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Tierras Sin Dueños: The Effect of Cuba’s Foreign Investment Scheme on United States’ Certified Property Claims

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In the early 1990s, rapid economic and political change in Cuba was predicted, resulting in great speculation from U.S. companies holding certified claims to property Fidel Castro had confiscated at the beginning of the 1959 Revolution. A similar assumption was made when Castro announced his long overdue retirement this past February. Two days later, the Wall Street Journal published an article highlighting the Cuban government’s plan to turn the island into a “hotspot” for the “capitalist sport” of golf. The premise behind such a surprising statement from the leftist government lies in Cuba’s desperation for an infusion of cash into its lagging economy. Worried about the decline in tourism compared to places like the Dominican Republic, Raúl Castro, Cuba’s new President, is pushing foreign investment in golf resort communities. The projects consist of hundreds of villas and apartments overlooking a golf course and surrounded by marinas for wealthy foreigners’ boats. One small problem stands in the way however, Cuba does not recognize the right to buy or sell property for profit. In order to make the project work and encourage wealthy foreigners to invest in Cuba, the communist

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1 Larry Luxner, U.S.-Cuba Litigation Keeps D.C. Attorney Robert Muse Busy, CUBANEWS, Dec. 2005, at 8 [hereinaftter Luxner, U.S.-Cuba Litigation]. In February of 1996, the Cuban air force shot down two civilian planes piloted by the “Brothers to the Rescue,” a well-known anti-Castro group. This hostile act inspired the birth of the Cuban Liberty and Democratic Solidarity Act or Helms-Burton, aiming to defeat the communist dictator once and for all. As the Act sought to restrict foreign investment and trade until the point of complete economic deprivation, many speculators erroneously believed that Castro’s days were numbered and Cuba would become democratic. See DONNA RICH KAPLOWITZ, ANATOMY OF A FAILED EMBARGO: U.S. SANCTIONS AGAINST CUBA 180-82 (Lynne Rienner Publishers 1998).

2 Tom Brown, Thorny Property Rights Dispute Looms Over Cuba (Feb. 21, 2008), http://www.reuters.com/article/GCA-Cuba/idUSN2125218720080221; see also Ana Radelat, Settlement of U.S. Claims Against Cuba Unlikely as Long as Fidel Stays in Power, CUBANEWS, Feb. 2005, at 1 (discussing the various roadblocks to settling U.S. property claims caused by the rocky relationship between the two governments).


4 Id. Some of the world’s leading construction and architecture firms involved are Foster + Partners from London and Bouygues SA from France. Both have drawn up plans to construct 18-hole golf courses and resorts in Cuba. Id.

5 The quasi-legal mechanism used by most Cubans to upgrade their residences is called the permuta. The permuta is a type of barter system, coupled with government forms, fees, and inspections of course. The underground scheme allows one party to swap houses with another party, sometimes even compensating those who give up a better property with money. See Marc Lacey, With a Wink and a Whisper, Cuba’s Housing Market Booms, N.Y. TIMES, Jan. 28, 2008, at A1.
government will have to allow investors to acquire limited property rights through the use of a seventy-five year lease.6

What do golf resorts and limited property rights in Cuba mean? It certainly doesn’t mean that the United States will be lifting the embargo and resuming trade with Cuba anytime soon.7 While the settlement of property claims are highly anticipated by U.S. companies and expatriated Cuban Nationals alike, the amount of the claims and the hostility between the United States and Cuba are so great that it has blocked any chance of settlement. Additionally, the U.S. embargo against Cuba imposes severe limitations for those who want to settle.8 As such, these seized assets remain an obstacle to normal economic relations with Cuba. Meanwhile, Cuba is ready to do business despite the U.S. embargo, but with whom? Cuba’s revised foreign investment law permits limited forms of property ownership through joint ventures with the Cuban government or a Cuban-owned enterprise.9 Realizing Cuba’s potential as the largest market in the Caribbean, businesses in the United States are anxious to become a part of the flourishing Cuban economy. Nevertheless, they are held back by inefficient and burdensome foreign policy designed to cater to a small group of Castro’s opponents in the United States.10

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6 Córdoba, supra note 3.
7 See Luxner, U.S.-Cuba Litigation, supra note 1. “[T]here’s never been a resumption of U.S. trade with an embargoed nation – China, East Germany, Vietnam are all examples – without first a settlement of outstanding property claims.” Id.
8 See Radelat, supra note 2, at 2.
9 See Michael Buettner, Cuba Today: Ready to do Business Despite U.S. Embargo, TAMPA BAY BUS. J., Nov. 14, 1997. These reforms of course only apply to foreigners interested in investing in the country; Cuban citizens are still not allowed to sell their homes or even start their own businesses. Id.
This comment seeks to analyze the current trend in foreign investment in Cuba and its effects on the potential settlement of U.S. certified property claims. In order to do this, it is helpful to examine the history of Cuba’s real property system and foreign investment scheme, as well as to understand the complex property dispute that is the cause of an embargo spanning nearly half a century. Section III examines the social and economic conditions that may impede settlement altogether or at least induce a settlement that is unique to this highly politicized situation. Section IV goes on to evaluate how Cuba might settle the certified property claims should that day ever arrive. Furthermore, this article will present a unique alternative for settling the property claims that will benefit both Cuba and U.S. commercial interests.

I. Cuba’s Foreign Investment Scheme

Contrary to the world’s current perception, there are two different Cubas, a socialist Cuba and a capitalist Cuba. An excellent way to illustrate this conundrum is by examining Cuba’s property and foreign investment systems. The current constitution recognizes property rights. In fact, Cuba has the highest home ownership rate in the Western Hemisphere. While real estate cannot be bought or sold to turn a profit, a complex yet booming quasi-legal housing market does exist. In addition, contrary to what popular rhetoric contends, Cuba’s Foreign Investment Law, allows for 100 percent foreign ownership of businesses in certain sectors, real estate being one of them. Recognizing the above, Cuba has provided a system of land tenure for foreign

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11 This comment will only focus on the U.S. commercial claims, but it is worth noting that there are other components to the confiscation of property in Cuba at the beginning of the Communist Revolution that are beyond the scope of this article. Those include topics such as the future system of property rights after the fall of communism in Cuba, expatriated Cuban nationals’ claims to expropriated property, and residential property claims in general.
13 *Id.; see also supra* note 5.
14 Ashby, *Cuban Real Property, supra* note 12.
investors, ultimately increasing capital investment in the island. Not completely devoid of its socialist roots however, the real property holding scheme both bolsters and legitimates the Castro regime through its complete disregard for the rule of law.\textsuperscript{15}

\textbf{a. The Legal Framework of Real Property Law in Cuba 1898-1992}

After Cuba liberated itself from Spain in 1898, its first constitution was enacted in 1901. Within a takings clause, the 1901 constitution recognized the right of an individual to own private property.\textsuperscript{16} The next landmark in Cuban property law did not occur until the enactment of its 1940 constitution, which followed a period of political instability and eight different constitutions. The 1940 constitution limited foreign ownership of property and guaranteed property rights for citizens. Additionally, Article 24 allowed the expropriation of property only after a judicial determination of just cause, a finding of public purpose, and of course, the payment of just compensation.\textsuperscript{17} Article 87 of the constitution laid out a broad concept of private property based on its social function.\textsuperscript{18} Unfortunately, the 1940 constitution was suspended in March 1952 when Fulgencio Batista overthrew the democratically elected government. While many of the constitutional provisions were later reinstated, Articles 24 and 87 were not.\textsuperscript{19}

\textsuperscript{15} See Hans de Salas del Valle, \textit{Caveat Investor: Realities of Doing Business in Cuba}, CUBA FOCUS, Aug. 20, 2007, at pt. I. The lack of an impartial legal system has left investors without legal remedies for disputes arising from confiscated property or breach of contract. The only recourse that remains is an international dispute mechanism such as arbitration, but this would likely be a waste of time as Cuba heeds to nobody. \textit{Id.}

\textsuperscript{16} Ashby, \textit{Cuban Real Property}, supra note 12, at 124. “Nadie podrá ser privado de su propiedad sino por autoridad competente y por causa justificada de utilidad pública, previa la correspondiente indemnización. Si no procediese este requisito, los jueces y tribunales ampararán y, en su caso reintegrarán al expropiado.” 1901 CONST. DE LA REPUBLICA DE CUBA, art. 32.

\textsuperscript{17} 1940 CONST. DE LA REPUBLICA DE CUBA, art. 24.

\textsuperscript{18} Ashby, \textit{Cuban Real Property}, supra note 12, at 125. “El Estado cubano reconoce la existencia y legitimidad de la propiedad privada en su más amplio concepto de función social y sin más limitaciones que aquellas que por motivos de necesidad pública o interés social establezca la ley.” 1940 CONST. DE LA REPUBLICA DE CUBA, art. 87.

\textsuperscript{19} Ashby, \textit{Cuban Real Property}, supra note 12 at 125.
Nonetheless, despite the lack of constitutional protections, Cuba still had a well developed real property system for 1950s standards, comparable to that of the United States’ today.\(^{20}\)

After Castro’s government took over in 1959 it passed the Fundamental Law of the Republic, which modified and reinstated most of the 1940 constitution. One of the reinstated provisions was Article 24.\(^{21}\) A primary goal of the Revolution was the reform and redistribution of property\(^{22}\) and so, over the next five years Castro made amendments to the Fundamental Law in relation to agrarian and urban property. The proceeding Agrarian Reform Law\(^{23}\) limited the total amount of land that could be owned by an individual, expropriating the additional amount exceeding that limit. The expropriated land was then redistributed amongst landless farm workers who were given actual legal title to their properties instead of usufruct rights.\(^{24}\) The residential reform counterpart or the Urban Reform Law of 1960 ended the free market for buying and selling residential property while at the same time extending home ownership to a broader segment of the Cuban population.\(^{25}\)

\(^{20}\) An excellent example of the sophistication of its property laws can be found in the condominium laws. Cuba’s 1952 condominium laws contained sections relevant to co-ownership of common elements, mutual easements through, the right to use common elements, and restrictions on the right to lease or sell the underlying property. Antonio R. Zamora, *Real Estate Investments in Cuba: Back to the Future*, 11 FLA. J. INT’L L. 539, 545 (1997) [hereinafter Zamora, *Back to the Future*].

Two other important areas of real property law stemming from colonial times were also well developed by the 1950s in Cuba, real estate mortgage laws and the registry of property. The mortgage laws allowed summary procedures in the execution of mortgages, and mortgages were also incorporated into the condominium laws. *Id.* at 545-46.

\(^{21}\) Ashby, *Cuban Real Property*, supra note 12, at 126.

\(^{22}\) *Id.* Before Castro took over less than three thousand corporations or individuals owned seventy three percent of Cuba’s arable land. Seventy percent of Cuban farmers were tenant farmers who leased the land through the payment of a fixed percentage of their agricultural output. *Id.*


\(^{24}\) See Ashby, *Cuban Real Property*, supra note 12, at 126-28.

