

Reconciling U.S. Property Claims in Cuba

Transforming Trauma into Opportunity



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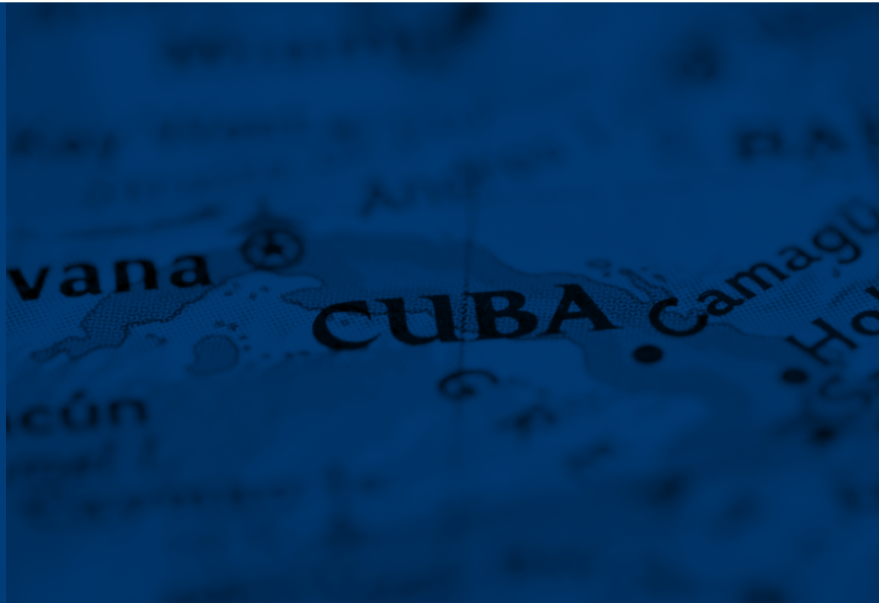


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Secretary John Kerry shakes hands with Cuban Foreign Minister Bruno Rodríguez on the occasion of Kerry’s visit to Cuba for the reopening of the U.S. Embassy in Havana, U.S. Department of State.
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Ted Piccone, *U.S.-Cuba Normalizations*, Florida International University, April 2015

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1. Introduction and Overview

Overturning a deeply unpopular dictatorship, the Cuban revolution of 1959 initially waved the banners of political independence and freedom, national pride, and social justice. But the Cuban revolution—like so many previous social upheavals in history—quickly turned into a gritty struggle over the control and ownership of material properties of all types: industrial and commercial enterprises, large-scale farmlands, import and export licenses, brand names and patents, and household residences. At first, government seizures concentrated on large foreign-owned firms but the nationalization fever soon consumed the properties of Cuban nationals as well. Within a few years, the Cuban state and its stalwarts controlled most of the means of production—the accumulated capital stock of the nation—and by the end of its first decade in power, had even taken control of most small-scale enterprises. The revolution also upended residential real estate: the Urban Housing Reform of October 14, 1960 abruptly transferred property rights from the former owners to the tenants (under Article 21 landlords who remained in Cuba were compensated with life-long pensions), and residencies of those who fled the island were declared “abandoned” and redistributed to regime constituents.

As the revolution proclaimed its socialist values, altering property relations became the main instrument for consolidating power: the government increasingly monopolized the sources of wealth and income while depriving its potential opponents of economic resources. No less important were the social and cultural implications of the reconfiguration of property relations: those dispossessed of their properties—denounced as criminal capitalist exploiters—were also stripped of their social legitimacy, the symbols of their personal accomplishments and family pride, their august positions in the social hierarchy. Their identities were deconstructed and shattered.¹ In contrast, those who suddenly inherited the nation’s wealth gained power and prestige, and many Cubans of humble origins felt a new sense of self-worth and social pride.

¹ The 1968 film, *Memories of Underdevelopment*, brilliantly captured the psychological disorientation of Cuba’s displaced elites and educated middle classes. The film was based on Edmundo Desnoes, *Inconsolable Memories* (New York: New American Library, 1967).

The nationalization of property also had an important international objective: to reduce the leverage of the United States over economic and political choices. U.S. commercial interests were extensive and visible in pre-revolutionary Cuba, controlling key nodes of the economy including public utilities, energy industries, centers of finance, and large sugar estates.² By seizing these assets, the Cuban revolution transformed the island's international relations, dramatically reducing the influence of the United States. Eventually the regime would openly declare itself Marxist and align with the Soviet Union, the arch-enemy of its former partner.

Claims and Counter-Claims

Today, over five decades later, the U.S. government, on behalf of U.S. firms and citizens seeking redress for confiscated properties, and the Cuban government, with its own claims for damages allegedly inflicted by U.S. aggressions, have agreed to discuss resolution of their respective claims. U.S. negotiators are preparing for complex and potentially prolonged negotiations. The international community has experience in the resolution of outstanding property claims, but the Cuban case is unique in many respects, including in the markedly superior dollar value of the claims and the very long time interval that has elapsed since the properties changed hands. Nevertheless, diplomats and lawyers look to precedents, and this paper will consider cases that offer useful ideas for helping to resolve Cuba claims—including Vietnam, the Soviet Union, Germany and other Eastern European cases, and Nicaragua.

To collect and adjudicate property claims of U.S. nationals,³ the United States established the Foreign Claims Settlement Commission (FCSC), a quasi-independent entity within the U.S. Department of Justice. In response to congressional legislation⁴ authorizing the Commission to gather information for an eventual negotiation on claims of lost properties in Cuba, the Commission reviewed the applications of U.S. corporate and citizen claimants and certified as legitimate nearly 6,000 claims valued by the FCSC at \$1.9 billion (not including the accrued simple interest of 6 percent per annum typically awarded by the Commission).

² A treasure trove of information on U.S. economic interests in pre-revolutionary Cuba are the files for its Cuba programs of the Foreign Claims Settlement Commission of the United States (FCSC), available at <http://www.justice.gov/fcsc/final-opinions-and-orders-5#Cuba>. See also Guillermo Jiménez, *Las Empresas de Cuba 1958* (Havana: Editorial de Ciencias Sociales, 2004); and Louis A. Pérez, Jr., *Cuba: Between Reform and Revolution*, 4th edition (Oxford University Press, 2011).

³ Title V of the International Claims Settlement Act of 1949 defines a “national of the United States” as “(A) a natural person who is a citizen of the United States, or (B) a corporation or other legal entity which is organized under the laws of the United States, or any States, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity. The term does not include aliens.” International Claims Settlement Act (ICSA) of 1949 (22 U.S.C. § 1643 *et seq.*).

⁴ Public Law 88-666 (1964) amending Title V of the International Claims Settlement Act (ICSA) of 1949 (22 U.S.C. § 1643 *et seq.*).

Very often outstanding property claims that were the product of great social upheavals have been resolved within the context of a broader settlement of the underlying conflicts. Following the historic December 17, 2014 announcement by Presidents Barack Obama and Raúl Castro of intentions to renew diplomatic relations—first suspended in January 1961—and the reopening of embassies in both capitals the following summer, the two governments decided to establish a bilateral commission charged with addressing a number of vital issues, including claims.⁵ Among other goals, existing U.S. legislation also conditions the full lifting of the U.S. economic embargo and hence the re-opening of normal commercial relations on the settlement of property claims.

Wrapping a claims settlement within a more sweeping diplomatic package could have large advantages. A robust accord could help overcome long-simmering bilateral animosities and reconcile the fractured Cuban family. Potentially embarrassing “concessions” by either party could be masked by larger victories on more weighty or emotive issues. What to some might appear the unseemly materialism or inequity of property claims would be subsumed within a higher-toned humanitarian achievement. Having turned the page on a half-century long era of conflict, Cuban society could begin in earnest on a new path toward social peace and shared prosperity. The claims settlement, which would bolster investor confidence, could also be linked to a reformed economic development model for Cuba actively supported by the international community.

We will begin with a discussion of why, after so many decades have passed, both the U.S. and Cuban governments now consider it in their own self-interest to resolve outstanding property claims. Cuba’s claims against the U.S. government encompass economic damage allegedly occasioned by the prolonged U.S. commercial sanctions and deaths and debilitating injuries attributed to U.S.-sponsored hostilities, including the Bay of Pigs invasion.

The paper will look closely at the nearly 6,000 certified U.S. claims, disaggregating them by corporate and individual, large and small. It will then explain and assess the procedures and valuation methodologies of the FCSC, noting its strengths and weaknesses, from both the U.S. and Cuban perspectives. Among the biggest controversies will be the FCSC’s multiple criteria for placing monetary values on properties, and doing so in the absence of any representative of the defendant—the Cuban government. Another particularly troublesome issue is whether valuation judgments should add accrued interest charges which, in the Cuba case, would substantially inflate U.S. claims. However, there are many precedents in international claims negotiations for settlements that allowed

⁵ Cuba Ministry of External Relations, “Press release issued by the Cuban delegation to the first meeting of the Cuba-US steering committee,” September 11, 2015, <http://cubaeeuu.cubaminrex.cu/article/press-release-issued-cuban-delegation-first-meeting-cuba-us-steering-committee>.

for interest payments well below the FCSC's 6 percent benchmark rate. It has been Commission practice to account for the passage of time through simple (not compound) interest charges, rather than adjustments for price inflation.

What can we learn from previous cases of claims settlements? What can we say about the virtues of restoration of properties versus monetary compensation? How about more creative forms of compensation, such as vouchers, tax credits, development rights, and debt-equity swaps, or long-term sovereign bonds? Many expropriation disputes have been resolved via lump-sum settlements, whereby governments agree upon a total amount of financial compensation that is transferred in a lump sum to the plaintiff government which then assumes the responsibility to distribute the transferred monies to its national claimants. In most cases, the agreed upon lump-sum transfer fell short of what the plaintiff government originally claimed in lost properties, such that the lump-sum transfer must be shared by some formula, such as a *pro rata* basis, among the claimants. In the Cuba case, this paper suggests a hybrid formula, whereby smaller claimants receive financial compensation (whole or partial) while larger claimants can select an “opt-out” option whereby they pursue their claims and alternative instruments of compensation directly with Cuban authorities, perhaps facilitated by an umbrella bilateral claims resolution committee.

The return of properties to former owners occurred on a large scale in some Eastern European countries following the collapse of the Soviet Union, most notably in what was East Germany. Such massive restitution signaled a moral repudiation of the over-turned socialist regime and a definitive return to market-driven capitalism. Such conditions do not exist in Cuba today. On the contrary, Cuba faces regime continuity where the Communist Party remains very much in control and its constituents—including managers of state-owned enterprises and the associated ministries as well as thousands of homeowners with authorized deeds of title—are the beneficiaries of the massive seizures of properties. Whereas property restitution may occur in exceptional circumstances, the settlement of U.S. property claims is more likely to result in compensation which, as we shall see, can take various forms.

Compensation Funds and Grand Bargains

To the extent that the U.S. claimants receive financial compensation, what might be the sources of the funds to be transferred? The Cuban government is one obvious source, payments occurring either by front-loaded monetary transfers or long-term sovereign bonds. This paper assesses Cuba's future capacity to pay. But other sources can also be imagined, from the U.S. government itself (whether by the refreshing of frozen Cuban assets since disbursed by domestic U.S. courts, from

penalties paid by private financial institutions found to be in violation of sanctions regulations, or, less likely, entirely new appropriations), or via the taxation of certain future transactions arising out of the normalization of U.S.-Cuban relations. In other country cases, compensation funds benefited from the revenues generated by the privatization of state-owned enterprises, but the Cuban government has ruled out system-wide privatizations, at least for the time being.

A separate but politically emotive matter is the lost properties of Cuban-American exiles. Under customary international law and by U.S. legal practice the U.S. advocates (“espouses”) only for claimants who were U.S. citizens “at the time of taking,” that is, when the properties were confiscated. Cuban-Americans who received their U.S. citizenship post-confiscation do not meet this strict criterion. Nevertheless, the political clout of the two million strong Cuban-American diaspora, already manifest in U.S. legislation, may well be powerful enough to induce the U.S. government to seek some redress for their lost properties. But the Cuban government will be loath to admit any wrongdoing in this regard: anything but token compensation would be prohibitively costly, in light of the tens of thousands of potential claimants including not only Cuban-Americans but also Cuban citizens resident on the island; and any large-scale restoration of properties, many of which are household residences, would be political suicide for the incumbent regime in Havana. But there are alternative concessions that might be extended to the diaspora that would meet, at least partially, their financial demands and psychological needs to overcome trauma and achieve national reconciliation—as will be spelled out in a sequel study. This paper, however, focuses solely upon those claimants who were U.S. nationals at the time of taking.

Finally, the paper will outline the shape of a large diplomatic package deal, within which a property claims settlement might be more palatable to all parties. Property relations underpin social relations and economic development options. Can the property claims settlement be wrapped into a carefully considered process wherein Cuba (with the benefit of international experience and the counsel of multilateral development institutions) designs a development strategy that balances public powers and private rights, protects socio-economic sustainability, and provides a healthy ecosystem for business investment and shared prosperity? In such a grand bargain, the claims settlement—rather than be a crippling drain on Cuban financial resources—could help set in motion an inflow of investment capital and associated technologies to spark a twenty-first century Cuban renaissance.

