substitutional Restitution

There may be instances in which direct restitution will be impractical or undesirable, but both Cuba and the U.S. claimant will still wish to apply a restitution type of remedy.<sup>62</sup> Such circumstances may dictate restitution of substitute property (that is, the transfer to the claimant of other property, equivalent in value to the one confiscated). Where restitution of substitute property is proposed, it will be necessary to set rules on, among other things, how the equivalence of the properties is to be established.

Substitutional restitution may be appropriate, for example, in cases where the confiscated property is farmland that has been conveyed to co-operatives or divided among small farmers. Rather than dispossessing the current occupants, Cuba may offer to convey to the U.S. claimants agricultural or other lands in state hands that may be equivalent to those expropriated.

Restitution—whether direct or substitutional—could be an important ingredient in the mix of remedies available to U.S. claimants who entered into negotiations with the Cuban Government. It will be inappropriate in many instances. And even where appropriate, its use should be tempered by the realization that restitution will often be a slow and difficult process, and one subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others. In addition, if a variety of remedies are offered, care must be taken to assure that the benefits received by those availing themselves of the restitution alternative are neither better nor worse off than those receiving other types of remedy.

### c. Issuance of State Obligations

A number of Eastern European countries used state-issued instruments, which will be

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62. *Id.* at 77.

generally referred to here as “vouchers,” to provide full or partial compensation to expropriation claimants.<sup>63</sup> The vouchers may not be redeemed for cash but can be used, among other things: as collateral for loans; to pay (fully or in part) for property sold by the state, including shares in privatized enterprises; to purchase real estate put up for sale by the state; to be exchanged for annuities; or as investment instruments.<sup>64</sup>

The voucher system provides a potential way of resolving the claims of those U.S. nationals who may not be interested in recovering the properties they once owned because of the obsolescence or physical deterioration of the facilities. The system recognizes the limits of the country’s ability to pay compensation claims, and avoids the dislocation costs and disputes associated with direct restitution systems. An issue that would need to be resolved at the outset would be the level of compensation to be offered in proportion to the loss.

The system has potentially great flexibility because the vouchers could be used for a variety of purposes, some of which may be more attractive than others to individual claimants. Also, in addition to vouchers, other state-issued instruments could be used as means of compensating U.S. claimants. These include annuities, bonds, promissory notes, stock certificates, and other debt or equity instruments.

There are, however, several potential drawbacks to a system of vouchers or other state-issued instruments.<sup>65</sup> The instruments will fluctuate in value and are likely to depreciate if Cuba’s economy stagnates. In addition, to the extent the instruments are used as income-generating devices (e.g., for the collection of annuities), the rate of return is likely to be very low.<sup>66</sup> Also,

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63. Alternative Recommendations for Dealing with Confiscated Properties in Cuba, *supra* note 12, at 70.

64. *Id.*

65. Travieso-Díaz, **Laws and Legal System**, *supra* note 34, at 78.

66. *Id.*

the basic underpinning of a voucher system is confidence in the state's ability to make good on its commitments.<sup>67</sup> Therefore, the security, transferability, and marketability of the compensation instruments is a serious concern that the Cuban Government will need to overcome in order for the remedy to have acceptability with the claimants.

#### d. Other Compensation Mechanisms

Other remedies that might be utilized in Cuba, and have not yet been tried elsewhere, could consist of economic incentives to invest in the country.<sup>68</sup> These remedies could include, for example: giving credits on taxes and duties to the extent of all or part of the claim amount; granting the ability to exchange the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, or preferences in government contracting; and conferring other benefits. Each claimant might be interested in a different "package," so ad-hoc, case-by-case negotiations would need to be conducted, at least to resolve the most significant claims.

The second stage of claims resolution could be initiated concurrently with the first, but may extend for a considerable period of time to allow for potentially complex negotiations to be conducted between the claimants and Cuba.

### 3. Stage Three: Binding International Arbitration

A direct settlement between a U.S. claimant and Cuba, if successful, should satisfy the claimant in that it would represent the best resolution that he was able to obtain through

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67. Id.

68. Id.



bargaining with Cuba.<sup>69</sup> But success is not assured. Therefore, to address the situation where direct negotiations were not fruitful or the claimant was not interested in pursuing negotiations, the United States and Cuba would have to have agreed on a mechanism for assuring that those claimants were not left without a remedy. That would bring about the next stage in the process.