\(^{25}\) *Id.* at 129. The Urban Reform Law expropriated all rental properties and offered them for sale to the tenants at a fixed price established by the state. Mortgages on urban properties were also cancelled, and the mortgagors were to make principal payments only to the state. Essentially, the law left all housing occupants as they were, while changing their legal status. *Id.* at 129-30.
Despite the Marxist undertones of the 1976 constitution, the rights to personal property were preserved through Article 22.\textsuperscript{26} However, title to residential property refers to the residential structure only rather than the underlying land (which belongs to the state).\textsuperscript{27} From 1984 to 1988, Cuba, the only communist political system which encouraged private ownership of homes and personal property, enacted a Housing Law that gave all Cubans the right to own the home in which they lived.\textsuperscript{28} Similar to previous reforms in Cuba, four years later, the free market in residential property ended and severe restrictions were again placed on residential sales.\textsuperscript{29} Around the same time, a new Civil Code was enacted, the Civil Code of 1987. Neither condominiums, mortgages, nor the registry of property were mentioned in the new code. What was mentioned with respect to real estate though, were the many forms of acquiring real property, like through a lease or buy/sell contract, as well as the various ways in which title to those properties could be held.\textsuperscript{30}

\textbf{b. Foreign Investor’s Property Rights}

The collapse of the Soviet Union and the Eastern Bloc in 1992 shattered Cuba’s economy.\textsuperscript{31} As a result, Cuba was forced to choose between isolation and reform; it chose insertion into the global economy. In order to accomplish market-based reforms the Cuban

\begin{itemize}
\item \textsuperscript{26} “Se garantiza la propiedad personal sobre los ingresos y ahorros procedentes del trabajo propio, sobre la vivienda que se posea con justo título de dominio y los demás bienes y objetos que sirven para la satisfacción de las necesidades materiales y culturales de la persona. Asimismo, se garantiza la propiedad sobre medios e instrumentos de trabajo personal o familiar que no se emplean para explotar el trabajo ajeno.” 1976 CONST. DE LA REPUBLICA DE CUBA, art. 22.
\item \textsuperscript{27} Ashby, \textit{Cuban Real Property}, supra note 12, at 130.
\item \textsuperscript{28} \textit{Id.} at 131. When the housing law was enacted only 50 percent of Cubans owned their homes. By 1988 that number had risen to 87 percent. \textit{Id.} at 132.
\item \textsuperscript{29} \textit{Id.} at 131.
\item \textsuperscript{30} See Zamora, \textit{Back to the Future}, supra note 20, at 545-46.
\item \textsuperscript{31} See Antonio R. Zamora, \textit{Cuba’s Business Enterprises: How Business is Conducted on the Island}, 15 FLA. J. INT’L L. 345, 352-53 (2003) [hereinafter Zamora, \textit{Cuba’s Business Enterprises}]. In the 1970s and 1980s the Cuban economy was synched to the economy of the Soviet Bloc and as such was heavily subsidized. \textit{Id.} at 351. After the collapse of the Soviet Union, Cuba’s national income dropped 25 percent, foreign trade dropped 75 percent, and gross national product fell 34 percent. \textit{Id.} at 352-53.
\end{itemize}
government recognized the need for foreign investment. Accordingly, the 1976 constitution was amended to allow foreign entities to take equity positions in certain sectors of the Cuban economy, like real estate and tourism. One of the most important reforms regulating participation of foreign entities in Cuban real estate is The Foreign Investment Act of 1995 (Law 77). Law 77 provides greater security and legal guarantees for foreign investors. The Law allows foreigners to acquire ownership in “(a) housing and residences and other structures destined for private residences or tourism activities of persons who are not permanent residents in Cuba; (b) housing or offices of foreign companies; and (c) real estate development for use in tourism.” Legal protection of investments is also covered by Law 77, which provide guarantees from expropriation without just compensation, protection against claims of third parties, the right to transfer ownership to other foreign investors, and the right to transfer invested capital and earned profits abroad.

For real estate development purposes, under section (c) of Law 77, three types of foreign investment are allowed in Cuba: international association contracts, joint ventures or mixed

32 See Ashby, Cuban Real Property, supra note 12, at 133-34.
34 Ashby, Cuban Real Property, supra note 12, at 135.
35 LEY NUMERO 77, LEY DE LA INVERSION EXTRANJERO, ch. 6, art. 16, Gaceta Oficial de la Republica de Cuba [Gaceta Oficial] Extraordinary Ed. No. 3, Sept. 6, 1995, 33 I.L.M. 331 (1996). Under this new law, even United States citizens are allowed to purchase land in Cuba. Unfortunately, it is the United States’ laws that prohibit them from doing so. Other important aspects of Law 77 include: the Law refers to the buying of the structure and not the land (which belongs to the state), developers may get basic usufruct rights to use land for anywhere from twenty-five to fifty years, and permanent residents may not acquire real estate as individuals. See Ashby, Cuban Real Property, supra note 12, at 135-36.
companies, and totally foreign-owned companies.\footnote{Zamora, \textit{Cuba’s Business Enterprises}, supra note 31, at 355.} Most investments generally take the form of a joint venture between a Cuban commercial company\footnote{Id. at 355.} and the foreign corporation. There are more than 400 joint ventures operating in Cuba today. The main countries which took advantage of these opportunities are Spain, Canada, Italy, France and the United Kingdom. Another common trend has been the joint venture between a foreign corporation and a state enterprise.\footnote{See id. at 356.} While totally foreign-owned companies are allowed under Law 77, very few have been formed. Additionally, this type of legal entity is not expected to become a valid option in the Cuban foreign investment scheme, mostly because the government favors the participation of Cuban companies in the venture.\footnote{Id. at 355.} Approval of investments greater than ten million dollars and those involving 100 percent of capital owned by foreign companies must be approved by the Executive Committee of the Council of Ministers.\footnote{See id. at 356.}

Additional legal guaranties for foreign investors’ property interests can be found in the 1992 constitutional amendments, Cuba’s 1987 Civil Code, and international investment treaties. Article 25 of the amended constitution provides that the government may not expropriate assets without public utility reasons and without proper indemnification.\footnote{1992 CONST. DE LA REPUBLICA DE CUBA, art. 25.} The 1987 Civil Code contains provisions concerning guarantees against nationalization as well.\footnote{See 1987 COD. CIV. arts. 133.1, 134.1, 135.1.} Likewise, the investment treaties between Cuba and various European countries cover investments made by

\footnote{Zamora, \textit{Cuba’s Business Enterprises}, supra note 31, at 355.}
\footnote{The Cuban commercial company can be compared to a limited liability entity in the United States. Other features include centralized management, unlimited capital divided into shares according to the shareholders’ contributions, and it is open to anyone willing to purchase shares in the corporation. The legal basis for these entities is found in the Cuban Commercial Code and theoretically the company is totally independent from the state. Realistically, the shareholders’ major decisions are made according to the economic plan of the government with the Communist Party having the final say. \textit{See id.} at 353-54.}
\footnote{Id. at 355.}
\footnote{See \textit{id.} at 356.}
\footnote{Ashby, \textit{Cuban Real Property}, supra note 12, at 136.}
\footnote{1992 CONST. DE LA REPUBLICA DE CUBA, art. 25.}
\footnote{See 1987 COD. CIV. arts. 133.1, 134.1, 135.1.}
nationals and companies of both countries alike. The term investment is interpreted broadly to cover all assets without distinction. In Cuba, foreign investments are entitled to the following guaranties: freedom from unreasonable administrative measures impairing the foreign investment, most-favored-nation benefits, freedom from expropriation except for reasons of public utility and payment of fair market value compensation, entitlement to the transfer of all earnings and proceeds from Cuba in freely convertible currency, compensation from losses caused by war or armed conflict in Cuba, and an arbitration clause for disputes arising between the foreign investor and Cuba.

\[c. \text{ The Current Status of Cuba’s Foreign Investment System}\]

After the enactment of Law 77 the amount of foreign investment in Cuba increased substantially, but nothing spectacular when compared to other Caribbean countries. Among investments, real estate and tourism were the most prevalent. Almost instantly, several joint venture projects sprung up in Havana overnight. Some of the more notable commercial developments are, the rehabilitation and transformation into offices of the old Lonja del Comercio (the Commodities Exchange) in Havana’s historic center and the two million square foot office towers known as the Miramar Trade Center. The first residential project to be completed through the new foreign investment scheme was called the Monte Carlo Palace on Miramar’s Fifth Avenue. Another luxurious residential project called Jardines de 5ta. Avenida consisted of 175 condominium units.

\[45\] Id. at 161-62.
\[46\] Zamora, A U.S. Perspective, supra note 33, at 60.
\[47\] Ashby, Cuban Real Property, supra note 12, at 140-41. The completed residential projects are located in the Miramar district, a preferred community for foreign diplomats, businesspersons, and the Cuban elite. The units
of the projects’ success, the Cuban government declared a moratorium on the approval of all future condominium projects. The Cuban officials gave two official reasons for the moratorium: one, the lack of infrastructure for water and sewer; two, the absence of real estate laws addressing among other issues, condominium ownership, registration of title, timeshare ownership, and financing options. The unofficial reason relates to Cuba’s socialist agenda, as it was soon determined that private ownership of luxurious condominiums needed to be reevaluated and controlled.\textsuperscript{48}

The moratorium did not end private ownership in Cuba altogether, albeit the amount of foreign investment in Cuba has declined since Law 77’s initial enactment. By June 2004 there remained a little over 400 joint ventures in Cuba, compared to the more than 500 that sprung up instantly in the aftermath of Law 77. A total of half a dozen mixed corporations were created in 2003, nearly six times less than the average thirty-five per year created in the mid- to late-1990s.\textsuperscript{49} Alternatively, the exception to the decline in foreign investment is found in the tourism sector. At the end of 2003 there were 271 hotels in Cuba. Large international hotel groups like Spain’s Sol Melia, Germany’s LTI, and Canada’s Sherritt International, continue to build upscale resorts in Cuba’s main touristic areas through the formation of joint ventures with local

\footnotesize{were priced anywhere from $94,000 for a studio to $400,000 for a penthouse. Since the concept of mortgage financing was literally unknown in Cuba, buyers purchased homes either in cash or in periodic installments. \textit{Id.}
\textsuperscript{48} Zamora, \textit{A U.S. Perspective, supra} note 33, at 60. The government was concerned that private ownership of luxurious condominiums would cause social unrest amongst the Cuban population, who suffered extreme hardships in the aftermath of the fall of the Soviet Union. \textit{See id.}
companies. Legal scholars attribute the decline in foreign investment to several factors, mainly the contradictory position of the Cuban government towards foreign investment, the endless obstacles and restrictions an investor is presented with when attempting to enter the Cuban marketplace, and of course, the Helms Burton Act. Overall, prospective investors find investing in Cuba a daunting task. Likely, a more practical reason for the decrease in Cuba’s foreign investment is its underdeveloped infrastructure and unsophisticated real property system.