2. Nationalization and Compensation: U.S. and Cuban Positions

Why Compensation?

During the administrations of Dwight Eisenhower and John F. Kennedy, the Cuban revolutionary government engaged in sweeping confiscation of private properties, including business entities (large and small, foreign and domestic) bank accounts, and personal residences—many owned by U.S. nationals. Today, many of these firms no longer exist and many of the original property owners are deceased. Buildings still standing are often badly deteriorated and any remaining capital stocks are woefully outdated, often rusting and cannibalized for spare parts. Some properties have changed hands multiple times, and have undergone improvements and transformations rendering them no longer recognizable to their pre-revolutionary owners.

Many properties have been sliced into subdivisions while others have been consolidated with other units. What were once luxury single-family villas are now densely populated multi-unit dwellings, as crowded new tenants altered spatial relations and added partitions and lofts. In the countryside, large estates were carved into more manageable pieces while many private plots were collectivized, changing the face of Cuban agriculture. In contrast, the Cuban government has maintained select villas in Havana and rented them to diplomatic missions and international businesses.

On the island, two and even three generations of Cuban citizens have labored on these new agricultural entities, managed the business enterprises, and inhabited the reconfigured housing stock. Few stop to think about the transformation of property relations that occurred over five decades earlier, in the time of their parents and grandparents. The current property relations appear the normal state of affairs. Most occupants of homes and apartments have been issued deeds of ownership by government registries;⁶ in socialist Cuba, where most citizens have meager personal savings and

⁶ Philip Peters, *Cuba's New Real Estate Market* (Washington, D.C.: Brookings Institution, Latin America Initiative Working Paper, 2014).

no other financial instruments (financial markets are repressed), the family dwelling is often the only significant family asset.

In this context, compensation for lost properties becomes a complex social matter, fraught with potentially explosive repercussions within Cuba. Compensation could become a major source of friction in the process of normalization of bilateral relations between Cuba and the United States. The economic costs alone—direct costs of compensation claims and disruptions to economic activity—could be prohibitive.

Nevertheless, through the new bilateral commission, Cuba has formally reaffirmed its willingness to discuss claims with the U.S. government. But Cuba's opening bargaining posture is intended, among other goals, to reassure Cuban citizens: Cuban claims for economic damages allegedly inflicted by the U.S. embargo—priced at more than \$100 billion—and for alleged deaths and injuries to Cuban citizens attributed to U.S.-sponsored acts of violence, would more than offset legitimate U.S. claims, such that no actual transfers, of monies or properties, would be forthcoming.

In considering compensation and its potential economic and political impacts, it is vital to distinguish between, on the one hand, U.S. nationals “at the time of taking,” when properties were confiscated in the early years of the revolution (the subject of this paper); and on the other hand, the Cuban-American exiles, whose properties were taken prior to their attaining U.S. citizenship. In the minds of both the U.S. and Cuban governments, the two categories of claimants are wholly separate and benefit from very distinctive rights or lack thereof.

The U.S. and Cuban governments both agree on two vital points widely accepted in international law: sovereign governments have the right to take private properties in the public interest, even as compensation should be paid to the former owners. Thus, both governments consider these claims to be legitimate topics for negotiation.

U.S. Policy on Nationalizations and Compensation

U.S. policy on nationalizations has been remarkably consistent over time, as most famously enunciated in a landmark letter from Cordell Hull, Franklin D. Roosevelt's Secretary of State, to the Mexican Ambassador to the United States wherein the United States “readily recognizes the right of a sovereign state to expropriate property for public purposes” but adds:

“In the opinion of the Government of the United States the legality of an expropriation is contingent upon adequate, effective and prompt compensation.”⁷

The sovereign right to take property for public purposes, enshrined in the Fifth Amendment to the U.S. Constitution under the principle of eminent domain with just compensation,⁸ was reaffirmed in international expropriation cases that occurred in the same timeframe as the Cuban revolution of the early 1960s. When in 1953 the government of Jacobo Árbenz in Guatemala expropriated large plantations owned by the United Fruit Company, the United States replied:

“The Government of the United States does not controvert in the slightest the proposition that the Act of Congress of the Republic of Guatemala, Decree 900, known as the Agrarian Reform Law, constitutes an act of sovereignty inherent in Guatemala.”⁹

Similarly, in 1962 Secretary of State Dean Rusk sent a note to Brazil with regard to the expropriation of a subsidiary of the International Telephone and Telegraph Company (ITT):

“We acknowledge the right of a government to expropriate property belonging to nationals of other countries for public purposes, if provision is made for the payment of prompt, adequate and effective compensation.”¹⁰

A crystal-clear statement of U.S. policies on nationalizations, issued shortly after the FCSC finished certifying U.S. property claims in Cuba, reaffirmed:

“Our policy can be simply stated: we recognize the right of any country to expropriate the property of a United States investor, in the absence of specific governmental undertakings to the contrary, so long as the taking is non-discriminatory, for a public purpose, and accompanied by prompt, adequate, and effective compensation. In our view, these are the minimum standards under international law.”¹¹

⁷ *Foreign Relations of the United States 1940*, Vol. V, Notes from Secretary of State Hull to the Mexican Ambassador (1938), pp. 1009-1010.

⁸ The Fifth Amendment states: “...nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. X.

⁹ *Department of State Bulletin* (XXIX), No. 742, September 14, 1953. The United States did, however, dispute Guatemala’s compensation offer, and eventually unleashed covert action to unseat the Árbenz government.

¹⁰ As cited in Renato Ribeiro, *Nationalization of Foreign Property in International Law*, (Washington, D.C.: Embassy of Brazil, 1977), p.87.

¹¹ Richard J. Smith, “The United States Government Perspective on Expropriation and Investment in Developing Countries,” *Vanderbilt Journal of Transnational Law*, Vol. 9, 1976, pp. 517-522. See also the landmark Shanghai Power Company ruling by the U.S. Claims Court (*Shanghai Power Company vs. United States* 4 Cl. Ct. 237 (1983)) which noted that “The United States has consistently taken the view that foreign governments are entitled to confiscate property belonging to U.S. nationals[...]accompanied by ‘adequate, effective and prompt compensation.’” See also Martin Domke, “Foreign Nationalizations,” *American Journal of International Law*, Vol. 55, 1961; and Marjorie Whiteman, *Digest of International Law*, 1967, pp. 1085 – 1136.

The U.S. policy of accepting the legitimacy of nationalization contingent upon just compensation is also enshrined in various U.S. laws, beginning with the just compensation clause of the Fifth Amendment. Congress has incorporated this principle into numerous statutes, for example the Hick-enlooper and Gonzalez amendments, that condition U.S. bilateral and multilateral assistance on “prompt, adequate, and effective” compensation for nationalized U.S. properties.¹² The Congress established the FCSC and its predecessors to help adjudicate compensation, and the settlement of such international claims has been a primary function of the Department of State’s Office of the Legal Adviser and its largest office, the Office of the Assistant Legal Adviser for International Claims and Investment Disputes (L/CID).

More specific to Cuba, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (otherwise known as the Helms-Burton Act) explicitly links the full lifting of economic sanctions against Cuba to the satisfactory resolution of outstanding property claims. In determining whether a transition government is in power in Cuba, Helms-Burton directs the President to take into account the extent to which that government, among other things, is:

“...taking appropriate steps to return to United States citizens (and entities which are 50 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 to provide equitable compensation to such citizens and entities for such property.”¹³

Helms-Burton adds: “It is the sense of the Congress that the satisfactory resolution of property claims by a 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.”¹⁴

While Helms-Burton formally wrote into law the linkage between compensation and normalization of relations, this linkage had long been present in U.S. policy toward Cuba. Commenting on the policies of the Carter administration in their exhaustive study of U.S.- Cuban relations, William LeoGrande and Peter Kornbluh concluded: “Viewed from Washington, the nationalization of U.S. property in 1960 was the proximate cause for imposing the embargo, so it could not be lifted until the compensation issue was addressed.”¹⁵

¹² 76 Stat. 260-61 (1962), 22 U.S.C. § 2370(e); Section 21 of the Inter-American Development Bank Act, P.L. 92-246; Section 12 of the International Development Association Act, P.L. 92-247; and Section 18 of the Asian Development Bank Act, P.L. 92-245.

¹³ Pub.L. 104-114, 110 Stat. 785; 22 U.S.C. § 6021 – 6091, at section 6065(b)(2)(D).

¹⁴ 22 U.S.C. § 6067 (d).

¹⁵ William LeoGrande and Peter Kornbluh, *Back Channel to Cuba* (Chapel Hill: University of North Carolina Press, 2014), p. 164.

More broadly, the U.S. insistence on compensation is driven by several interests:

- As a capital exporting country, the United States wishes to safeguard the international investments of U.S. firms and their balance sheets, and by raising the costs to nationalizations, reduce their frequency.
- As a capitalist country, the United States wishes to reaffirm the sanctity, even the morality, of private property rights—which it asserts is essential to the well-functioning of private markets and hence also in the interests of any developing country.
- As a nation with an interest in global economic prosperity, the United States believes that efficient international capital markets are vital to global growth which is tied to secure property rights.
- As a nation with an interest in the political stability and economic progress of developing countries, the United States believes that foreign investment can be important vehicles for the transfer of badly needed capital, technology and “know how.”
- As may be true in the Cuba case, the United States can leverage claims settlements—when the defendant nation sees the settlement in its own self-interest—to advance other U.S. interests including market-oriented reforms in the partner’s economy.

In light of these substantial national interests, the United States insists on the principle of compensation, even in cases where the dollar amounts at stake are small. However, as we shall see, the interpretation of just compensation applied to specific cases is hotly debated and subject to diplomatic compromise. Private claimants have not always been satisfied with their monetary rewards, especially those resulting from the contemporary practice of settlements with lump-sum payments.

Cuban Position on Nationalization and Compensation

The Cuban government does not dispute the principle of compensation for taken properties: Cuban laws explicitly recognize rights to compensation; Fidel Castro offered compensation for expropriated U.S. properties, at least rhetorically, at the outset of the revolution; and Cuban diplomats have repeatedly offered to include U.S. property claims in bilateral negotiations. Following the passage of the punitive Helms-Burton Act, the Cuban legislature responded: “We reaffirm the disposition of the Government of Cuba, as expressed in the nationalization laws enacted over 35 years ago, with regard to an adequate and just compensation for the expropriated properties of citizens of the United States.”¹⁶ In taking this position, Cuba differentiates itself from early Soviet ideology, where nationalizations were seen as a return to the more natural state of communal properties, from which private ownership had been an immoral and temporary diversion.

¹⁶ Ley de Reafirmación de la Dignidad y la Soberanía Cubana, Article 2, December 24, 1996. Cited in Soraya Castro Marino, “Ideas Iniciales Sobre el Tema de las Compensaciones: Identificación de Líneas Generales de Trabajo,” unpublished draft, no date.

Why would Cuba see it in its national interest to honor the principle of compensation for the taking of private properties, even when taken in the interests of social development and national independence? Compensation settlements have several significant benefits to the payor nation, including enhancing its international reputation, bolstering state legitimacy, and deepening domestic tranquility, while avoiding compensation settlements yields negative consequences. In the Cuba example:

- Notwithstanding its revolutionary credentials, the Cuban government likes to present itself as a nation of laws, that abides by its constitutions and laws. For example, the *Gazeta Oficial*, Cuba's official digest of government pronouncements, regularly publishes laws and decrees replete with highly legalistic language.
- The 1940 constitution (Article 24), which the revolution initially proposed to restore, as well as subsequent constitutions, and the various early nationalization acts, generally authorized compensation for seized properties (with some exceptions, as for those persons associated with the Batista government).
- Importantly, Law 851 of July 6, 1960, which authorized the nationalization of the properties of U.S. nationals (in retaliation for the refusal of U.S.-owned refineries to refine crude oil from the Soviet Union) provided for compensation payments. These payments were to be arranged by means of 30-year bonds with two percent interest, to be financed from sugar sales to the United States, which the United States was already cutting as punishment for previous Cuban actions. However disingenuous the payment scheme, the law nevertheless acknowledged the compensation obligation.¹⁷ Similarly, the Agrarian Reform Law of May 17, 1959 provided for compensation via 20-year bonds with interest.
- Not wanting to be seen as a rogue nation, Cuba routinely espouses its adherence to international legal norms, a point highlighted by President Raúl Castro in his letter to President Barack Obama on restoring diplomatic relations.¹⁸ Of particular relevance here, Cuba actively participates in international commercial arbitration tribunals as established in contracts with foreign investors.
- Cuba has already negotiated bilateral settlements of outstanding property claims with other governments, including Canada (1980), Great Britain (1978), France (1967), Spain (1967), and Switzerland (1967).¹⁹ The agreed payments were not large; for example, the Canadian

¹⁷ For reviews of Cuban nationalization laws, see Rolando Anillo-Badia, "Outstanding Claims to Expropriated Property in Cuba," *Cuba in Transition* (Miami: ASCE 2011); Matias Travieso-Diaz, "Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba," *University of Pennsylvania Journal of International Economy and Law* 17, (1996); and Olga Miranda Bravo, *Nacionalizaciones y Bloqueo* (Havana: Editorial de Ciencias Sociales, 1996) whose annex includes excerpts from the key nationalization acts.