One way of protecting the rights of the U.S. claimants would be for the Cuban Government to agree to submit to binding international arbitration any claim that it was unable to settle with a U.S. national. Historically, however, arbitration of disputes between private citizens and states has resulted in inconsistent decisions on key issues. In Saudi Arabia v. Arabian American Oil Co. (ARAMCO), for example, the arbitration tribunal refused to apply the law of Switzerland (where the tribunal was located), even though Saudi Arabia had agreed to having the seat of the tribunal in Switzerland.<sup>70</sup> By contrast, the arbitrator in Sapphire International Petroleum v. National Iranian Oil Co., decided that the legal system of the place of arbitration would govern the arbitration.<sup>71</sup> Likewise, inconsistent results on this issue were achieved in three other arbitrations between Libya and the nationals of foreign states that arose out of the nationalization of Libyan oil in the early 1970s.<sup>72</sup> This lack of uniformity and predictability in the outcomes underscores the need to establish clearly and in advance the legal regime that would govern the arbitration of disputes between U.S. citizens and the Cuban government.<sup>73</sup>

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69. Alternative Recommendations for Dealing with Confiscated Properties in Cuba, *supra* note 12, at 65.

70. 27 I.L.R. 117 (1958).

71. 35 I.L.R. 136 (1963).

72. *British Petroleum Expl. Co. v. Libyan Arab Republic*, 53 I.L.R. 297 (1973) (deciding that the municipal procedural law would govern the arbitration); *Texaco Overseas Petroleum & Ca. Asiatic Oil Co. v. Libya*, 17 I.L.M. 1 (1978) (holding that local law was not to be applied to the arbitration); *Libyan Am. Oil Co. v. Libyan Arab Repub.*, 20 I.L.M. 1 (1981) (leaving unclear whether the arbitration was governed by the international legal system or the place of arbitration).

73. Predictability of applicable rules could be achieved if the United States and Cuba agreed in advance to a procedure analogous to

Apart from legal considerations, the main difficulty involved in establishing a tribunal to adjudicate disputes between a U.S. claimant and Cuba would be that provisions would have to be made for Cuba to set up an independent source of funds available to satisfy tribunal awards. Otherwise, a victory by a U.S. claimant in arbitration could prove pyrrhic because no funds might be available from which to satisfy the award. For that reason, Stage Three should be initiated at a later time than the first two stages, and its success would depend among other things on Cuba's economic recovery.

#### 4. (Hypothetical) Stage Four: Participation in Cuba's Claim Resolution Program

Assuming that it was not feasible or productive to have direct negotiations between U.S. claimants and Cuba, another alternative could be to allow U.S. nationals to participate in Cuba's domestic claims resolution program, were such a program to be instituted. But the types of remedies available to U.S. nationals opting to participate in a parallel Cuban domestic claims program would of necessity have to be few in number, relatively straightforward in execution, and demand little in the way of up-front cash outlays by the state. The results of a domestic Cuban process would be likely, therefore, to leave many claimants dissatisfied.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Since the resumption of diplomatic relations between the United States and Cuba effective July 1, 2015, representatives of the two countries have been meeting to discuss a

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that used by the Iran-U.S. Claims Tribunal (Tribunal) set up to resolve the expropriation claims of U.S. nationals against Iran. See Norton, *supra* note 29, at 482-486. One important aspect of the Tribunal's framework is the adoption of The United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules, which are designed to address international commercial arbitration. See UNCITRAL Arbitration Rules, **UNCITRAL**, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html) (last visited Feb. 29, 2016).

possible resolution of the expropriation claims issue. Despite the limited economic reforms that Cuba has implemented under Raúl Castro since 2010, it is most likely that the negotiations will be held while Cuba is besieged by a depressed economy and an unstable political situation.

The conditions under which the settlement will be negotiated will greatly restrict the remedies that Cuba will be able to offer the U.S. claimants. Certainly, the traditional way of settling expropriation claims—i.e., Cuba’s payment of a lump sum of money to the U.S. Government to be distributed pro-rata among all claimants—will not be adequate across the board, given Cuba’s inability to pay a significant portion of the amounts it owes. Lump-sum compensation should be given to the vast majority of U.S. nationals to the extent funds are available, but should be substituted with (for those claimants not eligible for a lump-sum settlement) a variety of other remedies to be negotiated by the claimants with Cuba, including restitution of the expropriated assets, compensation through state-issued instruments, and other means. While the eventual solution reached in each case is likely to grant only partial recovery to the claimant, the results in most cases would probably be more beneficial to these claimants than if they were included in a comprehensive lump-sum distribution. All else failing, a fallback program for binding arbitration of unresolved claims would have to be available to provide additional avenues of recovery for those who did not have other ways of obtaining redress for their claims.

#### **A. Recommendation**

As the discussion in this paper shows, even a very modest scheme for resolving the certified claims of U.S. nationals require the U.S. Government to make a number of important and unprecedented policy decisions. For example, the U.S. Government will need to decide whether to abandon the traditional “espousal” principle and adopt a more flexible approach that includes, in addition to securing payments to the vast majority of claimants, allowing the other claimants to pursue direct negotiations with Cuba to obtain redress.

These and other policy issues should be examined in the near term by a multi-agency task force, perhaps with the assistance of outside experts. The task force's mandate should include proposing legislation to permit the use of frozen Cuban assets to defray lump sum payments, approve any needed appropriations, and take other form of legislative action.