II. A 50 Year-Old Property Dispute

   a. Confiscation of U.S. Commercial Property and the Trade Embargo

   Signs of potential mass property confiscations after Castro came to power were evidenced by a series of laws promulgated in 1959. The initial law was enacted purportedly for the recovery of stolen property, and authorized the government to confiscate all property that belonged to collaborators of the Batista government. Soon thereafter, new land laws furthering

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50 Ashby, Cuban Real Property, supra note 12, at 142. Foreign investment through tourism is what has kept Cuba afloat after the demise of the Soviet Union. It also coincidently, helps avert the pressure put on its economy from the U.S. embargo. Tourism has created employment, increased the amount of hard currency flowing into the country, and has stimulated new industries like furniture manufacturing. See Michael Braga, Destination Cuba: Tourism industry grows in expectation of American visitors, HERALD TRIB. (Sarasota, FL), June 17, 2004, at A1.

51 A foreign investor never actually owns any property, but receives a ten-year, renewable lease from the government. When the venture dissolves all assets revert back to the state. The Cuban government views foreign investments as an income source for the state. Therefore, if the source stops being profitable, the government retains sole discretion to terminate the venture. Salas del Valle, supra note 15, at pt. III.

52 Since all foreign investment proposals are evaluated on a case-by-case basis, the terms and conditions will vary from investor to investor. Not surprisingly enough, all companies are subject to the government’s fiscal and regulatory regulations. The fiscal regulations alone are discouraging, and include a 30 percent tax on profits, a 25 percent payroll tax, and control of all financial transactions by the Central Bank of Cuba. Id.

53 See Ashby & Jablonski, supra note 49, at 274; Zamora, A U.S. Perspective, supra note 33, at 60. A general concern expressed by businessmen around the world is the absence of specific legislation for the key components of a real property system, like mortgages and specific ownership rights other than the mere permission to acquire an interest in the property. Ashby, Cuban Real Property, supra note 12, at 144.

the philosophy of the revolution forced vacant land owners to sell their land at foolishly low prices.\textsuperscript{55} The major reform legislation affecting foreign-owned property however was the Agrarian Reform Law of 1959,\textsuperscript{56} which limited property ownership of Cuba’s best economic ventures (farms, co-operatives, and special development acreages). Other provisions of the Agrarian Reform Law disallowed ownership of sugarcane lands by foreign shareholders, limited the amount of land that any company or individual could hold, and offered compensation in the form of 20 year government bonds at four and one-half percent interest.\textsuperscript{57} It soon became apparent that Cuba did not want outside interests interfering with Cuban industry and that major changes in its foreign investment scheme were soon to follow.

While U.S. commercial interests had not been officially expropriated yet, a concerned United States government sent an official note to the Cuban government courteously laying out its expectations of prompt and adequate compensation for the confiscation of any U.S. citizens’ property.\textsuperscript{58} Castro, offended by the United States’ reprisals of his land reform policies, responded by seizing three U.S. owned cattle- ranches as well as various sugar interests. The expropriation of U.S. agricultural interests increased thereafter until 131 ranches or 2.4 million acres had been seized. To make matters worse, foreign bank accounts in Cuba were frozen, blocking any U.S. company’s attempt to transfer their accounts back to the United States.\textsuperscript{59} Similar schemes were enacted into law and carried out against U.S. interests in the mineral and

\textsuperscript{55} Id. at 74. At the time few U.S. investments had been affected, with the exception of a few larges hotels that were owned by both Cuban and U.S. interests alike. \textit{Id.} at 75.

\textsuperscript{56} Id.; see also \textit{supra}, notes 22-23.

\textsuperscript{57} GORDON, \textit{supra} note 54, at 75-76.

\textsuperscript{58} Id. at 78 (citing 41 Dep’t State Bull. 958 (1959)).

\textsuperscript{59} Id. at 79 nn.38-39.
petroleum industries. Under the new oil code, U.S. companies such as Standard Oil and Shell would be forced to pay 60 percent royalties on oil production. Foreign oil companies’ only option was to withdraw from Cuba, inducing a new law that charged the companies with breach of contract and stimulated a reluctant willingness to commence negotiations with the United States regarding previously expropriated agricultural interests under the Agrarian Reform Law.

Concern for business operations back in the United States produced sharp criticism of Congress’s slow reaction to Cuba’s hostile attitude. Businesses put pressure on the political branches to react, and it was suggested that Congress might adjust the sugar quotas allocated to Cuba as retaliation for Castro’s actions. In 1960, expropriation of foreign properties increased exponentially until Castro had confiscated the entire privately owned sector of the Cuban economy. The nationalization of foreign investment thus became both the cause and effect of Congress’s decrease in the sugar quota. As Cuba feared reduction of the sugar quota, the United States continued to question Castro’s methods used to take foreign property. Since Congress was in an election year many congressmen were more than willing to strike back by reducing the sugar quota. This infuriated Castro even more because he opposed Congress’s unilateral ability to regulate the quota and would have much preferred that the quota be set

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60 See id. at 80-81. The new mineral law required companies to start development on their mining claims within sixty days or the claims would be forfeited to the Cuban government. As a result, Bethlehem Steel had 10,000 acres of mining claims confiscated by the Cuban government. Id.
61 See id. at 80, 82-83.
62 Id. at 81. The United States’ two cent a pound sugar subsidy provided over one hundred million dollars annually to the Cuban economy. Id. at 85.
63 GORDON, supra note 54, at 84. The United States continued to write notes to Cuba expressing its concern over the implementation of the Agrarian Reform Law. These notes provoked hostile sentiment from the Cuban government who accused the United States of engaging in counterrevolutionary activities towards Cuba. Id. at 84 n.55.
64 Id. at 85. Notice that the government was not challenging Cuba’s right to take the properties but simply the way with which they went about doing it. For instance, the Cuban government refused to write receipts for the property that it took and often times seized the property arbitrarily, absent any governmental authority. Id. at 86.
through bilateral negotiations.\textsuperscript{65} It was apparent that harsh legislation would only lead to more confiscations of U.S. interests. President Dwight Eisenhower thus urged patience in the matter and took a wait and see attitude towards the communist dictator’s threats.\textsuperscript{66}

The distaste for foreign investment, especially from the United States, could not be denied however. A major trade agreement signed by Cuba and the Soviet Union left the above proposition abundantly clear. The agreement extended a one hundred million dollar credit to Cuba at two and one-half percent interest and contained a promise from Russia to purchase five million tons of sugar over the next five years. The Soviets agreed to pay a price for sugar slightly below that on the world market, provoking more talk in the United States about the unnecessary continuance of the sugar subsidies.\textsuperscript{67} It became evident that Congress needed to take action in the wake of Cuba’s increased trading with Russia and further expropriations in the oil and mineral industries.\textsuperscript{68} On July 6, 1960 Congress passed a new bill amending the Sugar Act of 1948 and giving the President discretionary power to set the sugar quota at any figure he desired until March 31, 1961.\textsuperscript{69} Cuba threatened the United States with the seizure of all U.S. owned sugar mills, worth about 260 million dollars. Shortly before President Eisenhower planned to exercise his new discretionary power, Castro announced a new expropriation law directed solely at United States’ commercial interests. The law was enacted in accordance with the government’s ability to nationalize property when they considered it in defense of the

\textsuperscript{65} Id.
\textsuperscript{66} Id. As an alternative to negotiating with the Cuban government, it was suggested that some of the sugar subsidization funds be used to compensate the property owners. This suggestion was met with opposition as it would use taxpayers’ money to insure private business owners against foreign expropriations. \textit{Id.}
\textsuperscript{67} Id. at 87-88.
\textsuperscript{68} See generally id. at 89-97.
\textsuperscript{69} 7 U.S.C.A. § 1158 (1960). The official legislative purpose of the Act was to ensure that the United States did not suffer a sugar shortage. Conversely, the real reason behind the Act was purely a diplomatic tool to retaliate against more expropriations if necessary. GORDON, \textit{supra} note 54, at 97 n.91.
national interest.\textsuperscript{70} The law also provided for compensation in the form of 30 year bonds at two percent interest. The bonds were to be paid with Cuba’s profits from the sugar the United States purchased each year.\textsuperscript{71} The compensation proposal was obviously impossible to enact since the sugar quota for the rest of the year had been nearly eliminated by Eisenhower himself.\textsuperscript{72} While it was likely that Castro would have ultimately confiscated all U.S. commercial interests anyway, the reduction in the sugar quota exacerbated the process even more.

The mass nationalization of U.S. interests in Cuba, one of the largest in U.S. history, culminated in the most restrictive and failed embargoes in modern history. In October of 1960 the Cuban government enacted the second nationalization law, effectively confiscating the remaining privately owned foreign interests on the island, including the banking industry.\textsuperscript{73} By the end of 1960, eighty percent of Cuban industry was in the government’s hands. As part of the United States’ warfare against Cuba, it enacted a partial embargo in response to Cuba’s second nationalization law.\textsuperscript{74} The basis for the embargo was the Export Control Act of 1949.\textsuperscript{75} Later, President Eisenhower was forced to sever all diplomatic ties with Cuba. After a bomb exploded during one of Castro’s speeches, he accused the U.S. embassy in the matter and ordered the embassy’s staff to be reduced to eleven people. By 1962, Cuba’s trade with and dependence on the United States dwindled as its reliance on and trade with other socialist countries increased.\textsuperscript{76}

\textsuperscript{70} Id. at 97-98.
\textsuperscript{71} Id. at 98-99.
\textsuperscript{73} RICH KAPLOWITZ, \textit{supra} note 1, at 40. During that time, a total of 2.7 million acres of sugarcane lands was expropriated. In addition, more than 160 U.S. properties were confiscated. One of the properties was the Nicaro nickel mining plant, worth one hundred million dollars. \textit{Id.}
\textsuperscript{74} Id. The embargo prohibited all exports to Cuba except nonsubsidized foodstuffs and medicines. It also prohibited any commodity of U.S. origin from being re-exported to Cuba through a third country. \textit{Id.}
\textsuperscript{76} RICH KAPLOWITZ, \textit{supra} note 1, at 41-42.
Throughout the 1960s U.S. policy regarding Cuba was clear, destabilize and overthrow the Castro government through economic sanctions. After the Bay of Pigs debacle\(^{77}\) the policy goal towards Cuba remained the same as before, only the embargo was the lone tool left with which to accomplish it. After gaining international approval, President Kennedy formalized the embargo in February 1962 by banning all trade with Cuba, this time under the guise of the Trading with the Enemy Act (TWEA), which was recognized as a mechanism for defeating communism in the Americas.\(^{78}\) Next, Congress passed a law barring assistance to any country that extended aid to Cuba.\(^{79}\) The law provoked concern from U.S. allies who saw the Act as an attempt to infringe on their sovereign powers as a nation. As such, many countries refused to participate in the economic sanctions.\(^{80}\) Though the embargo did wreak havoc on the Cuban economy, it also served as the device that kept Castro in power for so many years, consequently blocking any attempt to negotiate and settle the property claims of U.S. commercial interests.\(^{81}\)

**b. Certified Property Claims and Secret Settlements**

When it became obvious that the Cuban laws which granted a limited right to compensation could never be enforced in Castro’s Cuba and diplomatic means where no longer available, U.S. commercial interests sought compensation through judicial remedies in the

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\(^{77}\) On April 16, 1961, Cuban exiles invaded Cuba from launching posts in Nicaragua. Unfortunately, the mission was a complete failure. One hundred and fifty exiles were killed and the rest taken prisoner. See HANEY & VANDERBUSH, *supra* note 10, at 25-27; RICH KAPLOWITZ, *supra* note 1, at 88-89.