¹⁸ However, Cuba fails to ratify many UN human rights treaties, including, for example, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, among others.

¹⁹ Michael W. Gordon, "The Settlement of Claims for Expropriated Foreign Private Property between Cuba and Foreign Nations Other than the United States," *University of Miami Inter-American Law Review*, vol. 5, no. 3, (October 1973), pp. 457-470. Gordon notes that these various settlements did not disclose sufficient information to determine the relative percentages which the agreed upon payments represent in proportion to the total claims of the nationals of each country. (The Cubans have purposefully kept such information from the public record. Hence, one cannot posit a possible Cuban bargaining position based upon their previous settlements of claims with other nations.) Gordon also finds that the Cuban government sought commercial concessions as part of these accords. On the France-Cuba accord, see Burns H. Weston, *International Claims: Post-War French Practice* (Syracuse: Syracuse University Press, 1971).

agreement committed Cuba to pay \$850,000 as a global indemnity (with an initial installment followed by four semi-annual payments) to be distributed by the Government of Canada to its claimants.

- Interested in attracting foreign investors, the Cuban government recognizes that unresolved U.S. property claims, and associated U.S. legislation, raise a significant barrier to new capital inflows. For many non-U.S. multinationals, the Cuban market is too small to risk potential confrontations with the U.S. government or with U.S. claimants. As with U.S. sanctions more generally, the unresolved property claims, even when they do not forestall deals entirely, do raise the costs of doing business in Cuba, and hence prejudice Cuban economic development.
- In so far as Cuba wishes to restore normal commercial relations with the very large market immediately to its north, the outstanding property claims remain a significant barrier, legally, politically, and commercially.

On numerous historical occasions, Cuban diplomats have expressed their willingness to include U.S. property claims in bilateral negotiations. In their account of secret U.S.-Cuban negotiations during 11 U.S. administrations, *Back Channel to Cuba*, LeoGrande and Kornbluh record numerous occasions during which Fidel Castro, Ernesto “Che” Guevara, and senior Cuban envoys agreed to include the discussion of outstanding property claims in an agenda for negotiations.²⁰ Notably, in the immediate aftermath of the 1959 agrarian reform law nationalizing large estates, Castro assured the U.S. ambassador in Havana that he recognized Cuba’s obligation to pay compensation (albeit based on assessed values for tax purposes and to be paid with 20-year bonds).²¹ In his 1963 discussions with the U.S. journalist Lisa Howard, Castro repeated his readiness to discuss compensation for U.S. lands and investments.²²

Cuban Claims

“The compensation issue could be decided easily and quickly: simply offset U.S. claims with Cuban counter-claims! Or else the issue can drag on for years....”

—Senior Cuban Diplomat²³

During his joint press conference with Secretary of State John Kerry, on the occasion of the re-opening of the Cuban Embassy in Washington, D.C., Cuban Foreign Minister Bruno Rodriguez underscored Cuba’s claims:

²⁰ LeoGrande and Kornbluh, op.cit.

²¹ Ibid, pp. 21-22.

²² Ibid, p. 69.

²³ Author conversation with Cuban diplomat, June 2015.

“We have insisted that the total lifting of the blockade is essential to move on towards the normalization of relations, of bilateral relations, as well as the return of the illegally occupied territory of Guantanamo, as well as the full respect for the Cuban sovereignty, *as well as the compensation to our people for human and economic damages.*”²⁴

As Rodriguez’s statement suggests, Cuba has two categories of claims: economic damages from the long-standing U.S. economic sanctions, and personal injury damages sustained by Cubans killed or harmed by alleged U.S. hostilities:

Economic damages. In a 2015 report to the United Nations General Assembly, Cuba asserted that the accumulated economic damages from the U.S. economic sanctions had reached \$121 billion.²⁵ The annual report offers some estimates on sectoral damages but does not discuss methodology. An earlier 1992 Cuban statement detailed these estimated cumulative losses among others:²⁶

- \$3.8 billion for losses in the tourist industry
- \$400 million for losses in the nickel industry
- \$375 million for the higher costs of freighters
- \$200 million for the purchase of sugarcane crop equipment to substitute for U.S.-manufactured equipment
- \$120 million for the substitution of electric industry equipment

Personal injury damages. The Cuban government claims that U.S. “acts of terrorism against Cuba have caused 3,478 deaths and 2,099 disabling injuries.”²⁷ Examples of such alleged acts include:²⁸

- CIA-supported hostilities in Cuba resulting in 549 deaths between 1959-1965 alone;
- The Bay of Pigs invasion resulting in 176 deaths and over 300 wounded of which 50 were left incapacitated;
- The explosion of the French vessel *La Coubre* on March 4, 1960 in Havana Harbor, resulting in 101 deaths including some French sailors;

²⁴ U.S. Department of State, “Press Availability with Cuban Foreign Minister Bruno Rodriguez,” July 20, 2015, <http://www.state.gov/secretary/remarks/2015/07/245094.htm>.

²⁵ Republic of Cuba, *On Resolution 69/5 of the United Nations General Assembly entitled “Necessity of ending the economic, commercial and financial blockade imposed by the United States of America against Cuba,”* June 2015, <http://www.cubavsbloqueo.cu/sites/default/files/INFORME%20BLOQUEO%202015%20-%20EN.pdf>.

²⁶ As listed in Miranda Bravo, *op.cit.*, pp. 77-84.

²⁷ Bruno Rodríguez Parrilla, “Necesidad de poner fin al bloqueo económico, comercial y financiero impuesto por los Estados Unidos de América contra Cuba,” United Nations General Assembly 68th session, October 29, 2013, New York, New York, <http://www.cubaminrex.cu/es/intervencion-del-ministro-de-relaciones-exteriores-de-cuba-bruno-rodriguez-parrilla-en-el-68-periodo>.

²⁸ “Demanda del Pueblo de Cuba al Gobierno de Estados Unidos por Daños Humanos,” May 31, 1999, <http://www.cuba.cu/gobierno/DEMANDA.html>.

- The terrorist bombing of Cuban Airlines Flight 455 in 1976 killing all 73 persons on board including 57 Cubans;
- The September 11, 1980 assassination of Cuban diplomat Félix García Rodríguez in New York City;
- Numerous aggressions from the U.S. naval base in Guantanamo resulting in the deaths of Cuban citizens;
- Suspicions that the United States employed biological warfare to spread fatal dengue fever in Cuba

The economic embargo claim is likely to be rejected by the United States government. It could cite Article XXI of the Agreement of the World Trade Organization (WTO) and its “security exception” allowing member states to pursue “essential security interests.” Furthermore, the United States would hardly want to endanger its preferred instrument of international coercion short of the use of force, as employed most recently and so successfully against Iran. On the other hand, Cuba’s personal injury claims, while of a different nature than property claims, may have stronger standing: the United States has negotiated settlements with Libya and Iraq regarding claims of American citizens who had sued those countries for acts of terrorism resulting in personal death and injury claims.

In weighing its claims against the U.S. government, Cuba may want to consider two relevant historical examples, namely the Soviet Union and Vietnam. In the interest of reaching broader diplomatic objectives with the United States, both states set aside their initial counter-claims for reparations for injuries against their nationals attributed to hostile U.S. actions, even as these grievances were deeply rooted in the national consciousness.

In the 1933 Roosevelt-Litvinov Agreements, which opened normal diplomatic relations while concurring on future discussions of U.S. claims, the Soviet Union agreed to forego claims for damages done by U.S. troops dispatched in 1918 to aid the counter-revolutionary White Armies seeking to overthrow the Bolsheviks.²⁹

Similarly, Vietnam initially had sought to collect on a secret pledge by the Nixon administration, in the context of the 1973 Paris Peace negotiations, to provide \$3.25 billion in reconstruction assistance and repair for war damages. In response to Hanoi’s disregard of the 1973 accords when it sent troops into the South to liquidate the Republic of South Vietnam, and the unresolved Missing-in-Action/ Prisoners-of-War (MIA/POW) cases, in 1977 the U.S. Congress went on record as opposing

²⁹ Donald G. Bishop, *The Roosevelt-Litvinov Agreements: The American View* (Syracuse: Syracuse University Press, 1965).

bilateral and multilateral aid to Vietnam.³⁰ During the normalization negotiations with the Clinton administration, Hanoi dropped its demand for war reparations. The United States did, however, provide war-related assistance, in modest amounts, for such programs as clean-up of the Agent Orange (dioxin) defoliant used by the U.S. military, removal of unexploded ordinance and de-mining, and support for disabled persons.

³⁰ Congressional Research Service, *Vietnam's Future Policies and Role in Southeast Asia*, Report prepared for the Committee on Foreign Relations, United States Senate, April 1982, pp.65-66. Also see Richard E. Feinberg, "Principles and Power: The Treatment of Property Claims by Socialist Vietnam," forthcoming in the journal *Problems of Post-Communism*.

3. Claims of U.S. Nationals: Key Controversies

If both the United States and Cuba concur on the compensation principle—that governments can legitimately nationalize private properties in the public interest even as they are obligated to pay just compensation—many complex issues remain on the negotiating table. These outstanding issues could be negotiated in fairly short order if both governments perceive a prompt resolution to be in their overriding national interests. Alternatively, the negotiations could drag on for many years, as governments dispute a host of issues, ranging over potentially conflicting interpretations of diplomatic history, legal doctrines, and financial technicalities.

Among the key agenda issues: 1) Whether to recognize the FCSC rulings as a legitimate procedure; 2) Whether to accept or challenge the FCSC valuations of lost properties; 3) Whether to negotiate a lump-sum settlement; 4) Whether to establish procedures whereby some claimants could accept monetary compensation for their lost properties, or choose instead to “opt out” and select an alternative case-by-case solution; 5) Whether Cuba should recognize accumulated interest as awarded by the FCSC on its certified claims or whether to negotiate an alternative benchmark interest rate or other formula for partial payments; 6) Where to locate sources of compensation funds; 7) Whether the claims settlement should be framed within broader economic goals, addressing such issues as Cuba’s capacity to pay and the establishment of a more favorable environment for business investment and job creation on the island.

5,913 Claims, \$1.9 billion in Property Losses

In 1964 the U.S. Congress directed the Foreign Claims Settlement Commission (see Box 1) to determine the validity and amount of claims of U.S. nationals against Cuba based on losses resulting from the nationalization, expropriation, intervention, or other taking of properties between

BOX 1. The Foreign Claims Settlement Commission of the United States (FCSC)

The Foreign Claims Settlement Commission of the United States (FCSC) is an independent quasi-judicial agency situated within the U.S. Department of Justice. Established in 1954, the Commission replaced the War Claims Commission and the International Claims Commission. The Commission consists of three Commissioners, serving three-year terms, who are nominated by the President with the advice and consent of the U.S. Senate. The Commission employs a small staff of legal experts. By statute, the Commission's decisions on claims "are final and conclusive on all questions of law and fact, and are not subject to review by any official of the United States, or by any court."

The Commission's primary mission is to review claims of U.S. nationals against foreign governments, to rule on their legal validity and monetary ("compensable") value. The FCSC and its two predecessor commissions have undertaken 47 claims programs in which more than 740 claims were filed and nearly \$4 billion in awards were granted, including claims against the governments of (in alphabetical order): Albania, Bulgaria, China, Cuba, Czechoslovakia, Egypt, Ethiopia, East Germany, Hungary, Iran, Panama, Poland, Romania, the Soviet Union, Vietnam, and Yugoslavia. In a few instances, Congress has authorized the "pre-settlement adjudication" of claims before there were funds available to pay awards—including the Cuba case (as well as China, East Germany and Vietnam).

The FCSC certifies and determines the value of claims, but the U.S. Department of State, not the FCSC, takes the lead in negotiating claims with foreign governments. The U.S. Treasury, not the FCSC, is responsible for disbursing monetary rewards. As negotiations with foreign governments have often yielded amounts well short of the cumulative FCSC awards, the Treasury has distributed *pro rata* payments to claimants.

Source: FCSC, U.S. Department of Justice, *Annual Reports, 2014*; see also Sidney Freidberg [FCSC Commissioner], "A New Technique in the Adjudication of International Claims," *Virginia Journal of International Law*, vol. 10, no. 2 (1969), pp. 282-299.

January 1, 1959 (the triumph of the Cuban revolution) and October 16, 1964 (the program's authorization date).³¹ Wisely, Congress wanted the FCSC to collect, adjudicate and archive such claims while memories were fresh and documentary evidence more readily available, for use by the State Department in future negotiations with Cuba. When Congress authorized the program, there were no funds available to make payment on the claims, and Congress signaled it had no intention to appropriate funds for the purpose of paying such claims.