\(^{78}\) *Id.* at 47-48.

\(^{79}\) *Id.* at 49.

\(^{80}\) *Id.* In response to the international cries of the embargo’s extraterritorial reach, the Secretary of Commerce proceeded to close U.S. ports to ships that had first carried supplies to Cuba and then tried to dock in the United States. *Id.*

\(^{81}\) See *id.* at 49-50; Rolando J. Santiago, *Y2K, The Millennium for a Revised U.S.-Cuba Trade Policy: Grounds for Removing the Embargo*, 6 NAFTA: L. & BUS. REV. AM. 169, 184 (2000). The embargo has been used as part of Castro’s domestic policy to explain any and all economic difficulties on the island. So even if Castro is the true cause of food shortages on the island, through the embargo he is able to convert the United States into the scapegoat for Cuba’s problems. *See id.*
United States. The United States’ court cases on this subject are largely inconsistent. Central themes inherent in the major cases are Cuba’s sovereign immunity, the act of state doctrine, and the interpretation of the Hickenlooper Amendment. The two major cases that impacted U.S. legislation on Cuba during the early years following the embargo are *Banco Nacional de Cuba v. Sabbatino* and *Banco Nacional de Cuba v. First National Bank of New York*. The underlying discrepancy in the two cases was the significance of the act of state doctrine, which, for no legally viable reason, the Supreme Court changed dramatically from one case to the next. The act of state doctrine was initially defined in *Underhill v. Hernandez*, and states that the courts of one country may not judge the sovereign acts of another country. The Supreme Court’s contradictory definitions reflect the changes in U.S.-Cuban policy over the years as well as the interplay of the balance of powers in the United States.

In *Sabbatino*, the more noteworthy of the two decisions, the validity of the Cuban nationalization law was contested under international law. The court below determined that the nationalization law violated the principles of international law applicable to the taking of foreign private property, precluding the use of the act of state doctrine by Cuba as a defense and creating an international law exception to it. The lower court’s decision soon became the subject of much litigation because according to the act of state doctrine as originally defined in *Underhill*

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82 See GORDON, supra note 54, at 153. Judicial intervention in Cuba would have been fruitless as the judiciary was in no position to question Castro’s orders. Furthermore, any judgment against the Cuban government would have been close to impossible to enforce. Some scholars even suggested that U.S. companies would not have accepted Cuba’s methods for calculating compensation and would have likely sought international means of obtaining more favorable compensation. *Id.*

83 *Id.* at 155.


86 168 U.S. 250, 252 (1897).

and the principles of sovereign immunity, one nation’s court does not possess the power to adjudicate another nation’s sovereign act.\textsuperscript{88} The Supreme Court eventually granted certiorari, turning its primary focus on the act of state doctrine. The Court found that no international law exception existed and as such, it was prohibited from judging the sovereign acts of a foreign government. Moreover, the Court was concerned with separation of powers issues and did not want to hinder the executive’s ability to negotiate a favorable settlement in the future for the entire class of confiscated property owners.\textsuperscript{89} Nevertheless, the Supreme Court’s decision was not well received and the Hickenlooper Amendment was quickly enacted to reverse its effect.\textsuperscript{90} Presumably, a U.S. court can now proceed to adjudicate the legality of the act of a foreign state, unless the President specifically states otherwise.\textsuperscript{91} This set the stage for the First National Bank decision, which rejected the notion that the foreign policy of the United States compelled the judiciary to refrain from acting in cases where the issue was the validity of expropriatory measures under international law.\textsuperscript{92}

During the initial attempt to settle property claims in U.S. courts the government froze all Cuba’s assets, 180 million dollars, in the United States.\textsuperscript{93} Also, in 1964 Congress amended the Foreign Claims Settlement Act to create a Cuban Claims Program under Title V of the International Claims Settlement Act of 1949.\textsuperscript{94} Under the program, U.S. nationals who had their property seized by Castro’s regime could submit claims to be certified by the Secretary of State.

\textsuperscript{88} See GORDON, supra note 54, at 158-60.
\textsuperscript{90} See GORDON, supra note 54, at 166-68. The Amendment also requires the speedy payment for expropriated property in convertible foreign exchange, a standard which has not been widely accepted as a rule of customary international law. Id.
\textsuperscript{93} Certified Cuban Claims: Key Events-US Property Claims, http://www.certifiedclaims.org/key_events.htm (last visited April 19, 2008).
\textsuperscript{94} Radelat, supra note 2.
The certified claims, once approved, would be used to secure just compensation for the claimants in future negotiations with the Cuban government. In total, the U.S. government certified 5,911 claims out of the 8,816 filed during 1966 to 1972, the time period to file a claim. The Foreign Claims Settlement Commission determined that under international law the claimants were entitled to six percent per annum interest on the value of their claims. Current estimates of the total value of the U.S. certified claims today ranges from six to twenty billion dollars.

Recently, the certified claims program was reopened in 2006 at the request of Secretary of State Condoleezza Rice to accommodate a more recent taking of property by the Cuban government. In an unprecedented move by the commission to reopen the claims, five more were certified, including the famous Starwood Hotels and Resorts claim.

The U.S. obsession with isolating Cuba had a cool-down effect in the 1970s. Secret negotiations took place between U.S. and Cuban officials in the hopes of ending the embargo and negotiating compensation for the U.S. certified property claims. Over the years there have been efforts to settle the claims, but the process has been complicated by the political climate and the ongoing embargo.

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96 This administrative agency of the U.S. Department of Justice is quasi-judicial in nature. Its primary focus is on the determination of the validity and the valuation of claims of U.S. nationals who have had their properties expropriated in foreign countries. See Certified Cuban Claims: Understanding U.S. Claims, http://www.certifiedcubanclaims.org/understand_b1_foreign.htm (last visited April 19, 2008).

97 See Luxner, *Mauricio Tamargo*, supra note 95; Radelat, supra note 2, at 2.

98 Much to the surprise of everyone who had thought that Fidel had seized all foreign-owned property over four decades ago, a U.S. telephone company, International Telephone and Telegraph Corp., managed to retain 400 acres of land in Cuba until 5 years ago. Frances Robles, *U.S. Hotel Firm’s Land Seized only Recently*, MIAMI HERALD, Aug. 25, 2005, at 1A. Starwood Hotels and Resorts Worldwide, who had acquired International Telephone and Telegraph in 1998, filed a complaint in 2005 with the U.S. Justice Department for 63 million dollars worth of land that the Cuban government had seized from them in 2003. Id. The land had been used as a transmitting station for an international telephone service until 1992, but remained largely unused until the Cuban government seized it in 2003. Id.


been additional attempts by the Cuban government to settle the property claims. In fact, Cuba has settled property claims with all other nations. The United State’s failure to accept Cuba’s offer to settle is simply a justification of its own policy towards Cuba. As mentioned earlier, Cuba offered to compensate U.S. property owners through bonds funded with income from sugar sales to the United States. President Eisenhower responded to the offer by suspending the sugar quota, and President Kennedy eliminated the quota altogether, effectively cutting off the source of dollars needed to back the bonds. Over the last fifty years, in spite of well-established mechanisms in both international and national laws to settle the claims, the two governments have simply failed to settle the claims because of the political purpose they serve.

c. Codification of the Embargo

Even though the U.S. embargo against Cuba was considered by many as failed policy in light of the survival of Castro’s regime, the United States government decided to intensify its effect through codification in the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton) during the Clinton administration. The Act represented a culmination of U.S. policy towards Cuba, in hopes that it would one day dominate its transition to democracy.

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102 See Cuba versus Blockade: Cuban People’s Web Site, http://www.cubavsbloqueo.cu/Default.aspx?tabid=271 (last visited Apr. 19, 2008). To date Cuba has signed agreements providing compensation for expropriated assets with Canada, the United Kingdom, Spain, France and Switzerland. The agreements are in the form of a lump sum payment that is considerably less than the U.S. minimum standard of effective compensation. Id.

103 See Sandels, supra note 99.

104 See supra Part II.a.

105 22 U.S.C. §§ 6021-91 (2008). President Clinton was reluctant to sign the Act into law, but it was an election year and he was influenced by domestic concerns, especially pressure from the Cuban-Americans, who had gained substantial political control in Washington. JOAQUIN ROY, CUBA, THE UNITED STATES, AND THE HELMS-BURTON DOCTRINE 1-2 (University Press of Florida 2000).
Helms-Burton is organized into four major titles. Title I of the Act strengthens the U.S. embargo against Cuba by codifying all executive orders relevant to the embargo (codification into law of the embargo), puts an end to indirect financing of Cuba by American companies that provide loans to those dealing in property that was confiscated from U.S. nationals, and completely bans any product that originated from or passed through Cuba in route to the United States.  