³¹ Title V (October 16, 1964) of the International Claims Settlement Act (ICSA) of 1949, as amended (22 U.S.C. § 1643).

Seven years later, on July 6, 1972 the FCSC completed its work, having vetted a total of 8,816 claims. The Commission's report noted that "The Cuban Claims Program was the most complex and challenging ever delegated to the Commission, both from a legal and administrative point of view, and it was the most interesting one as well."³² The Commission dismissed 2,905 claims on various grounds: the claimant failed to offer sufficient evidence of ownership; the claimant was not a U.S. citizen at the time the claim arose; or the claimant failed to demonstrate that the claim met the "continuing nationality" criteria, e.g., that the claim must have been held continuously by one or more U.S. nationals (in the case of a dual national, the FCSC follows the "dominant and effective nationality" rule). The Commission found 5,911 claims to be worthy of compensation ("compensable") with a principal value of \$1,851,057,358. In an unusual move, in 2005 Secretary of State Condoleezza Rice requested the FCSC to open a second Cuban Claims Program to review claims for properties nationalized after May 1, 1967 and that had not been reviewed during the initial Cuban Claims Program; just two additional claims were certified but one, by Starwood Hotels and Resorts (Sheraton and Westin chains) was valued at \$51.1 million, boosting total certified claims to \$1,906,479,883.³³

The certified claims are top-heavy in value. The largest ten claims account for \$960 million, or nearly half the total value while the largest 50 claims account for \$1.5 billion, or over three-quarters of the total value (Annex 1). Of the top ten certified claimants, five are sugar companies (North American Sugar Industries, United Fruit Sugar Company, West Indies Sugar Corporation, American Sugar Company, and Francisco Sugar Company). The other top five are, even today, major U.S. firms in their respective fields: the largest claimant by far, Cuban Electric Company, has a majority of its shares held by OfficeMax Inc.; the remaining four firms are MOA Bay Mining Company (now Freeport-McMoRan Inc.), ITT Corporation, Exxon, and Starwood Hotels and Resorts. Among the other top 50 corporate claimants are such name brands as: Texaco, Coca-Cola, Colgate-Palmolive, Boise Cascade, American Brands (formerly American Tobacco), Sinclair Oil, United States Rubber Company, F.W. Woolworth, Continental Can Company, Owens-Illinois Inc., Firestone Tire and Rubber Company, the Chase Manhattan Bank (now JPMorgan Chase), IBM World Trade Corporation, Swift and Company, the First National Bank of Boston, General Electric, Texas Petroleum, Goodyear Tire and Rubber, Procter and Gamble, First National City Bank (now Citibank), International Harvester (now Navistar International), General Motors, and Sears, Roebuck. The weightiness of this list of corporate giants—today and even more so at the time—is indicative of the breadth of U.S. business interests in Cuba in the 1950s. The Cuban revolution's sweeping nationalizations of these totems of U.S. capitalism sent a shockwave through the nation's business centers, and contributed to the determination of the U.S. government to overturn the regime in Havana.³⁴

³² FCSC, *Cuba Claims Program Final Report*, 1972, p. 71.

³³ FCSC, U.S. Department of Justice, *Annual Reports*, Cuba First and Second Programs.

³⁴ As well documented, most recently, in LeoGrande and Kornbluh, *op.cit.*

To be eligible for compensation under FCSC rules, a firm must be under continuous ownership by U.S. nationals (the “continuous nationality principle” of public international law). Over the years, it is likely that some of these firms and their assets, and others further down on the FCSC list of certified claims, have been transferred to non-U.S. citizens and hence would have been extinguished. Logically, before formal negotiations begin with Cuba, the FCSC should update the ownership of its inventory of Cuba claims: the total principal value of valid claims today could be materially less than the \$1.9 billion calculated primarily during the 1965-1972 review because some claims may have changed ownership in ways that disqualify them. However, “unfortunately the Commission is unable to revise its decision to reflect any succession in ownership of the Cuba claims as its authority to take such action expired when the Cuba claims program was completed in 1972. Accordingly, the Commission has not endeavored to determine the current owners of the claims.”³⁵

The certified corporate claims account for the lion’s share of the total claims in value, but the claims of individuals, while generally of much smaller financial magnitude, account for the large number of total claims. Claims of individual U.S. citizens—primarily for land, improved real properties, securities and mortgages, and “other” personal properties—total 5,014, even as their cumulative value is just \$229 million (Figure 1). Of these individual U.S. citizen claims, only 39 are larger than \$1 million each, of which only four surpass \$5 million each (Figure 2). The 5,014 citizen claims minus the 39 citizen claims larger than \$1 million each yields 4,975 individual claims with certified values of less than \$1 million. These 4,975 claims carry a cumulative value of just \$132 million.

Figure 1. Total Claims Corporate and Individual

	Claims	Amount (\$USD)
Corporate	899	1,677,280,771
Individual	5,014	229,199,112
Total	5,913	1,906,479,883

Source: Authors calculations based on Foreign Claims Commission of the United States, Cuban Claims Program Certified Claimants List (2009), <http://www.justice.gov/sites/default/files/fcsc/docs/ccp-listofclaims.pdf>.

As we shall see, this breakdown of claims—taking into account their skewed size (large and small) and nature of ownership (corporate versus individual)—suggests several possible solutions. Some 85 percent of the claims—5,014 of the total of 5,913—could be fully settled for the relatively small sum of \$229 million (excluding interest charges). If spread over, say, five or ten years, these payments could be reduced to just \$45.8 million (\$229/5) or \$22.9 million (\$229/10) per annum, modest amounts even for the capacity of the Cuban economy. The amount of payments to individual claim-

³⁵ E-mail communication with Jeremy LaFrancois, Chief Administrative Counsel, FCSC, July 9, 2015.

ants could be further reduced if payments to individual claimants were capped, at say \$1 million per claimant.³⁶ At the same time, corporate claims are heavily concentrated in the top 50 claimants; the design of satisfactory solutions for these firms—as will be suggested below—would be a leap forward toward a comprehensive settlement of U.S. property claims in Cuba.

Figure 2. Claims by Size

	Claims > \$1 Million USD	Total Amount for Claims > \$1 Million USD	Claims > \$5 Million USD	Total Amount for Claims > \$5 Million USD
Corporate	92	1,602,062,292	41	1,479,628,077
Individual	39	97,576,071	4	31,404,097
Total	131	1,699,638,363	45	1,511,032,174

Source: Author's calculations based on Foreign Claims Commission of the United States, Cuban Claims Program Certified Claimants List (2009), <http://www.justice.gov/sites/default/files/fcsc/docs/ccp-listofclaims.pdf>.

FCSC Methodology: Criticisms

In the Cuba case, the credibility of the FCSC is enhanced by its rejection of 2,908 claims (2,905 rejected in the First Cuba Program, 3 more in the 2005-2006 Second Cuba Program), or nearly one-third of those presented to it. Other claims were reduced in value; for example, the Commission reduced the certified losses of the Cuban Electric Company—the largest claimant (now held by Office Depot)—from the firm's proposed claim in excess of \$323 million to a final decision of just \$268 million. Overall, the adjudication process was not rushed. On the contrary, the FCSC took seven years, vetted each individual claim with some care, and turned to external experts for assistance. Furthermore, in the Cuba program, the Commission has been remarkably transparent in its decisions: it published a compendium of select cases to illustrate its decision rules;³⁷ and most recently electronically posted a complete index of all of its decisions, claim by claim, discussing the evidence presented by the claimant and the reasons behind the Commission's adjudications and valuations.³⁸ Researchers interested in viewing complete folders, with the full evidence presented by claimants or their legal representatives, can do so in the Commission's offices at the Department of Justice in Washington, D.C.

³⁶ For examples of capping or scaling compensation payments in other settings, see Anna Gelpern, "The Laws and Politics of Reprivatization on East-Central Europe: A Comparison," *University of Pennsylvania Journal of International Business Law*, vol. 14, no. 3 (1993), pp. 315-372.

³⁷ Foreign Claims Settlement Commission of the United States, "Claims Against Cuba – Lead Decisions," updated October 23, 2014, <http://www.justice.gov/fcsc/claims-against-cuba-lead-decisions>; for the final report on the Cuba program, see Foreign Claims Settlement Commission of the United States, *Section II Completion of the Cuban Claims Program Under Title V of the International Claims Settlement Act of 1949*, July 6, 1972, <http://www.justice.gov/sites/default/files/fcsc/docs/final-report-cuba-1972.pdf>.

³⁸ U.S. Department of Justice, "Completed Programs – Cuba," under "Index of Commission Decisions," <http://www.justice.gov/fcsc/claims-against-cuba>.

The Office of the Legal Adviser of the U.S. State Department has full confidence in the FCSC.³⁹ Yet, from the vantage point of foreign governments, the procedures of the Commission are subject to several important challenges. Most evidently, Commission procedures are *ex parte* and non-adversarial: the defendant (the Cuban government in this case) was not present and had no opportunity to question the assertions of the claimant, to examine and challenge the evidence presented by the claimant or its legal representatives, nor to present contradictory evidence. The Commission did not have access to Cuban property registries, nor was it able to conduct on-site visits. In Commission procedures, there is no external appeals process, either to a superior U.S. court or to an international tribunal.

Not surprisingly, other governments have taken issue with FCSC findings: a former State Department Deputy Legal Adviser and experienced claims negotiator has noted:

“In one negotiation, a foreign government systematically reviewed each of the [FCSC certified] U.S. nationals’ property claims , arguing that many of the claimed real properties did not exist at the locations asserted, that some had been sold by claimants, that some were properties in which a U.S. national did not have a beneficial interest at the time of taking, and so forth....In another negotiation, the foreign government argued that a series of the properties claimed were, in fact, owned by its own nationals—by persons who had established close relations with the U.S. claimants but had not transferred the properties in question to them.”⁴⁰

Another major issue derives from the Commission’s lawyerly, case-by-case approach. The Commission reviews each claim in isolation, and simply sums together all of the awards into an adjudicated total principal value. The FCSC judgments are based on asset values, whereas a nation’s capacity to pay is a function of its current production or foreign exchange earnings (past stocks versus current flows). The FCSC’s total principal value of all the claimants is arrived at independently of the nation’s current capacity to pay. In the Cuba case the claims date to the early 1960s, whereas the compensation would be made in the context of an entirely different Cuban economy. Today, Cuba faces a host of serious challenges as it seeks to bolster its international competitiveness and augment its capacity to earn foreign exchange.

³⁹ “It has established a solid track record.” Author interview with official of the Office of the Legal Adviser, U.S. Department of State, August 2014.

⁴⁰ Ronald Bettauer, book review, *The American Journal of International Law*, vol. 94, no. 4 (October 2000), pp. 810-812. Cuban lawyers have also noted the absence of their government from the FCSC proceedings: see Miranda Bravo, p. 70.

Valuation of Lost Properties

As in many nationalization disputes, including domestic cases, the thorniest issue is placing a value on the seized properties. As the FCSC itself recognized, for many claims the issue of valuation “proved to be a most difficult one to resolve.”⁴¹ To arrive at a fair market value as of the time of taking, the U.S. Congress has directed the Commission to honor “the principles of international law, justice and equity,” and in each case to apply the most appropriate method “to the property taken and equitable to the claimant including: i) market value of outstanding equity securities; ii) replacement value; iii) going concern value (which includes consideration of an enterprise’s profitability); iv) book value.”⁴²

Book value is especially controversial. The valuation can vary depending on the accounting principles employed. It may also be overly dependent upon the firm’s own account of its assets and liabilities. In pre-revolutionary Cuba, many firms understated “book value” in order to reduce their tax liabilities. For example, a Cuban scholar has asserted that a U.S. firm, Lone Star Cement, had declared its net assets (a financial concept similar to book value) as only \$1.6 million in 1959 for tax purposes, as compared to its much higher FCSC valuation of \$24.9 million.⁴³ When Fidel Castro signaled he might offer compensation based on reported tax returns, firms and the U.S. government reacted very negatively.⁴⁴

The various methodologies for calculating fair market value can yield radically different solutions.⁴⁵ Moreover, within each methodology, the choice of key assumptions (for example, reference points for interest rates, inflation, and discounted value) and other inputs will also produce sharply divergent quantitative outcomes. For example, when the international accounting firm Price Waterhouse (now PwC) was commissioned to place a value on the nationalized Julio Buitrago sugar company in Nicaragua in the early 1990s, it applied two different methodologies: discounted cash flow (or “on-going concern value”), which projected expected future cash flows and converted the cash flows into their present values using a discount rate in this case of eighteen percent judged to reflect the

⁴¹ FCSC, Cuba Claims Program, *Final Report*, p. 83.

⁴² International Claims Settlement Act of 1949 (ICSA), Title 22 § 1623 “claims.”

⁴³ As argued in Carlos A. Batista Odio, “Las Compensaciones por las Propiedades Estadounidenses Nacionalizadas en Cuba en el Marco del Conflicto con Estados Unidos,” paper presented to the Latin American Studies Association, Chicago, September 24-26, 1998.

⁴⁴ Cuban analysts point out that the U.S. Department of Commerce had estimated the book value of all U.S. firms at the end of 1959 at \$956 million, or roughly half of the FCSC valuations, as reported in *Survey of Current Business*, Table 3, at 22-23, August 1961. See Jesus V. Bu Marcheco, “Demandas de Propiedad Entre Cuba y Los Estados Unidos: Una Revisión de la Literatura,” mimeo., Havana (February 2014), p.7. See also Matias Travieso-Diaz, “Alternative Remedies in a Negotiated Settlement of the U.S. Nationals’ Expropriation Claims Against Cuba,” *University of Pennsylvania Journal of International Economy and Law*, vol. 17, no. 2 (1996), p. 662, fn. 16.

⁴⁵ For various discussions on valuation methodologies, see Richard B. Lillich (ed.), *The Valuation of Nationalized Property in International Law, Volumes I-IV* (Charlottesville: The University Press of Virginia, 1972, 1972, 1973, 1987); Chittharanjan F. Amerasinghe, “Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice,” *The International and Comparative Law Quarterly*, vol. 41, no.1 (January 1992), pp. 22-65; and Charles Brower and Jason Brueschke, *The Iran – United States Claims Tribunal* (The Hague: Martinus Nijhoff Publishers, 1998).

riskiness of those cash flows; and the liquidation value (similar to depreciated replacement value), based upon the price that could be achieved through an orderly sale of all assets. The two methodologies yielded values of \$5-9 million and \$12 million, respectively.⁴⁶

The extreme difficulties facing the Commission in applying these various methodologies in the Cuba case where access to evidence and location were constrained by circumstances are evident in reading through the claims' files. For example, take Cuba Claims Case 0485, Standard Fruit and Steamship Company. Initially, the Commission's preliminary award offered full book value, oddly excluding depreciation even though it was noted in the claimant's presentation. Then, as a result of expert testimony and additional materials, the Commission found that "the oral hearing warranted a determination as to value based upon factors other than book value," yielding a much higher valuation of the waterfront property in question. The preliminary proposed award was \$732,701.47, the final certified loss was for \$1,930,125.91.

Or take the claim of Starwood Hotels and Resorts (Claim CU-2-001), certified for \$51 million under the Second Cuba Claims Program in 2005-2006. Starwood argued in favor of calculating the "value of the land to a willing buyer and a willing seller in post-Castro Cuba." In the absence of an active commercial real estate market in Cuba, Starwood persuaded the Commission to base its evaluation of its lost properties on comparative real estate values around the Caribbean basin, including Puerto Rico, Costa Rica and Cancun.⁴⁷

To further complicate valuation, the Congress added this curious qualification: the fair market value should be calculated "without regard to any action or event that occurs after the taking" ...nor should it "reflect any diminution in value attributable to actions which are carried out, or threats of action which are made, by the foreign government with respect to the property before the taking."⁴⁸ That is, the Commissioners should extract themselves from the historical context in which the property was, or would have been, in existence. The Congress might consider this legal myopia "most...equitable to the claimant." However, the real market value of the property would most probably have been diminished, perhaps considerably, if the actual revolutionary context—before and after the taking—were taken into account.

⁴⁶ Price Waterhouse, "Ingenio Julio Buitrago (Montelimar): Diagnostic, Valuation and Privatization Strategy Report," December 4, 1992, contract funded by USAID. As discussed in Richard E. Feinberg, "Nicaraguan Democracy and the Post-Conflict Resolution of Property Claims," 2015, unpublished manuscript.

⁴⁷ In contrast, in valuing claims in the German Democratic Republic, the Commission found that "it was unable to apply the familiar concept of fair market value due to its obvious absence in a communist society where controlled rents often don't meet the actual cost of building upkeep. The Commission, likewise, was forced to reject the suggestion that it value property in the German Democratic Republic as if it were located in West Germany, since property cannot be valued separate and apart from its location." FCSC, "Final Report on the German Democratic Republic Claims Program," 1981, https://edit.justice.gov/sites/default/files/pages/attachments/2014/08/27/final_report_on_the_german_democratic_republic_claims_program.pdf.

⁴⁸ International Claims Settlement Act (ICSA), Title 22 § 1623 (a)(2)(B).

In this regard, a counsel to the Cuban government has written that “no premium on book value should be allowed for going-business value, in circumstances in which a change in government economic policies has resulted in a doubtful earning capacity for the nationalized entity....Going-business value is a very substantial portion of many of the losses found by the Commission to have been suffered.”⁴⁹ The author cites as examples the Cuba claims of the Colgate-Palmolive Company and the Coca-Cola Company. In a similar vein, Chilean legal scholar Francisco Orrego Vicuña argued that valuation criteria must take into account local circumstances: it would be an error to impose valuation standards which “are not even remotely related to the complex economic and political realities surrounding an act of nationalization. The extreme example is perhaps that of a claim based on the application of market value for the valuation of property taken by a revolutionary government.”⁵⁰

These potential criticisms of the FCSC—its one-sided procedures, questionable selection of methodologies, ahistorical paradigm, and in the Cuba case, lack of location access and failure to update its claims decisions to ensure consistency with its own “continuous nationality” criteria—would give the Cuban government a plethora of arguments, should it choose to re-open the Commission’s valuations. Whether the Cuban government would want to do so, however, would be an important tactical decision, as it could hugely delay the negotiations. But in arguing for other concessions, the Cubans could correctly point out that the Commission’s methods were imperfect at best, and that the \$1.9 billion awards number (plus the Commission’s six percent simple interest awards) should not be treated as sacrosanct. Rather, as the Commission itself notes, the certified awards are referred to the Secretary of State “for use in future negotiations” with the Cuban government.⁵¹ This is precisely the logical conclusion of Ronald Bettauer, the veteran U.S. claims negotiator:

“Thus, there can be strikingly different views on each side of the negotiating table as to which claims are valid under international law and what the appropriate valuation of a valid claim should be under international law....when the two sides have different perceptions of the facts and of how to apply the law to them, the only way to reach agreement is through a negotiated compromise—with respect to both the terms of the agreement and the amount of the settlement.”⁵²

⁴⁹ Victor Rabinovitz, “The Impact of the Cuban Nationalizations on Compensation and Valuation Standards,” in Illich, op.cit., vol. 4, chapter IV, p. 153.

⁵⁰ Francisco Orrego Vicuña, “The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives,” in Lilich (ed.), op.cit., vol. 3, p.132, footnote 4.

⁵¹ FCSC, *Annual Reports*, Cuba – Second Program.

⁵² Ronald Bettauer, op.cit.

4. Frameworks for Reconciliation

Lump-sum Settlements: Historical Cases

Since World War II, lump-sum settlements have been the preferred mechanism—for the United States and other developed nations—for the settlement of bulk nationalizations of alien properties. In a lump-sum settlement, the two governments negotiate a total amount of financial compensation that is transferred in a lump-sum or global indemnity to the plaintiff government which in turn assumes the responsibility to distribute the transferred monies among its national claimants. For the *demandeur*, such arrangements commend themselves for several weighty reasons: greater efficiency in coping with large numbers of claims; enhanced consistency in the administration and adjudication of claims; promoting fairness among claimants in setting criteria for evaluating claims and distributing awards; and upholding professionalism and integrity in the national claims commission (in the case of the United States, the FCSC). National commissions and the associated lump-sum settlements may also provide the *demandeur* with greater leverage over the defendant, and make it more difficult for the defendant government to adopt a “divide and conquer” strategy. Perhaps even more importantly if sometimes less visibly, lump-sum negotiations allow the two governments to address other matters, such as broader investment and trade relations; in some cases, the lump-sum settlement may even be wrapped into a strategic deal, such as the normalization of bilateral relations.

Morally, lump-sum settlements avoid any admission of wrong-doing. Neither state is called upon to admit, at least not explicitly, the validity of the accusations of the other state, nor to make politically painful apologies. The final accord is published but the internal calculations, the trade-offs across claims and counter-claims, are not revealed to the public, and may not even be fully apparent to the negotiators themselves.

As a rule, lump-sum settlements have found that “adequate” payment, as called for in the formula enunciated by Cordell Hull, amounted to less-than-full compensation. A seminal study of 69 lump-sum settlement agreements among nations found that partial payment of principal has been the rule, often without interest.⁵³ (The authors cautioned, however, that lump sum settlements have often been linked together with *quid pro quos* “which are well-nigh impossible to assess.”⁵⁴). The Commission’s standard policy of adding interest charges derives not from Congressional authority but rather from its own judgment, as the Commission noted in its report on its Cuba Claims Program: “Although Title V of the (Foreign Claims Settlement) Act did not expressly provide for the inclusion of interest on the amount allowed, the Commission concluded that interest should be added in a certifiable loss in conformity with principles of international law, justice and equity, and should be computed from the date of loss to the date of any future settlement.”⁵⁵

The FCSC has adjudicated a wide variety of claims that can be broken into four broad categories: Eastern Europe, the Communist giants (the Soviet Union, China), oil exporters, and select others (Vietnam, Germany).⁵⁶ After World War Two, and drawing upon blocked financial assets, funds were established to compensate claimants for losses in Eastern Europe; for claims in Poland, Bulgaria, Hungary and Romania, *pro rata* payments covered an (unweighted) average of 45 percent of the FCSC-adjudicated claims awards, without interest.

From the perspective of the claimants, settlements with the two Communist giants, the Soviet Union and China, were even less successful, as broader geopolitical interests seemingly out-weighed the interests of individual property claimants: frozen assets of the Soviet Union allowed for *pro rata* payments of merely 9.7 percent; in 1979 the People’s Republic of China (PRC) agreed to pay \$80.5 million into a China Claims Fund (with an initial payment followed by five annual payments) which allowed for *pro rata* payments to U.S. claimants of 39 percent of the value of their claims as certified by the FCSC. In contrast, settlements with oil exporters Iran and Libya have allowed for full payment of principal and some interest.

In the *sui generis* cases of Vietnam and Germany, Vietnam (1995) agreed to apply its assets frozen by the U.S. government to pay claimants 100 percent of principal and 80 percent of interest. As fortune would have it, the Vietnamese financial assets in the custody of the U.S. government were sufficient to fully cover those payments, so from the Vietnamese perspective the transaction was a

⁵³ Burns H. Weston, Richard B. Lillich, and David J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (New York: Transnational Publishers, Inc, 1999), p.95.

⁵⁴ *Ibid*, p.86.

⁵⁵ FCSC, *Cuba Claims Program*, op.cit., p.76.

⁵⁶ All figures in this section on country settlements are from Foreign Claims Settlement Commission, *Annual Reports*, especially Section VI, Table B, “International Claims Settlement Act of 1949 (Awards and Payments).”

wash. The German (1992) agreement, to pay up to \$190 million, which covered 100 percent of principal and approximately 50 percent of interest, was pertinent in two respects. First, U.S. negotiators accepted less than the full 6 percent interest, as the German negotiators balked at adding interest charges to compensation, just as the German government had refused to do in resolving property claims in East Germany following reunification. In the words of an official of the German government, “we avoided the ‘fictional calculations’ of what properties might have earned, had there been no World War II, no German Democratic Republic.”⁵⁷ Also of note, in determining its interest awards on German claims, the FCSC made explicit that interest was to be simple, not compound interest, in accordance with previous Commission decisions.⁵⁸

A common criticism of lump sum settlements negotiated by the State Department is that they give too much weight to diplomatic interests, resulting in the claimants receiving considerably less than the values of their lost properties.⁵⁹ However, from the claimant perspective, the recent settlements with Vietnam and Germany and with the oil exporters are more heartening. These more favorable settlements reflect the debtor nation’s capacities to pay (in the Vietnam case, the existence of frozen assets), and certainly in the Vietnam and German cases, favorable diplomatic contexts.

Claims of U.S. Nationals: Solutions

For reasons stated at the outset of this paper, physical restoration of properties will be exceptional; with the passage of so much time, many properties will have been transformed beyond recognition and the potential for conflicts with current occupants would be too great. As long as the Cuban Communist Party remains in power, their core political interests militate against a visible restoration of the old order. Rather, let us consider two potential solutions: 1) A simple lump-sum settlement for all claimants; and 2) a two-tiered solution, whereby corporate claimants can choose either to seek creative bargains, or join individual claimants in a lump-sum settlement. A variant of this option would be to place an “equity” cap on payments on individual claims, for example at \$1 million per claim.

⁵⁷ Author interviews, German Ministry of Finance, Berlin, September 21, 2015. However, in its domestic restitution program, Germany did adjust property values, originally based on earlier tax assessments, and applying complex multipliers, for exchange rates and price inflation.

⁵⁸ FCSC, “Final Report on the German Democratic Republic Claims Program,” 1981, op.cit.

⁵⁹ See Brice M. Clagett, “Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal,” in Illich (ed.), op.cit., vol. 4, pp. 31-97. Nevertheless, the courts have confirmed the presidential powers to settle claims against foreign governments that take property belonging to U.S. citizens without compensation. Under this “doctrine of espousal,” the negotiations conducted by the Department of State are binding on the claimants, the settlement constituting their sole remedy. See *Dames and Moore v. Regan*, U.S. Supreme Court, 1981; and *Shanghai Power Company v. the United States*, U.S. Claims Court, 1983.