Title II grants the President the power to end the embargo and provide assistance to a free Cuba, but only when a transition government is in place that fulfills certain requirements of the Act. The most controversial title is the third one, which coincidently relates to the property claims as well. Title III internationalizes what was once thought to be a bilateral embargo by creating a cause of action in U.S. courts, available to any U.S. citizen, against any legal person or government that traffics in property that once belonged to a U.S. citizen and was confiscated by the Castro regime. Title III permits recovery up to three times the amount of the property’s current market value. Fortunately, in order to avoid an international debacle, Title III also authorizes the President to suspend its effective date for renewable six months periods, something the last

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107 22 U.S.C. §§ 6062-66 (2008). Title II lists the basic freedoms and liberties that are enjoyed in the United States as the criteria for determining that a democratic transition government has taken over in Cuba. Of the criteria, ensuring the right to private property is central. Also, the Title notes that neither Fidel nor Raul may be involved in the transition government in any capacity. *Id.*
108 The Act therefore allows U.S. courts to assert its jurisdiction over foreign companies for acts that took place outside the United States’ jurisdiction. Also, Title III permits expatriated Cubans who later became U.S. citizens to file suits, completely ignoring the fact that at the time of the expropriation they were actually Cuban citizens and thus should not have standing to bring suit. RICH KAPLOWITZ, supra note 1, at 180.
two Presidents have done indefinitely since its enactment.\textsuperscript{112} Finally, Title IV denies a visa to enter the U.S. to any foreigner who has been found to have trafficked in confiscated property.\textsuperscript{113}

Helms Burton was enacted in part as a reaction to the economic reforms that increased foreign investment in the island. As foreign investors began to do business in Cuba and acquire interest in property, the United States became involved because it was apparent that some of the property had been taken from U.S. citizens four decades ago and compensation had never been paid.\textsuperscript{114} Helms-Burton does not purport to prohibit a foreign person from conducting business altogether in Cuba, rather, it aims to curtail foreigners from trafficking in expropriated property. The main goal of the Act is to increase pressure on the Cuban government by restricting assistance to countries that would invest in the Cuban economy, thus bringing the socialist economy crashing down.\textsuperscript{115} The international community expressed instant disdain for the Act, with its extraterritorial nature the main concern surrounding the legislation. Many governments, including traditional U.S. allies, challenged the Act on the grounds that it violated their ability to make decisions as a sovereign nation.\textsuperscript{116} The international response to Helms-Burton provoked retaliatory legislation in Europe and Canada,\textsuperscript{117} as well as Cuba itself.\textsuperscript{118}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{112}] RICH KAPLOWITZ, supra note 1, at 181.
\item[\textsuperscript{113}] 22 U.S.C. §§ 6091 (2008).
\item[\textsuperscript{114}] See Digna B. French, Economic Sanctions Imposed by the United States Against Cuba: The Thirty-Nine Year Old Embargo Culminating with the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 7 U. MIAMI INT’L & COMP. L. REV. 1, 12 (1998-99). But cf. ROY, supra note 105, at 19, 201 (attributing the continuation of the U.S.-Cuba feud after the fall of the Soviet Union to U.S. anger and frustration that Cuba’s political regime did not crumble but continued on its socialist course, creating a dual society for its inhabitants).
\item[\textsuperscript{115}] See RICH KAPLOWITZ, supra note 1, at 182; Nicolas Crespo & Saturnino E. Lucio II, Impact on the Helms-Burton Law (The Cuban Liberty Act) on Cuban Tourism, Papers of the Seventh Annual Meeting of the Association for the Study of the Cuban Economy (Aug. 7-9, 1997), in 7 ASCE 131, 133 (1997). This lofty goal was the same one put forth for the creation of the original embargo. If it didn’t work then why would it work now?
\item[\textsuperscript{116}] See French, supra note 114, at 12-13.
\item[\textsuperscript{117}] The European Union countries and Canada immediately passed legislation prohibiting European companies from obeying the Act and allowing them to countersue U.S. companies in European courts. See RICH KAPLOWITZ, supra note 1, at 185; French, supra note 114, at 13.
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continued to ignore the international concerns even when it was subject to World Trade Organization review.\textsuperscript{119} The U.S. failure to prevent tarnishing its international image alludes to the real reason for the enactment of Helms-Burton, U.S. domestic politics. The only segment of the U.S. population that stood to gain from its enactment was a segment of the Cuban-American population that enjoyed great political power in Washington.\textsuperscript{120}

Much debate has been considered as to the actual effectiveness of Helms-Burton in halting foreign investment in Cuba. Since the creation of the first joint venture, the total amount of foreign investment in Cuba has been five billion dollars. Of that, a large portion was invested between 1995 and 2000.\textsuperscript{121} Helms-Burton originally targeted the major companies who sought to improve the progress of the Cuban economy, including Spain’s Sol Melia and Canada’s Sherritt.\textsuperscript{122} While economic sanctions have deterred some companies from investing in Cuba,\textsuperscript{123} there are still many others who get around the Act without too much difficulty.\textsuperscript{124}

\textsuperscript{118}Cuba passed a law that penalized U.S. citizens who sought restitution of their expropriated properties under the Helms-Burton Act. Notably, the Cuban legislation recognized the right of U.S. citizens to compensation for their confiscated properties should the United States and Cuba ever negotiate an agreement, but it excluded them from any relief if they sought to take action under Helms-Burton. The law also allowed Cuban citizens to pursue damage claims against the United States for injuries caused by the embargo. RICH KAPLOWITZ, supra note 1, at 185.

\textsuperscript{119}Id.

\textsuperscript{120}See id. at 186-88; ROY, supra note 105, at 8-9.


\textsuperscript{122}See id. at 18, 25-26.

\textsuperscript{123}Id. at 18, 29. Notably, several Canadian and Spanish hotel chains did not pursue their planned investments in Cuba because of Helms-Burton. Id.

\textsuperscript{124}A 2007 article in the Miami Herald, featuring the France-based conglomerate Bouygues SA, exposed its double dealings on both sides of the Florida Straits. Bouygues, which had long been constructing luxury hotels in Cuba through one of its entities, Bouygues Batiment International, was awarded one of the most expensive public works projects in Florida history. Bouygues Travaux Publics, another entity of the same Bouygues currently building hotels in Cuba, was to construct and run a tunnel at the Port of Miami. The public works contract sends a contradicting message, allowing a major trafficker in expropriated assets to profit with impunity in the United States. Larry Lebowitz, Company’s Links to Cuba Could Dig Port Tunnels’ Grave, THE MIAMI HERALD, May 11, 2007; Larry Lebowitz & Matthew I. Pinzur, County Officials may Overlook Cuban Links, THE MIAMI HERALD, May 12, 2007.
in order to avoid problems with Helms-Burton, a few companies have spent more time and money on investigating projects to determine if it would entail trafficking in confiscated property. A major accomplishment of the Act has been the disrupted flow of foreign financing into Cuba through targeting overseas’ banks that finance these projects.\footnote{Spadoni, supra note 121, at 18, 30. Remember that Cuba does not provide a large amount of financing options within Cuba itself and likely investors must go outside in order to find capital.} The response has been to transfer the investor’s money through fiduciary enterprises, financial entities, or investment funds. Another technique foreign banks have developed with the help of the Cuban government is the use of off-shore companies, which disguise the banks’ financial interest in the firms.\footnote{Id. at 18, 30-32.}

The Act has caused some damage no doubt,\footnote{Id. at 18, 33. A study done by the Cuban government estimates that the U.S. law has caused damages to Cuba in the amount of 208 million dollars. The larger amounts of lost capital resulted from the famous pull-out of the Mexican cement company, Cemex, due to pressure from the U.S. Id.} but Cuba has largely achieved its goals of strengthening its economy after the end of the cold war left it desolate and in the brink of disaster. Cuba’s real problem and reason that it has not reached full capacity with respect to foreign investment is its obsolete socialist system that does not adequately protect property rights, the key to economic growth in any country.\footnote{Crespo & Lucio II, supra note 115, at 133-34.} Certain investors left because of existing restrictions and controls placed on them by the Cuban government, making it unpractical to do business there anymore.\footnote{Spadoni, supra note 121, at 18, 25-26, 34.} An additional complaint by foreign companies is the great bureaucracy of paperwork that surpasses any amount of government red tape in the United States and has just made investing in Cuba too costly.\footnote{Crespo & Lucio II, supra note 115, at 131, 134.} So the truth of the matter is that it might not be the United States that is deterring hard currency revenues into the economy but the Cuban
government itself. It is important to note that despite increased costs in investing, less financing options and more complicated business operations, the overall investment process has not halted. Important investors in the tourism industry for example, are taking the position that despite the risk an unstable system of rights represents, it is good business sense to continue investing in Cuba.\textsuperscript{131} As a consequence, the government sees no reason for change and the inefficient socialist structure is likely to endure into the near future.

When Helms-Burton was first enacted it was intensely criticized as a rogue act of the United States, not only from an international law perspective but from a domestic standpoint as well. As time could tell, Helms-Burton’s threatening nature on foreign investment in Cuba soon became moot because Article III was permanently placed on hold. Overall, Helms-Burton has had little impact on foreign investment in Cuba.\textsuperscript{132} Few foreign companies left Cuba after its enactment, and in fact foreign investment grew after Helms-Burton was passed.\textsuperscript{133} It is evident that the embargo’s initial purpose of forcing a radical transformation of Cuba’s political and social institutions has horribly failed. Helms-Burton is not even a law, but actually foreign policy in disguise.\textsuperscript{134} When George Bush took the presidency in 2001, the Cuban-American leadership who had campaigned heavily for him expected President Bush to actually enforce Title III and IV of the Helms-Burton Act. For the most part Bush’s Cuban supporters would be largely

\textsuperscript{131} Spadoni, \textit{supra} note 121, at 18, 35-36. Increase in foreign investment is due to the ineffectiveness of U.S. pressure on foreign companies, firms that have verified that they are not dealing in confiscated property have gone on to realize their projects, and smaller enterprises have entered the Cuban market convinced that because they are small they can fly under the Helms-Burton radar.

\textsuperscript{132} See Crespo & Lucio II, \textit{supra} note 115, at 131, 133.

\textsuperscript{133} See \textsc{RICH KAPLOWITZ}, \textit{supra} note 1, at 189. “1993-1997 were years of economic growth for the Cuban economy, despite the most severe tightening of the embargo to date.” \textit{Id.} at 190.

disappointed with his continuation of Clinton’s policy. If anything, Bush was even more lenient than past democratic Presidents with respect to Cuban policy. Given the groups of congressmen and businessmen who now advocate opening up trade with Cuba, as well as the indifferent attitude of young Cuban-Americans towards the embargo, it would be hard for any future President to continue tightening the embargo or even consider the possibility of enforcing Titles III and IV of Helms-Burton.

III. The Effects of Cuba’s Current Trend in Foreign Investment on U.S. Certified Claims

Nearly forty years after the original confiscations of U.S. commercial property in Cuba no real attempt has been made by either side to settle the compensation claims. The case of Cuba has become an anomaly in the U.S. experience. Several factors helped shape the way history has played out, yet the U.S.-Cuba saga is mostly attributed to a mixture of U.S. domestic policy related to tax write-offs, special interest groups, and international commerce. About ninety miles south of the United States’ most southern point, a small communist island’s economy has been picking up stem largely due to foreign investment and tourism. Regrettably, this presents a problem for U.S. commercial interests with confiscated property claims. The United States has

135 See HANEY & VANDERBUSH, supra note 10, at 131-33, 152. Bush realized that trying to enforce Titles III and IV of Helms-Burton would be political suicide not just internationally but domestically amongst the business and free trade groups. Id. at 153.
136 See id. at 142-47. Throughout the Bush regime, agricultural imports from the United States entered Cuba under a limited exception of the embargo, and are increasing more and more each year. See id. at 149-50.
137 See id. at 153-54. At this point the prolongation of current policy towards Cuba is what can be expected. The embargo will not be lifted anytime soon as the importance of settling the property claims beforehand prohibits it.
138 ROY, supra note 105, at 14-15. The U.S. government has effectively negotiated a settlement with all other countries that have nationalized U.S. commercial properties abroad. Id.
139 Shortly after the confiscations of U.S. property, the U.S. tax law was changed to allow a deduction from ordinary income of the fair market value of the lost property under the casualty and theft loss deductions. Id.; see also infra Part III.b.
140 ROY, supra note 105, at 14-15; see also supra note 105 and accompanying text.
141 ROY, supra note 105, at 8-9, 19-21.
made it clear that it will not resume trade relations with Cuba until a democratic government is in place and compensation has been awarded the certified claimants. On the other hand, Cuba possesses little need or desire to begin trading with the U.S. since Cuba’s economy is supported by trade with Europe and the steady increase in tourism brought about through joint ventures with foreign investors.