Solution 1: All-Inclusive Lump-Sum Settlement

Following the many precedents for a lump-sum settlement, the United States could settle with Cuba to pay an agreed upon amount to the U.S. Treasury Department, and the Treasury would then distribute the proceeds *pro rata* to the claimants, perhaps with a minimum payment to all claimants (say \$10,000). One variant would permit the Cuban government to pay in installments over a number of years, following the precedents of agreements that the United States has signed with other countries and that Cuba previously negotiated with other claimant governments.⁶⁰

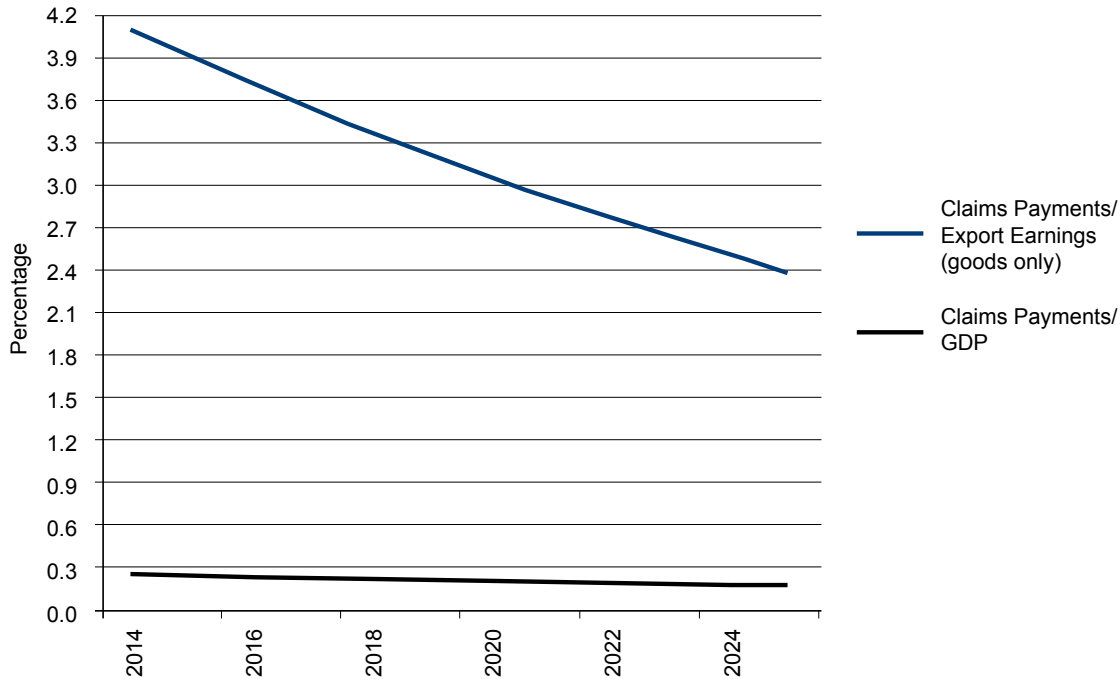
Let us assume that Cuba agreed to pay the full principal (but no adjustment for interest rates or price inflation) of \$1.9 billion in claims over a ten-year period, or approximately \$200 million per year (payment either in annual installments or via sovereign bonds with layered maturities, the advantage to bonds being the potential for a secondary market). How heavy a burden would these payments be on the Cuban economy? Let us take two common ratios to consider debt burdens: the ratio of debt service to exports, and the ratio of debt service to gross domestic product (GDP). If payments began in 2018, the \$200 million would consume approximately 3.4% of Cuba's earnings from its merchandise exports (Figure 3). If service exports were included in the denominator, the ratio would be even smaller.⁶¹ As a percentage of Cuba's GDP, the \$200 million payment would consume 0.2 percent. Assuming even modest growth in Cuba's exports and GDP, the debt ratios would decline over time, falling by 2025 to about 2.4 percent of merchandise exports and under 0.2 percent of GDP. These additions to Cuba's foreign debt service should, by themselves, be well within Cuba's capacity to pay without overly burdening the economy. Moreover, once the FCSC reviews claims for "continuous" nationality, it will find that some have been extinguished, and the Cubans may present cogent arguments that call into question the validity of some claims or that call for reducing their values. But even without those adjustments, it is simply not correct, as so often stated, that Cuba is too poor to manage payments on some \$2 billion of claims if stretched out over a reasonable timeframe and interest payments are excluded.

However, if interest charges accumulated since 1960 were added on, the debt burden would become more prejudicial to Cuba's economic prospects. As noted above, when it issued each claim, the FCSC awarded an interest rate of 6 percent from 1960 to the date of settlement. If simple interest (non-compounded) at 6 percent were accrued through 2014, interest charges would reach \$6.1

⁶⁰ For example, the Cuban settlement with France allowed for 11 equal semi-annual payments. See Weston, *op.cit.*, pp. 193-195.

⁶¹ Earnings from service exports, such as medical services, are excluded here, because they have involved a large but non-transparent subsidy element, especially for services provided to Venezuela, and which may not continue. That makes it very difficult to estimate the value of Cuba's service exports in the future.

Figure 3. Impact of Claims Payments on Cuban Economy, 2014-2025



Note: Assumes \$200 million in annual claims payments and 5 percent growth per annum in export earnings (goods only) and 3 percent growth per annum in GDP.

Source: Author's calculations based on ONEI, Anuario Estadístico de Cuba 2014, Tables 5.18 and 8.3.

billion, which if added to the principal of \$1.9 billion would yield a total claims charge of \$8 billion (about 10 percent of Cuba's GDP, if made in a single payment). Alternatively, if one selects the annual Treasury-bill rate, as reflecting the zero risk implied in the exercise, the accrued interest charge would then be \$5.1 billion (Figure 4), \$1 billion less than the FCSC-proposed interest bill but still burdensome for the Cuban economy. For example, even for the lower Treasury-bill rate of interest, the claims payment, if extended over a 10-year period, of principal plus interest/merchandise export earnings ratio in 2018 would be about 10 percent, and about 1 percent of GDP (Figure 5).

Thus, it would not be surprising if the Cuban government strongly resists heavy interest charges. Such substantial payments would require burdensome sacrifices. Furthermore, after decades of being steeped in socialist ideology, many Cubans are not accustomed to the idea—so evident to a capitalist society—that capital deserves to earn interest income. In addition, informed Cubans are aware that earlier lump-sum settlements entered into by the U.S. government with other nations allowed for interest payments well below the FCSC 6 percent benchmark. The Cuban government would be hard pressed to explain such a “market-driven” settlement to its population. Moreover, a punishing debt service would be counterproductive for both nations—making it more difficult for the Cuban economy to become a vibrant economic partner for U.S. traders and investors.

In summary, economic logic suggests that Cuba could manage principal payments of \$1.9 billion if extended over a 10-year timeframe, but is likely to resist the inclusion of accrued interest payments on both economic and political grounds. The Cubans will be able to reference the history of claims settlements: many lump-sum payments have provided for only partial payment of interest or the exclusion of interest payments entirely; a FCSC Commissioner, Sidney Friedberg, examined 11 lump-sum settlements (in Eastern Europe, Soviet Union, and China) where the Commission had initially awarded interest charges but in only one case did the final negotiated agreement allow for the actual payments of any interest.⁶²

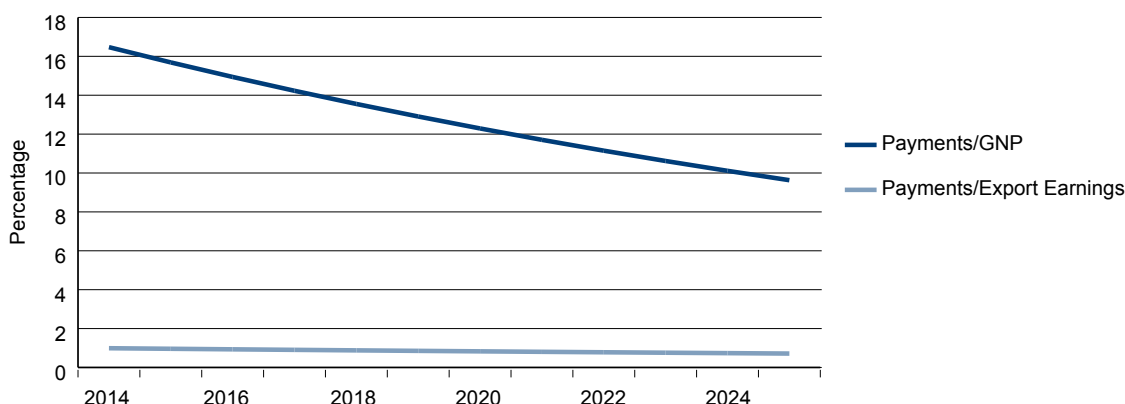
Figure 4. Simple Interest Rates on FCSC-Certified U.S. Claims

Interest Rate	Amount (\$ billion USD)
6% (FCSC)	6,108,489,281
6-Month Treasury Bill	5,105,216,193

Note: Accumulated interest on \$1,851,057,358 (as adjudicated by FCSC), 1960-2014. This table does not include the claim of Starwood Hotels & Resorts Worldwide, Inc. which was adjudicated only in 2006.

Source: Authors calculations based on Foreign Claims Commission of the United States, Cuban Claims Program (2009) <http://www.justice.gov/fcsc/claims-against-cuba>; U.S. Federal Reserve System.

Figure 5. Impact of Interest Charges on Cuban Economy 2011-2025



Note: Assumes \$800 million in annual claims payments (\$200 million + \$600 million accrued interest) and 5 percent growth per annum in export earnings (goods only) and 3 percent growth per annum in GDP.

Source: Author's calculations based on ONEI, Anuario Estadístico de Cuba 2014, Tables 5.18 and 8.3.

Solution 2: The Two-Tiered Solution

Some claimants, however, might not be satisfied with a principal-only payment spread over many years. So a two-tiered solution should be considered. As noted earlier, the 5,913 claims certified by the FCSC can be divided as between corporate claims, which are smaller in number and highly concentrated, and individual claims which are many in number and generally much smaller in size. These differences in magnitude suggest that the two categories of claims might be handled separately.

⁶² Friedberg, appendix, p. 299.

First, consider the certified claims held by individuals. The 5,014 individual claims total about \$229 million. If we examine them further, we notice that the FCSC valued only 39 of these individual claims at over \$1 million, of which only four claims were valued at over \$5 million. As a matter of equity among the claimants, and as occurred in some Eastern European property claims settlements following the end of the Cold War,⁶³ suppose for illustrative purposes individual claims payments are capped at \$1 million per claim (thus adversely affecting 39 claims), reducing claims compensation by \$59 million (\$98 million minus \$39 million in claims capped at \$1 million per claim). The holders of those larger individual claims might protest, but it could be argued that they were still receiving a non-negligible (“non-derisive” in legal terminology) percentage of their claim. At that point, compensation on individual claims would be about \$171 million (\$229 million minus \$59 million). If Cuba agreed to such a lump-sum payment, to be distributed by the U.S. Treasury by this formula of up to \$1 million per claim, all of the 5,014 individual claims would be resolved in one blow.

The 899 corporate claims are heavily concentrated: the top 10 corporate claims are valued at nearly \$1 billion, the top 50 at \$1.5 billion. Keep in mind that some of these claims have probably not been continuously held by U.S. citizens or firms majority-owned by U.S. citizens and hence are no longer compensable according to FCSC rules. Furthermore, the Cuban government might challenge the procedures and valuations of some of the awards. The corporate claimants could be given the opportunity to be included in a lump-sum settlement—albeit possibly facing an equity hair-cut to limit the burden on Cuba and to ensure a minimum payment to the smaller claimants—or to “opt out” of the general settlement and instead seek alternative remedies.⁶⁴ As a precedent, the 1992 agreement with Germany allowed claimants to elect either to accept payment of their FCSC awards or to waive their right to payment in order to pursue claims for their properties under German law.⁶⁵

Based on previous experiences, especially in post-Cold War Eastern Europe, but also taking into account the specific circumstances of Cuba—the nation’s past history and future promise—an assortment of business development rights could be designed and structured so as to propel forward Cuban economic development. Implementation of these concepts would require important changes

⁶³ On the Eastern European experiences, see Anna Gelpern, *op.cit.*; Mark Blacksell, Karl Martin Born and Michael Bohlander, “Settlement of Property Claims in Former East Germany,” *Geographical Review*, vol. 86, no. 2 (1996), pp. 198-215; Mark Blacksell and Karl Martin Born, “Private property restitution: the geographical consequences of official government policies in Central and Eastern Europe,” *The Geographical Journal*, vol. 168, no. 2 (2002), pp. 178-190; Frances H. Foster, “Restitution of Expropriated Property: Post-Soviet Lessons for Cuba,” *Columbia Journal of Transnational Law*, vol. 34, no.3 (1996), pp. 621-656.