Consequently, settling a fifty-year-old property dispute will be the last thing on any Cuban government’s mind. Putting aside the validity of the claims, the longer the claims go without settling the harder it will become to settle them in the future. The actual claim holder has changed hands several times, and the current claimants are completely removed from the initial emotions surrounding the claims, creating almost a disincentive to settle. Moreover, not only does Cuba not have the money to pay compensation, at whatever value is determined, but also, Cuba’s new foreign investment scheme, which offers limited interests in property to investors, complicates the process of settling claims even more. Furthermore, while the U.S. has made it clear that it will not lift the embargo until the property claims are settled, U.S. businesses with strong lobbying power in Washington, have begun urging Congress to let them get a piece of the

142 See The Helms-Burton Act, 22 U.S.C. §§ 6021-91 (2008). The original purpose of the embargo was to economically squeeze Cuba to the point that the “pueblo” became so fed up and demand democratic change. However, Castro has done such a good job in minimizing social unrest and deceiving everyone that now the country itself is experiencing economic growth without in turn passing that benefit on to the citizens. Cf. Artimus Keiffer, Comments on “Cuba’s Tourism Industry” by Suddaby and “Impact on the Helms-Burton Law on Cuban Tourism” by Lucio and Crespo, Papers of the Seventh Annual Meeting of the Association for the Study of the Cuban Economy (Aug. 7-9, 1997), in 7 ASCE 137, 138 (1997) (suggesting that increased tourism and foreign investment in Cuba will provide benefits for the Cuban people through the exposure to amenities and products for tourists).
143 ROY, supra note 105, at 12-14, 17-18.
144 Radelat, supra note 2, at 2.
145 Id.
tropical paradise. All these factors combined, along with recent political changes on the island, raise the question; should the certified claims even be settled at all? Cuba’s socialist structure is likely to endure into the near future; there will not be a dramatic democratic transition as expected. Cuba’s economy will dwarf into a dual system, which to some extent it already has, consisting of a free-market economy for foreign investors and the Cuban elite and a centralized, peso-based economy for the rest of the population. This following section will outline the political and economic hurdles that claimants will face if they seek to settle their claims.

a. Who Owns What

Any person or entity seeking to acquire real estate in any part of the world wants assurances of clear title, meaning that no one will challenge their ownership or acquisition of the property. Cuba’s foreign investment law affects not only the investors’ limited rights to property but those property rights of current and past owners as well. Hence, two questions must be asked here, 1) should the ownership claims of U.S. commercial interests who had their property confiscated by Castro in the revolution be of concern to the current owners of property in Cuba, and 2) do foreign-owners of Cuban real property even hold true legal title to the property or will they be subject to claims by previous owners on the basis that they never owned

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149 The common law definition of title is “‘legal evidence of a person’s ownership rights in property; an instrument (such as a deed) that constitutes such ‘evidence’ or the ‘bundle’ of legal rights constituting the legal right to control and dispose of property.’” Ashby, *Cuban Real Property*, *supra* note 12, at 142-43 (quoting BLACK’S LAW DICTIONARY (8th ed. 2004)).
the land in the first place? As to the first question, international law, the International Claims Settlement Act of 1949 and Helms-Burton play a large role in the ascertainment of the answer.\textsuperscript{150} International law more or less requires compensation be paid to foreigners who have their land expropriated,\textsuperscript{151} and Cuba from time to time has made good faith efforts to settle with U.S. claimants.\textsuperscript{152} Additionally, Cuba has in fact settled all expropriation claims with other countries.\textsuperscript{153} Since no compensation has been paid yet, one may argue that U.S. certified claims affect property rights of new owners should the claimants ever be allowed to enforce those rights in an independent Cuban court or an international tribunal. However, if the expropriation of the properties were legal under Cuban and international law, the fact that compensation has not been paid should not affect the future transfer of legal title.\textsuperscript{154} Contrastingly, claims derived under Helms-Burton demand the compensation or restitution of all confiscated property before the embargo can be lifted.\textsuperscript{155} While theoretically the restitution requirement may cloud the current owner’s title, Helms-Burton will unlikely be enforced outside the U.S. Moreover, serious questions of infringing on Cuba’s sovereignty\textsuperscript{156} would be raised if this section of Helms-Burton were enforced in a U.S. court.

The second question, do current owners of real property in Cuba hold true legal title applies to foreign owners and current citizens of Cuba alike. The answer to this question determines the ability of current owners to hold onto their property against future claims and affects the property’s transferability for profit should Cuba ever develop a free-market property

\textsuperscript{150} Zamora, \textit{Back to the Future}, supra note 20, at 551.
\textsuperscript{151} See GORDON, supra note 54, at 109-52.
\textsuperscript{152} See supra, Part II.b.
\textsuperscript{153} Zamora, \textit{Back to the Future}, supra note 20, at 552.
\textsuperscript{154} Cf. id. (arguing that the certified claims do affect future landowners rights to that property).
\textsuperscript{156} See supra, Part II.b.
system. The current constitution recognizes a citizen’s right to hold legal title in residences and personal property.\textsuperscript{157} Similarly, Law 77 grants foreign investors the right to acquire ownership and other property rights in select types of real estate.\textsuperscript{158} Under the common law, good title allows the owner to lawfully possess the property without having to worry about previous claims from past owners or interests. A marketable title is one that will allow the current owner to sell it free of encumbrances to a purchaser.\textsuperscript{159} Under Cuba’s current law, title to property is defined by actual or constructive possession of the property.\textsuperscript{160} Having title to property can be verified by a certificate of loan payment from the Banco Popular. In general, the type of evidence used to prove title depends on local custom, so while owners may not technically hold their properties in fee simple because of restrictions on conveyances, the certificate of loan payment from the Banco Popular is definitely considered good legal title in Cuba.\textsuperscript{161} An additional hurdle to attaining good title is the inadequacy of Cuba’s property registries. After the revolution the Cuban government created two new property registries, but failed to issue the necessary regulations governing them. This act of misadministration prevented many owners from registering their properties.\textsuperscript{162} It wasn’t until 2003 that the Cuban government took another shot at organizing the country’s real property, both public and private. While the new property registry system is identical to its counterpart in Spain, the lack of a consistent evidentiary system for documents proving good title still remains.\textsuperscript{163}

\textsuperscript{159} Ashby, Cuban Real Property, supra note 12, at 143.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 143-44.
\textsuperscript{163} Id. This presents a problem for foreign investors because since they are not really sure who owned the property before them they can never be assured of clear title until a claim is brought against them.
Another possible mechanism that allows a current possessor in Cuba to defeat a property claim lies within the concept of adverse possession or “Usucapion” in the civil law. Usucapion gives title of the property to any person who possesses the property and complies with certain requirements of the civil code.\textsuperscript{164} Under Cuban law, the only properties that can be adversely possessed are personal in nature. Real property is thus State property and always reverts back to the state.\textsuperscript{165} To determine which property can be adversely possessed a distinction must first be made between personal and real property. Luckily, under the socialist system, the actual building is considered personal property and not real property. Next, usucapion can take place through either good faith possession (the holder is unaware of the flaw on the title) or bad faith possession (the holder is aware of the flaw on the title but continues to possess the property anyway). The current civil code in Cuba does not recognize bad faith usucapion and as such, protects the former property owners, allowing them to reacquire their property.\textsuperscript{166} With the elimination of bad faith usucapion, if the current owner does not hold good title to the property because the confiscatory laws are illegal, they can’t claim that they adversely possessed the property either because that option is no longer available to them. Of course, if all the requirements are met, the good faith usucapion is still available to current possessors of the property. Under international law, a nation that confiscates property under its own laws can’t be found to possess in bad faith.\textsuperscript{167} Therefore, the government couldn’t have passed bad title to the current owners, and they would likely qualify under the requirements of good faith usucapion.

\textsuperscript{164} Juan C. Consuegra-Barquín, The Present Status Quo of Property Rights in Cuba, Papers of the Fifth Annual Meeting of the Association for the Study of the Cuban Economy (Aug. 10-12, 1995), \textit{in} 5 ASCE 195, 200 (1995). The stated requirements for Usucapion in Cuba are continuous possession of the property, under quiet and peaceful enjoyment, acting in an ownership capacity, and with public and open possession. \textit{Id.} at 201.
\textsuperscript{165} \textit{Id.} at 200-01.
\textsuperscript{166} \textit{Id.} at 201-04.
\textsuperscript{167} \textit{Id.} at 205-06.
meaning that the possessor had no reason to suspect that there was any defect in a title given to
them by their own government. Accordingly, it appears that the present possessors of property
in Cuba are the owners and have good title against possible future claims from U.S. commercial
interests.

b. U.S. Businesses Biggest Losers of All

U.S. businesses are by far the biggest losers in the embargo against Cuba.\textsuperscript{168} Over the
last few years joint ventures between Cuban companies and foreign investors have put U.S.
businesses at a competitive disadvantage when the embargo is lifted.\textsuperscript{169} On the other hand,
businesses from other countries are delighted that the embargo has not been lifted because this
allows them access to a market free of U.S. domination. Although U.S. commercial interests
have been restricted from conducting business with Cuba since the early 1960s, it has not
stopped American products from reaching Cuba’s small consumer population.\textsuperscript{170} A few years
ago, with the help of free-trade groups and business coalitions, the agricultural industry, through
a narrow exception to the embargo, began exporting agricultural products to Cuba.\textsuperscript{171} Since then
U.S. agricultural exports to Cuba have grown significantly, and the U.S. has become Cuba’s
largest supplier of agricultural products like rice and poultry.\textsuperscript{172} Success with similar programs

\textsuperscript{168} See Santiago, \textit{supra} note 81, at 196-97. It is estimated that lost business opportunities with Cuba ranges from one
to fifteen billion dollars. RICH KAPLOWITZ, \textit{supra} note 1, at 186.
\textsuperscript{169} See Santiago, \textit{supra} note 81, at 185-88, 196-97.
\textsuperscript{170} See Hans de Salas-del Valle, \textit{The French Connection: How Foreign Investors Defy Helms-Burton}, 86 CUBA
TRANSITION PROJECT paras. 5-7 (June 2007). American products usually get to the island by way of third party
distributors, leaving the American companies out of the financial equation. See Buettner, \textit{supra} note 9.
\textsuperscript{171} See United States Department of Agriculture Foreign Agricultural Service: Trade with Cuba,
Sanctions Reform and Export Enhancement Act, which changed the U.S.-Cuba trade relationship by enacting certain
exceptions from U.S. sanctions legislation for agricultural and medical exports. \textit{Id}. The new law prohibits any U.S.
person or company from providing payment or financing credit terms to anyone in Cuba, requiring cash in advance
\textsuperscript{172} \textit{Id}. In 2006 Cuba was the 33rd largest market for U.S. agricultural exports. \textit{Id}. 