⁶⁴ See Matias F. Travieso-Diaz, “Alternative Remedies in a Negotiated Settlement of the U.S. Nationals’ Expropriation Claims Against Cuba,” *University of Pennsylvania Journal of International Economic Law*, vol. 17, no. 2 (1996), pp. 659 – 690; and Rolando Anillo-Badia, *op.cit.*

⁶⁵ FCSC, “Final Report of the German Democratic Republic Claims Program,” https://edit.justice.gov/sites/default/files/pages/attachments/2014/08/27/final_report_on_the_german_democratic_republic_claims_program.pdf,” and “Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Settlement of Certain Claims,” article 3, 1992.

in U.S. laws and regulations that restrict U.S. investments in Cuba. To allay concerns among U.S. investors regarding the Cuban legal system, Cuba would need to authorize legislation enabling these various types of transactions, and perhaps even tailored resolutions guaranteeing the property rights of specific investments.

Cuba could consider offering corporate claimants this menu of options:

- **A “voucher”—a form of debt-equity swap**—authorizing the claimant’s right to an equity investment in a specified type of project. The voucher or coupon could be applied to the equity investment, against future tax liabilities, or possibly relief from certain performance requirements. The investment could be up to 100 percent ownership or could specify a joint venture with a Cuban state enterprise partner. The development instrument would also specify that the U.S. claimant would inject additional capital and modern technology into the project, and possibly the creation of new jobs, to ensure net benefits to the Cuban economy. Such development instruments would also require the U.S. firm to uphold high-quality international standards in areas such as labor rights, environmental stewardship, and public health. If used for tax liabilities, the voucher could be registered with the Cuban government and be marketable on a secondary market.⁶⁶
- **A “right to operate”** or open a business or business franchise, whether to service the domestic Cuban market or for exports. The Cuban market remains highly protected, such that firms that are allowed entry often enjoy oligopolistic advantages in their market niches. The Cuban government could ensure such market advantages for a fixed timeframe.
- **A final project authorization** of a claimant’s proposed investment in the new Mariel development zone, which enjoys special tax advantages, and is generally oriented toward export markets. To date, the Cuban government has approved only a few such projects, despite its insistence that it very much wants foreign investment to create good jobs and earn badly needed foreign exchange. This option might, if the Cuban government permits, allow claimants to short-circuit the frustratingly lethargic project approval process.
- **A “preferred acquisition” right**, which would entitle the claimant to pass to the front of the line in competitive bidding, for example for an attractive beachfront property, the formation of a joint venture with a state enterprise, the provision of power to the state energy grid, or entry into the telecom service sector. Again, the U.S. firm would be obliged to inject new capital and technology and its business plans would be subject to Cuban government approval.
- **Sovereign bonds** issued by the Cuban government. The bonds could be structured in various forms, for example 10-year bonds could promise payments in equal annual or semi-annual installments beginning the sixth year, bearing a market-rate of interest. Nicaragua offers a positive precedent.⁶⁷ Following the ouster of the Sandinistas in the 1990 elections,

⁶⁶ I am indebted to attorney Pedro A. Freyre for this suggestion.

⁶⁷ Richard E. Feinberg, “Nicaraguan Democracy and the Post-Conflict Resolution of Property Claims,” unpublished manuscript.

the new capitalist-oriented government resolved approximately one quarter of the property claims (irrespective of the nationality of the claimant) in favor of restitution or the provision of lands of similar value, the remaining majority of claimants receiving financial compensation via 15 to 20 year bonds. By end-2013, the Nicaraguan government had issued over \$1.2 billion in indemnity bonds of which about \$400 million had been allocated to U.S. citizens, including dual national Nicaraguan-Americans. Initially, bond prices fell steeply in the secondary market but eventually recovered most of their face value as successive governments—conservative and leftist—faithfully honored their obligations to bond holders.

- **Restoration of properties to former owners**, but only in exceptional cases and where local conditions permit. More likely, some claimants might be offered substitute investment opportunities in vacant locations of comparable value. Pro-development conditions, requiring injections of fresh capital and technology, would also apply.

Corporations pursuing these options could be given a deadline to negotiate their business deals, perhaps one to two years, before which end date they could choose instead to be included in the lump-sum settlement. After that date, if the U.S. firm chose not to participate in the lump-sum settlement, the U.S.-Cuban accord would specify that the U.S. firm would have to forfeit its claims. Nevertheless, the firm would still be free to attempt to negotiate business arrangements with the Cuban government.

Cuban law encourages foreign direct investment, up to 100 percent equity ownership in some situations, but in practice each investment application must pass through an opaque and tortuously slow official approval process, and in nearly all cases foreign firms must partner with Cuban state-owned enterprises, often with minority shares.⁶⁸ For the above suggestions to work in practice, Cuba would have to facilitate the investment approval process, and allow for majority foreign ownership. Furthermore, Cuban engagement with the international financial institutions could not only help improve the overall business climate and promote public-private partnerships, but could also make available official equity guarantees for some investors.

Unlike in post-Cold War Eastern Europe, for the foreseeable future Cuba is unlikely to offer significant opportunities to purchase shares in state enterprises undergoing full or partial privatization. The Cuban government has spun off some small service sector firms, such as restaurants, beauty salons, and taxi services, but authorities have rejected wide-spread privatization of “strategic” state-owned enterprises. Nor has an equities market been established, further limiting options for the two-tiered claimants.

⁶⁸ Richard E. Feinberg, *The New Cuban Economy: What Roles for Foreign Investment?* (Washington, D.C.: Brookings Institution, 2012).

A Claims Resolution Committee

To negotiate development rights, discussions between interested U.S. corporate claimants and the Cuban government could proceed either individually and in isolation, or else could be coordinated under an umbrella bilateral claims resolution committee. For each claim's case, the Cuban government representatives could include experts from the relevant sectoral ministries, and several cases could proceed simultaneously in separate chambers. The committee would be assisted by experts in project design and evaluation, including Cubans, U.S. citizens and mutually agreed-upon third-country nationals. The committee would seek to facilitate business deals; it would not have arbitration powers. Both corporate claimants and Cuba would have positive incentives to find win-win outcomes: the U.S. firms would seek investments whose projected income streams could well exceed the face value of their claims, while Cuba would simultaneously erase claims while importing investment capital currently in very short supply.

Legal experts familiar with the Iran-United States Claims Tribunal warn against the establishment of such a formal arbitral mechanism for the Cuba case. Initiated in 1981 under the Algiers Accords that freed the 52 American embassy hostages in Tehran, and established in the absence of diplomatic relations between the United States and Iran, the Hague-based Tribunal drags on, running up significant expenses for its nine arbitrators and staff. Such formal mechanisms run the risk of opening the gates to contentious replays of historical grievances, and of loosening the governments' control over the process. Also, the Iran-U.S. Tribunal has had the critical advantage of large sums of money from an initial award (\$1 billion of Iran assets frozen in the United States) and from the unending stream of Iranian petroleum earnings—conditions not present in the Cuba case.

But the less formal umbrella claims committee proposed here would still provide some useful architecture for facilitating deals in the mutual interest of the claimant firms and Cuba. It would have the virtues of a prescribed timeframe and lower expenses. It could also provide some degrees of transparency and consistency across negotiations. The dangers of corruption—always a risk in such circumstances—would be mitigated. When deals are signed, their essential components should be made public.

5. Compensation Funds

Once the claims negotiations commence in earnest, we will have a better idea as to the size of the required compensation fund. Conceivably, the opening Cuban position—to negate U.S. claims with Cuba’s counter-claims and call it a wash—could prevail, and no compensation funds would be required. Or Cuba could propose reverting to its law 851 (1960) whereby it nationalized many properties of U.S. nationals and offered compensation via long-term bonds bearing 2 percent interest, contingent upon the removal of U.S. trade barriers (the valuation of U.S. properties would have to be agreed upon). Alternatively, the two parties could turn to the two-tiered approach suggested here, whereby major corporate claimants might opt for alternative business rights rather than accept a *pro rata* monetary compensation, and the remaining compensation requirements for smaller claimants (individual and some corporate) would be modest (assuming little to no interest payments). It is also conceivable that the United States insists upon full compensation (albeit with partial or no interest payments) and that Cuba drops its counter-claims, as Vietnam did—if the claims settlement is wrapped in a broader policy package of paramount interest to Cuba.

Whatever the final claims agreement, there are several potential sources of compensation funds including some creative Cuba-specific financial transactions:

- **The Cuban government.** As shown above, Cuba’s anticipated export revenues are sufficient to support even a full compensation (without interest payments) settlement, provided that payments are extended over time. Cuba might tap taxes levied on future U.S. investors in Cuba, possibly imposing an earmarked surtax on net profits or on gross revenues, the logic being that these firms are benefiting from an economic normalization made possible by the claims settlement.
- **Revenues on normalization-related activities.** U.S. travelers could pay either a modest entrance fee or a portion of their landing rights fees could be so earmarked to the compensation fund, the logic again being that they are benefiting from an economic normalization facilitated by the claims settlement. If we project two million U.S. citizen visits per year, a

\$50 “user’s fee” tax would raise \$100 million a year. However, the travelers might object that ordinary citizens are paying for transfers to wealthy corporations and individual investors.

- **The U.S. Congress (1): replenishment of frozen assets.** In a break from long-standing international legal practice, in the 1990s the U.S. Congress empowered U.S. domestic courts to dispense frozen Cuban financial assets to “victims of terrorism.” (See Box 2). Florida courts proceeded to empty the coffer of frozen Cuban assets in favor of the alleged victims and their families. Cuba may well demand that the approximately \$200 million in formerly frozen funds be replenished by the U.S. government.⁶⁹ Conceivably, with support from the U.S. claimant community, the Congress might oblige.
- **The U.S. Congress (2): fresh appropriations.** Current law prevents the Congress from appropriating funds for claims settlements but Congress could revise the law. However, anticipated objections to public “bail-outs” of rich corporations are likely to foreclose this option.
- **The U.S. Executive Branch: commercial bank penalties.** The U.S. Department of Justice received \$3.8 billion from the penalties paid by BNP-Paribas Bank for violating U.S. sanctions against Sudan, Iran, and Cuba (see Box 3). The Executive Branch is considering applying these funds to judgments awarded by U.S. domestic courts to plaintiffs judged to have been harmed by Cuba, even if the cases fall outside of the timeframe of the BNP-Paribas violations. Similarly, the State Department could consider whether these monies could be used to compensate Cuba for harm caused by U.S. actions (Cuba’s claims). Mechanically, taking the ratio of Cuba-related transactions to monies available to the U.S. government (\$3.8 billion divided by \$8.8 billion) and multiplying by \$1.7 billion, the resulting \$734 million might be allocated to Cuba-related awards. Could these monies also be applied to compensate FCSC-certified claimants for lost properties?
- **The International Financial Institutions.** Cuba remains the outlier, the only nation (other than North Korea) not a member of the International Monetary Fund and World Bank.⁷⁰ Helms-Burton instructs the U.S. executive directors in the IFIs “to oppose the admission of Cuba as a member of such institution until the President submits a determination that a democratically elected government in Cuba is in power.”⁷¹ However, the U.S. does not possess a veto over IFI membership decisions; if the U.S. Treasury were to signal that it was not staunchly opposed, the IFI board might well act favorably upon a Cuban membership application—but Cuba must take that first step. Similarly, Cuba could seek membership in the Inter-American Development Bank. More immediately, the Andean Development Corporation (CAF), where the U.S. is not a member, has entered into conversations with Cuba, to begin technical assistance and possibly modest financial aid and could help Cuba underwrite a claims settlement.

⁶⁹ In a note of January 10, 2007 making reference to the frozen assets, the Cuban Foreign Ministry asserted: “Cuba will never renounce its right to demand full responsibility from the United States government for the theft, to the last penny, of funds that were legitimately ours.” Cited in Soraya Castro Marino, *op.cit.*

⁷⁰ Richard E. Feinberg, *Reaching Out: Cuba’s New Economy and the International Response* (Washington, D.C.: Brookings Institution, 2011), pp.63 -86.

⁷¹ Public Law 104-114 (1996), Section 104.

Box 2. “Default Judgments”: The Liquidation of Cuba’s Frozen Assets

Courts in Florida have issued extraordinarily large awards to the families of alleged victims of Cuban state terrorism. For example, families of persons killed when Cuban aircraft shot down two Brothers to the Rescue planes in 1996 were awarded \$188 million in damages; the daughter of a CIA pilot who was shot down over Cuba during the Bay of Pigs invasion and subsequently executed was awarded \$87 million. Cumulative awards (not including accrued interest) amount to over \$1 billion (not including one award for \$3 billion), most of which remain outstanding. Following the Cuban revolution, the United States froze about \$200 million in Cuban government financial assets which the courts have directed to be liquidated in partial satisfaction of these “default judgments”—so-called because the government of Cuba has refused to appear in court.