and the proximity of Cuba to the U.S. may cause businesses with lobbying power to assert
greater pressure on Congress to lift the embargo without necessarily settling the property claims
first. Until recently, special interest groups comprised of Cuban-Americans adamantly opposed
any trade with Cuba. 173 Now, the next generation of Cuban-Americans does not seem to be
concerned about Cuba at all. Moreover, Cuba needs the United States’ consuming capability to
jumpstart its lagging economy. In fact, high-level Cuban officials have expressed an interest in
reestablishing a relationship with the United States. 174 Without a doubt, Cuba has the potential
to become a major U.S. business partner. Coincidently, critics of the embargo and Helms-Burton
have often argued that opening up trade with the United States would provide Cuba with the
much needed cash to pay restitution for the property it confiscated. 175

Conversely, certified property claimants and other businesses may have a disincentive for
settling the property claims despite the potential for a successful trading relationship with Cuba.
One of the main reasons certified claimants have never pushed the U.S. government to settle
with Cuba is an unprecedented modification in the U.S. tax laws. While confiscations of
property from a foreign government are normally not allowed as casualty or theft losses under
the Internal Revenue Code, during the most serious period of confrontation with Cuba the Code
was changed to allow a deduction for any loss arising from a confiscation of property. 176

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173 See Zamora, Future Economic Relations, supra note 148. The United States’ entire foreign policy towards Cuba
is thus controlled by a select few of the Cuban-American old guard who no longer have family in Cuba and are so
out of touch with the reality there. Must individuals have either made fortunes here exploiting the benefits of the
embargo or would suffer great losses in the tourism industry if Cuba was opened to the average American. The
bottom line is that these Cubans have no business dictating foreign policy for a place that they know nothing about.
174 See id. at 117-18.
175 See Rolando H. Castañeda & George Plinio Montalván, Economic Factors in Selecting an Approach to
Confiscation Claims in Cuba, Papers of the Fifth Annual Meeting of the Association for the Study of the Cuban
176 ROY, supra note 105, at 14-15. The Revenue Act of 1964 treated both business and purely personal
confiscations of tangible property as casualty losses. The legislation also allowed the losses to be deducted from
of the large corporations whose properties were taken under Castro’s regime received substantial compensation through this indirect tax write-off mechanism.\textsuperscript{177} The tax benefit is estimated to compensate almost entirely for the total value of the certified property claims.\textsuperscript{178} During the process of establishing a relationship between the U.S. and Cuba, taxpayers who took advantage of this lucrative tax benefit will likely receive forms of settlements for their property claims, ranging from actual restitution of the confiscated property to monetary compensation in the form of debt instruments. The tax treatment for each form of compensation will likely influence both the claimant and the U.S. government’s desire to settle.\textsuperscript{179} For instance, return or recovery of property that was deducted in earlier years must be treated as income in the year it is recovered, unless the initial deduction failed to produce a tax savings.\textsuperscript{180} Monetary compensation, including bonds or shares of capital in joint ventures, would be considered a taxable exchange for which gain is recognized to the extent the amount realized upon such exchange exceeds the cost of the property.\textsuperscript{181} This imposes an inequitable burden on claimants, many who originally purchased their properties long before the 1959 revolution.\textsuperscript{182} Overall, U.S. claimants that took a loss for

\begin{itemize}
\item both capital or ordinary income. In addition, the carryover period for any loss increased from five years to ten.
\item \textsuperscript{177} ROY, supra note 105, at 15. The total tax write-offs are estimated to be two billion dollars. \textit{Id.} at 162.
\item \textsuperscript{178} See Castañeda & Plinio Montalván, supra note 175.
\item \textsuperscript{179} See Ashby & Mastrapa, supra note 176.
\item \textsuperscript{180} I.R.C. § 1.111-1 (2008). Note however that the taxpayer would only be liable for the amount of deductions he took, and he would not owe any excess on the basis of the property despite its appreciation in value. Ashby & Mastrapa, supra note 176, at 161.
\item \textsuperscript{181} I.R.C. § 1033(a)(2)(A) (2008).
\item \textsuperscript{182} Ashby & Mastrapa, supra note 176, at 162. The taxpayer could avoid a taxable gain under § 1033 if they succeed in purchasing similar property with the proceeds within two years or obtaining a controlling interest of the total number of shares in the corporation owning the property. However, it is unsure if § 1033 like-kind-exchanges apply to Cuban properties. \textit{Id.}
\end{itemize}
their confiscated property and later recover it or received compensation will likely incur future tax liabilities.

The disincentive to settle grows with each passing year. The original claimants of the confiscated properties were filled with passion and sentiment concerning their claims. Eventually, after the prospects of receiving compensation or reclaiming the lost property dimmed\(^\text{183}\) and the claims changed hands as companies grew, merged, or dissolved, the attitude towards settling has become more pragmatic and settling has become less important.\(^\text{184}\) Most companies holding property claims have lost hope that the U.S. will ever settle with Cuba, writing the claims off as a lost cause. Literally speaking, some corporations have written off their confiscated properties as causality and theft losses, receiving a huge tax benefit. As such, any successor corporation will become liable for future tax liabilities in connection with a possible settlement for the property claims.\(^\text{185}\)

Even if Cuba and the U.S. never arrive at a mutual settlement, holders of certified claims can still make money by selling their rights to the claims. Cuban claims are attracting attention from investors looking to buy, sell, swap and pool claims.\(^\text{186}\) Those looking to engage in the claims trade believe that once Fidel Castro leaves the scene a capitalist-friendly government will quickly emerge, the embargo will be lifted, and the Cuban economy will take off, allowing the investors to rake in the dough. One such scheme consists of a pooled-claims fund that would issue shares to the claimholders, sell the claims, or in some cases, fix up the claimant’s property

\(^\text{183}\) When the companies certified their claims they became bound by U.S. law to accept any compensation formula agreed to between the U.S. and Cuba, and forfeited any right they had to negotiate separately with the Cuban government. James Cox & Christina Pino-Marina, *Regaining Seized Assets Prospects Brighten for Collecting on Cuban Claims*, USA TODAY, Mar. 29, 1999, at 1B.

\(^\text{184}\) *Id.*; Radelat, *supra* note 2.

\(^\text{185}\) Ashby & Mastrapa, *supra* note 176, at 163-64.

and run it for them.\textsuperscript{187} Over time the claims that U.S. companies hold have increased in value, therefore allowing them to make substantial sums of money on what was once considered a dead asset.\textsuperscript{188} The U.S. Department of Justice released a statement in March of 2008 that put a small cramp in this lucrative market. The government assured buyers that a settlement with Cuba is not being considered at this time, and so, purchasing certified claims should be done with extreme caution.\textsuperscript{189} Additionally, there is a limitation on the transfer of certified claims which reads,

“The amount determined to be due on any claim of an assignee who acquires the same by purchase shall not exceed (or, in the case of any such acquisition subsequent to the date of the determination, shall not be deemed to have exceeded) the amount of the actual consideration paid by such assignee, or in case of successive assignments of a claim by any assignee.”\textsuperscript{190}

IV. The Fall of the Revolution \textit{Por Fin!}

\textbf{a. How to Approach U.S. Confiscation Claims for Cuban Property}

A future Cuban government\textsuperscript{191} will need to provide some type of remedy for the confiscated property claims.\textsuperscript{192} The extent and substance of that remedy is largely unknown,

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} Santiago, supra note 81, at 197; Cox \& Pino-Marina, supra note 183. The Cuban Electric claim, which is now owned by Boise Cascade, is estimated to be worth one billion dollars, making it the largest commercial claim so far. Santiago, supra note 81, at 197.
\textsuperscript{190} 22 U.S.C. § 1643f(b)
\textsuperscript{191} International law recognizes that any successor government should acknowledge and take care of all legitimate obligations of the previous government. Consuegra-Barquín, supra note 164, at 196.
\textsuperscript{192} International law requires that all foreign nationals who have their property confiscated by a foreign nation are due compensation for that property. Luxner, Mauricio Tamargo, supra note 95; Oskar Garcia, Scholars Weigh Claims Over Cuban Assets, WASH. POST, Oct. 5, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/10/05/AR2007100501052.html?referrer=emailarticle. Additionally, Cuban law at the time provided for the right to compensation. Both Article 24 of the 1959 Fundamental Law and the Agrarian Reform Law required as a constitutional right the payment of compensation to any landowner who has land expropriated by the government. GORDON, supra note 54, at 123-26.
although not without speculation from experts and property owners themselves. The current Cuban government is not entirely closed to negotiating a settlement for the confiscated properties, however they have made it clear that they will not be pushed or bullied by the United States government. Cuba claims that if anything the United States should be compensating them for the billions of dollars they have suffered in embargo-related damages over the years.\(^{193}\)

Whichever way the issue is resolved, the expropriation claims are recognized as a large obstacle to the normalization of U.S.-Cuba relations,\(^{194}\) and a precondition to increasing foreign investment in the island.\(^{195}\) As it becomes apparent that the transition to democracy and a free-market economy will not instantly occur in Cuba, the viability of any proposed program to settle property claims will depend on the economic and political conditions in which Cuba finds itself at the time.\(^{196}\) Also, several questions should be considered. One, who should negotiate the settlements? Two, what form of compensation would be best?

In Cuba’s past negotiations with the countries that did receive compensation for confiscated property all agreements were negotiated between Cuba and the state representing the claimant, the settlements were negotiated over a long period of time, and payments were made in lump sum.\(^{197}\) If history repeats itself, any future government in Cuba will likely seek similar

\(^{193}\) See Eaton, supra note 146.


\(^{195}\) “A well defined system of property rights forms the cornerstone to any free-market economy.” G. Douglas Harper, Restitution of Property in Cuba: Lessons Learned From East Europe, Papers of the Ninth Annual Meeting of the Association for the Study of the Cuban Economy (Aug. 12-14, 1999), \textit{in} 9 ASCE 409, 410 (1999) (quoting \textit{Private Property Rights in Cuba (1992): Housing}, La Sociedad Economica, Bulletin No. 15, 1). Aside from restoring positive relations with the U.S. (mainly the lifting of the embargo), other foreign investors would be more willing to invest in Cuba when they know that the country respects property rights, has mechanisms for enforcement, and that their particular property is free from any U.S. claims. \textit{Id.} at 411.

\(^{196}\) Travieso-Diaz, supra note 194, at 103.