Customary international law historically afforded sovereign states complete immunity from being sued in the courts of other states (Foreign Sovereign Immunities Act, FSIA, 1978). However, in 1996 in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) Congress amended the FSIA to allow U.S. courts jurisdiction when the foreign state has been designated a state sponsor of terrorism. At the time, the executive branch strongly opposed these Congressional initiatives, including allowing access to the frozen accounts: it argued that such assets have historically been used as leverage in diplomatic negotiations. The Administration also contended that numerous other U.S. nationals had legitimate (and prior) claims against these countries (mainly Cuba and Iran). FCSC-certified claimants have objected to the application of Cuba’s frozen assets to these “default judgments” but without success.

Source: Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism*, Report for Congress, Updated August 8, 2008, especially p. 53, footnote 206 for a summary of default judgments; Southern District Court of New York, Aldo Vera, Jr., v. Republic of Cuba, Case 1:12-cv-01596-AKH Document 666 Filed 08/22/14; Robert L. Muse, “Adverse Consequences of Court Judgments Against Cuba,” National Press Club, December 1, 2011.

Box 3: BNP-Paribas Bank Pays \$8.8 billion for Sanctions-Busting

In 2014 agencies of the federal government and New York collected \$8.83 billion in penalties from BNP-Paribas Bank, the fourth largest bank in the world, for violating U.S. sanctions on behalf of transactions involving three countries—Sudan, Iran, and Cuba—on the U.S. list of state sponsors of terrorism. The amount transferred to the federal government was \$3.8 billion. Of the sanctions-busting transactions, BNP-Paribas processed \$1.7 billion in financial transactions with sanctioned entities located in Cuba. The U.S. Department of Justice has announced that it “is exploring ways to use these forfeited funds to compensate individuals harmed by the sanctions regimes of Sudan, Cuba, and Iran,” from 2004 to 2012, the time period relevant to BNP-Paribas’s conduct in the case, and has asked interested individuals to submit information and an explanation as to why the harm should be considered.

Source: Cyrus R. Vance, Jr., “BNP Paribas Bank Pleads Guilty, Pays \$8.83 Billion in Penalties for Illegal Transactions,” New York County District Attorney’s Office, June 30, 2014, <http://manhattanda.org/press-release/bnp-paribas-bank-pleads-guilty-pays-883-billion-penalties-illegal-transactions>; “United States v. BNP Paribas S.A. (S.D.N.Y.),” <http://www.usvbnpp.com/>; author communications with Robert L. Muse.

Thus, there are a number of potential sources, some traditional and some more creative and specific to the Cuban opportunity, for generating compensation funds. Over the medium term, if the number of U.S. visitors and investors grow, and if Cuba joins the IFIs, these various sources could generate some \$673 million in annual flows—sufficient to permit full compensation with significant interest on the 5,913 U.S. claims if stretched over a decade (Box 4).⁷² In the more likely case that negotiations reduce Cuba’s compensation burden, the two governments could select among these various potential sources of compensation funds.

Box 4. Compensation Funds: Potential Sources

Source	Amount (USD)
Cuban Government	\$200 million per year
Revenues on related business activities	\$50 million ⁱ
Revenues on normalization-related activities	\$100 million per year ⁱⁱ
U.S. Congress replenishment of frozen Cuban assets	\$200 million ⁱⁱⁱ
U.S. Executive Branch funds from BNPP penalties	\$734 million ^{iv}
International Financial Institutions	\$250 million ^v

- i 1 percent on gross revenues of \$5 billion, as of year five
- ii Tax on U.S. travelers
- iii \$20 million per year over 10 years
- iv \$73 million per year over 10 years
- v As of year three, once Cuba joins the IFIs

⁷² While providing liquidity, loans from the IFIs would require repayment, typically amortized over the medium to long run.

6. A Grand Bargain?

In their opening meetings, the U.S. and Cuba will present their conflicting claims. One possible outcome is protracted and contentious negotiations. But there is a much more promising alternative approach: to take advantage of the very size and complexity of the conflicting claims and to make their resolution the centerpiece of a grand bargain that would resolve some of the other remaining points of tension between the two nations, and embrace an ambitious, forward-looking development strategy for Cuba.

There are precedents for such a grand bargain, in such cases as the Soviet Union, Vietnam, and China.⁷³ The Roosevelt-Litvinov agreements—negotiated in the White House directly between the U.S. president and Soviet foreign minister—laid the foundations for renewing diplomatic relations, and one might argue for the World War II alliance that defeated the axis powers. Similarly, the claims settlement with Vietnam was one piece of a much broader normalization process between the two once bitter adversaries—two nations that now label themselves strategic allies. Pointedly, at the August 14, 2015 flag-raising ceremony at the U.S. Embassy in Havana, Secretary of State John Kerry remarked:

“And last week, I was in Hanoi to mark the twentieth anniversary of normalization of relations between the United States and Vietnam. Think about that. A long and terrible war that inflicted indelible scars on body and mind, followed by two decades of mutual healing, followed by another two decades of diplomatic and commercial engagement. In this period, Vietnam evolved from a country torn apart by violence into a dynamic society with one of the world’s fastest growing economies.”⁷⁴

⁷³ “[the] settlement of outstanding claims against the PRC was a *sine qua non* of normalized relations between the two countries.” *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983).

⁷⁴ John Kerry Remarks at Flag Raising Ceremony, Havana, Cuba, July 20, 2015, <http://www.state.gov/secretary/remarks/2015/08/246121.htm>.

In recent U.S.-Cuban relations, there is also the precedent of the December 17, 2014 announcements, when the return of Alan Gross and a CIA asset for three Cuba spies was wrapped in the larger story of normalizing diplomatic relations, and on the U.S. side, the relaxing of certain travel and economic restrictions.

The two-tiered settlement strategy outlined above allows for U.S. firms to re-engage in Cuba. At the same time, some individual claimants and their families harbor deep affections for Cuba and would probably be willing to contribute to its future development. Cuba could consider special incentives to regain this legacy of the island's past, and for interested claimants to match their awards with re-investments in new projects.

With the right incentives, Cuba could also attract the capital and talents of many of the two million Cuban-Americans resident in the United States. With their separate legal issues and emotional charges, and the vastness of their numbers, the property claims of Cuban-Americans will require their own treatment (more on this in a subsequent paper). But the settlement of U.S. property claims might include a general framework for the future consideration of issues of concern to Cuban-Americans – with the overarching goal being reconciliation of the diaspora with the homeland.

The settlement of U.S. claims could be wrapped in a package of economic opportunities for Cuba. Importantly, the United States could further relax its economic sanctions (amending or repealing Helms-Burton), providing more trade and investment opportunities – and the capacity for Cuba to earn the foreign exchange needed to service debt obligations. In turn, Cuba will have to accelerate and deepen its economic reforms, to offer a more attractive business environment for investors and exporters. Politically, the Cuban government could present a significant softening of the U.S. embargo as a victory, offsetting any concessions made in the claims negotiations. A comprehensive package might also be more attractive to the U.S. Congress; formal Congressional consent would enhance the measures' legitimacy and durability and help to close off any court challenges, should some claimants be unsatisfied with the final settlement.

It is time for Cuba to enter the international financial institutions and the United States should no longer stand in the way. The IFIs can play a vital role, in providing capital and connections to the global marketplace. The IMF and World Bank are also deep repository of knowledge on transitions from central planning to more market-driven economic systems.

The claims settlement agreement between the United States and Hungary contained an annex where it was agreed, inter alia, that the Hungarian Government intended to settle outstanding dollar

bonds through direct talks with bondholders; and that the United States would seek authority from its legislature to accord Most-Favored Nation (MFN) treatment to Hungary, subject to separate negotiations.⁷⁵ In a grand bargain, the United States could offer to work with Cuba and other creditors to renegotiate Cuba's outstanding official (Paris Club) and commercial (London Club) debts on terms that take into account Cuba's capacity to pay.⁷⁶ The U.S. government continues to carry on its books \$36.3 million of Cuban obligations to the U.S. Export-Import Bank (Ex-Im Bank), which could be addressed within the Paris Club framework.⁷⁷ The United States could also agree to reconsider remaining trade and investment restrictions.

At this stage, it would be too much to expect agreement on a detailed development strategy for Cuba. But a process could be put in place whereby Cuba would work with its many international partners, including the United States, to forge a twenty-first century development model that preserves the social gains of the revolution but that also raises labor productivity and living standards. Under President Raúl Castro, Cuba has initiated economic reform and the international community can accompany it by adding its expertise and resources. It would not be too much for the claims settlement talks, if they agree on a two-tiered strategy, to include a discussion of the business climate, and what additional steps Cuba needs to take to attract badly needed foreign investment. As strict socialist property relations are gradually replaced by a more hybrid economic system, Cuba will need to design and implement new property regimes that promote individual initiative but that also encompass land-use, housing, natural resources and other regulatory oversight protective of the public interest and consistent with sustainable and equitable growth.

The strategic goals in a massive claims resolution process must be political: to heal the deep wounds of past conflicts, to lay foundations for peaceful coexistence and the non-violent resolution of disputes, to avoid jeopardizing fiscal balances and crippling debt burdens, to build investor confidence and international reputation, and to help render the Cuban economy more open and competitive. These vital goals will not always be fully convergent with the more traditional, legal objective focused narrowly on the rights of property claimants. In designing and implementing solutions, as claimants bang on doors and demand attention, policy makers should not lose sight of their overriding purposes. In the interests of both Cuba and the United States, the twentieth-century trauma of massive property seizures should be transformed into a twenty-first century economic development opportunity.

⁷⁵ *State Department Digest* 1973, p.337.

⁷⁶ Cuba and the Paris Club creditor governments have agreed to renegotiate debts of \$15 billion, which include accumulated principal and interest. Cuba has already restructured its debt with Japanese commercial creditors, Mexico and Russia, each time obtaining reductions of 70 percent to 90 percent in what was owed in exchange for extended payment plans. Marc Frank, "Cuba and Paris Club members agree on debt total: \$15 bln," Reuters, June 8, 2015, <http://www.dailymail.co.uk/wires/reuters/article-3115888/Cuba-Paris-Club-members-agree-debt-total--15-bl.html#ixzz3cV1cQuoz>.

⁷⁷ U.S. Department of the Treasury Foreign Credit Reporting System, "Table 5: FCE to Sovereign and other Foreign Official Obligors by Region and Country," available at: https://fcrs.treas.gov/FCRS_PublicSite/.

Annex: Top 50 Certified U.S. Corporate Claims

	Name of Claimant	Amount of Loss Certified (\$)
1	Cuban Electric Company	267,568,414
2	North American Sugar Industries, Inc.	97,373,415
3	MOA Bay Mining Company	88,349,000
4	United Fruit Sugar Company	85,100,147
5	West Indies Sugar Corp.	84,880,958
6	American Sugar Company	81,011,240
7	ITT as Trustee	80,002,794
8	Exxon Corporation	71,611,003
9	The Francisco Sugar Company	52,643,438
10	Starwood Hotels & Resorts Worldwide, Inc	51,128,927
11	International Telephone and Telegraph Co	50,676,964
12	Texaco, Inc.	50,081,110
13	Manati Sugar Company	48,587,848
14	Bangor Punta Corporation	39,078,905
15	Nicaró Nickel Company	33,014,083
16	The Coca-Cola Company	27,526,239
17	Lone Star Cement Company	24,881,287
18	The New Tuinucu Sugar Company	23,336,080
19	Colgate-Palmolive	14,507,935
20	Braga Brothers, Inc.	12,612,873
21	Boise Cascade Corporation	11,745,960
22	American Brands, Inc.	11,679,902
23	West India Company	11,548,959
24	Sinclair Oil Corporation	10,216,645
25	Burrus Mills, Incorporated	9,847,100
26	Pan-American Life Insurance Company	9,742,800
27	United States Rubber Company, Ltd.	9,523,892
28	Pingree, Sumner, Estate of	9,272,668
29	F. W. Woolworth Co.	9,188,256
30	Havana Docks Corporation	9,179,701
31	Continental Can Co.	8,906,810
32	Owens-Illinois Inc.	8,039,240
33	Brothers of the Order of Hermits of St.	7,885,099
34	Firestone Tire & Rubber Co.	7,649,180
35	The Chase Manhattan Bank, N.A.	7,461,468
36	Carl Marks & Co., Inc.	7,333,000
37	IBM World Trade Corporation	6,449,434
38	Baragua Industrial Corp. of New York	6,280,722

	Name of Claimant	Amount of Loss Certified (\$)
39	Swift & Company	5,953,393
40	The First National Bank of Boston	5,904,941
41	General Electric Company	5,870,437
42	Libby, McNeill & Libby	5,713,617
43	Texas Petroleum Co.	5,143,433
44	The Goodyear Tire & Rubber Company	5,118,762
45	Procter & Gamble Company	4,996,256
46	First National City Bank	4,973,029
47	International Harvester Company	4,589,423
48	Macareno Industrial Corp. of New York	4,145,316
49	General Motors Corporation	3,806,648
50	Florida Industrial Corp. of New York	3,749,751
	Total	1,505,888,500

Source: Foreign Claims Commission of the United States Cuban Claims Program (2009)
<http://www.justice.gov/sites/default/files/fcsc/docs/ccp-listofclaims.pdf>

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