\(^{197}\) \textit{Id.} at 106-07.
terms for the U.S. claims. Traditionally, the President of the U.S. has plenary power to settle claims against foreign governments.\textsuperscript{198} Here, due to the magnitude and the amount of the claims, certain groups have suggested that a bilateral U.S.-Cuba Tribunal be established to resolve the claims.\textsuperscript{199} A third alternative would be to allow the claimants to negotiate directly with the Cuban government for whatever form of compensation would mutually benefit the two parties. Unfortunately, it has been held that individual claimants have forfeited their right to settle directly with the Cuban government when they certified their claims with the Department of State. Claimants are thus bound by any settlement reached by the Department of State on its behalf.\textsuperscript{200} The executive branch could decide that the establishment of a bilateral tribunal would be best in this particular situation. However, in the past both Cuba and the U.S. have both settled property claims on their own without the help of an intervening third party. Also, the property claims were settled for a lump sum instead of assessing the amount of each individual claim.\textsuperscript{201}

Another issue is what form of compensation would be best? Ex-communist countries faced with a similar dilemma have chosen various models to deal with the claims of former owners, the two principle ones are restitution and compensation. The Restitution Model advocates the actual return of the confiscated property to its previous owner. When physical restitution is not possible, the owner is then compensated monetarily. The three basic components of the restitution model are: deals primarily with commercial property, former owners, and

\textsuperscript{198} Id. at 107.

\textsuperscript{199} CREIGHTON UNIVERSITY SCHOOL OF LAW & DEPARTMENT OF POLITICAL SCIENCE, REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES 2 (Creighton University Press 2007); see also Kern Alexander & Jon Mills, Resolving Property Claims in a Post-Socialist Cuba, 27 LAW & POL’Y INT’L BUS. 137, 141 (1995-1996) (recommending all property claims be submitted to and adjudicated by an international arbitration tribunal). The Creighton report has been criticized for its bias. The money used to develop the report is associated with several well-known anti-Castro groups. See Sandels, supra note 99.

\textsuperscript{200} Travieso-Diaz, supra note 194, at 107, 109.

\textsuperscript{201} Id. at 106-07.
owners must meet certain qualifications before restitution is granted to them (like having the actual title to the property), and there is a clear deadline for filing claims. On the other hand, the Compensation Model offers monetary compensation to the former owners, whether in cash, bonds, or vouchers in privatized industries. The Compensation Model also requires some form of verification that the person was in fact the former property owner. Regardless, both models recognize the previous owners’ property rights to some extent.

From an initial perspective the Restitution Model might not be so bad, as Cuba has a large external debt, and would likely not be able to raise the necessary capital to compensate the confiscated property owners. Also, restitution of commercial property works to infuse much needed capital and infrastructure into the poor and underdeveloped Cuban economy. Surprisingly enough, few U.S. commercial interests have actually expressed an interest in returning to their properties, largely because some of them have been neglected for so long that it would take too much money to restore the properties to a profitable state. Moreover, restitution would subject those commercial interests that took casualty and theft loss deductions to a large tax liability. The Restitution Model is not realistic or feasible from Cuba’s side either. The property sought to be returned may have been destroyed or substantially deteriorated. In addition, many of the joint ventures with foreign investors involve expropriated property. The Cuban government would have to balance the rights of the former owners against those of the

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202 Harper, supra note 195, at 412.
203 Id.
204 Id. at 412-13. Cuba owes eleven billion dollars to international private and public lenders. It has defaulted on most of those loan obligations. In addition, Cuba owes Russia twenty billion dollars. In total, Cuba’s debt is fifty-eight percent of its Gross Domestic Product. Travieso-Diaz, supra note 194, at 107-08n.42.
205 Harper, supra note 195, at 424.
206 See Cox & Pino-Marina, supra note 183; Villagran, supra note 101.
207 Ashby & Mastrapa, supra note 176, at 160; see also supra Part III.b.
Another disadvantage to the U.S. commercial interest entering into a restitution scheme entails the extent of its newly found property rights. The claimant may have its property restored, but does it still have the same rights to that property as before? In Cuba, the future property system and government for that matter is unpredictable. The government could impose restrictions or requirements on the claimant’s use of or ability to transfer the property.

The Restitution Model’s infeasibility is not to say that compensation is the only viable option, as it too suffers from several problems. The reality is that Cuba is a poor country near bankruptcy. Cuba has no money to pay claimants and it is unlikely that it will generate enough revenue to compensate all property owners without an increase in foreign investment. Cuba also claims that it has a counterclaim against the United States for damages caused by the embargo and terrorist acts carried out against the Cuban government, effectively wiping out the debt owed to former property owners. Even if monetary compensation was to be paid, the exact amount has been heatedly contested between the two countries. Cuba wants a lump sum settlement, as it has done with other countries for the expropriation of assets of their nationals. The United States’ figure is a bit more embellished, taking into account accumulated interest.

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208 Travieso-Diaz, supra note 194, at 111-12. If Helms-Burton and Cuba’s outdated real estate laws did not deter foreign investment, this certainly will.
209 Id. at 112.
210 See Garcia, supra note 192; Cox & Pino-Marina, supra note 183. “[I]f Cuba tried to pay claims back in hard currency, it would be able to pay only a few cents on the dollar.” Garcia, supra note 192.
212 A lump sum payment does not take into account the amounts claimed by the claimants for their loss of property. Instead, it is an amount substantially less than the total estimated value of the confiscated assets. The proceeds are then distributed proportionately among the claimants. See Travieso-Diaz, supra note 194, at 106-07.
213 See Alexander & Mills, supra note 199, at 168-78. In most past agreements negotiated between the United States and the confiscating government, the U.S. has accepted settlement for an amount substantially less than the total
An argument can also be made that Cuba did try to pay just compensation shortly after the properties were confiscated, but the United States government cut off its means of payment. Since then, the U.S. government has not made any further attempts to settle with the Cuban government or accept alternative offers. As such, Cuba may argue that it owes nothing to property owners or only owes them the value of the property the day it was confiscated but not interest.

According to the U.S., under international law the amount of compensation due is defined by the Hull formula, which requires “prompt, adequate, and effective” compensation. Under the formula, the adequate component means that payment should reflect the fair market value of the property at the time of the taking. When applied by most Western states this takes into account the economic value as well, including profitability, net-book value, and goodwill. Several scholars conclude that in conjunction with international law, any future Cuban government will have to pay compensation that reflects the property’s value at the time of expropriation with interest, but no obligation lies to return the property or account for any increase in the value of the property since then. Alternatively, Cuba could follow the social reform exception to the rule that a government must pay full value compensation. The exception applies to developing countries trying to gain control over a vital sector of their economy, and takes into account the social objectives for the expropriation and the State’s ability to pay.

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214 Cuba initially tried to compensate the claimants with the money received from sugar sales to the U.S. Cox & Pino-Marina, supra note 183.
215 Travieso-Diaz, supra note 194, at 105. Full compensation is not synonymous with adequate compensation. The Mexican expropriations of foreign owned oil interests suggest a pattern of accepting partial compensation on part of the U.S. GORDON, supra note 54, at 114.
compensation. 218 Cuba proscribes to the international public law view of compensation, which lacks clear legal requirements for establishing compensation norms in the case of expropriations of foreign assets by a State. 219 Therefore, absent clear international requirements of compensation, those afforded by Cuban national law should be sufficient to ward of criticism from the international community. Additionally, within the context of Latin America, the United States must remember that international public law allows the expropriating state to adopt the mode of or procedure for indemnification. 220 Hence, under international public law, the United States’ requirement of “prompt, adequate and effective” compensation does not have to be followed by Cuba. 221

b. Converting Claims to Equity Shares and Future Dividends

The international debt crisis of the 1980s led to the introduction of a mechanism for converting debt owed by a developing country into an equity investment in the debtor country. The so-called debt conversion programs proliferated in Latin American countries to help reduce debt and to increase foreign investment in the region. 222 In a typical transaction for converting

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218 Id. at 174. Most Western nations do not recognize this as a valid exception to compensation in international law. Id.
221 Cuba versus Blockade: Cuban People’s Web Site, The Expropriation and Indemnification process in Cuba, § 2.2.6, http://www.cubavsbloqueo.cu/Default.aspx?tabid=271 (last visited Apr. 29, 2008). Latin American governments claim that the only right of a foreigner is not to be discriminated against with respect to nationals. Id. Here, the argument can be made that since Cuban nationals and expatriated nationals alike have not received compensation yet, U.S. commercial interests are not being discriminated against.
debt into equity a third party investor would buy the debt at a discount on the secondary market. The debtor government would redeem the debt at a negotiated value in local currency. The funds resulting from the conversion would be invested in equity. If a privatization program\textsuperscript{223} was prevalent at the time, the debtor government would simply offer to exchange the debt for an interest in a public asset.\textsuperscript{224} After the 1980s there was a sharp decline in debt-equity conversions as a tool used to eliminate a country’s debt. The reason for its decline in use is unknown; however some basic principles for debt-equity conversions have been established. Debt conversions have been most effective when used to accomplish specific objectives rather than to solve a country’s debt problem. Additionally, debt-equity conversions are most successful if they support an investment priority geared towards attracting investment in the country.\textsuperscript{225} Debt to equity conversions do suffer from economic disadvantages as well. Increasing the inflation rate is one of them. Also, depending on the country’s inclination towards sovereignty and nationality, debt conversions may lead to an excessive amount of local assets under foreign control.\textsuperscript{226} On the contrary, large amounts of foreign investment are often needed to build infrastructure and provide social programming for developing countries. Another concern is the transfer of capital out of the country in the form of dividends and capital repatriation. In

\textsuperscript{223}Privatization is the transfer of property and management from the public sector to private individuals or entities in order to promote the building and operating of competitive environments, improve public services required for modernization of the economy, and generally promote foreign investment in a developing nation. Castañeda & Plinio Montalván, supra note 175, at 231.

\textsuperscript{224}MOYE, supra note 222, at § 3.1.

\textsuperscript{225}Id. § 6.

\textsuperscript{226}Id. § 2.2.
designing its conversion programs, debtor governments have often provided for the limitation of such transfers for a specified period of time.\footnote{Id. § 3.1; see also Resolução No. 1.460, de 1 de fevereiro de 1988. (Brazil).}

In light of the above discussion, it behooves the introduction of an alternative option for settling the U.S. certified property claims, which not only benefits the claimants economically but provides Cuba with a much needed infusion of foreign investment and capital. Central tasks in a transition government to increase economic activity in Cuba are the privatization of state-owned enterprises and attracting foreign investment.\footnote{Castañeda & Plinio Montalván, supra note 175, at 230. When a state-owned enterprise is sold to private individuals or entities, additional financing in the venture often follows. Id. at 239.} Well-defined and enforceable property rights will determine the pace that the privatization process and foreign investment will take in Cuba. Ultimately, the privatization of enterprises in order to provide the infusion of capital that Cuba needs to transition will be impeded by the existence of unresolved property claims.\footnote{Castañeda & Plinio Montalván, supra note 175, at 227-28.} Cuba has established certain property rights for investors, albeit with far more limitations than in non-communist countries. A freehold property system as in the United States is not necessary to attract critical foreign investment, only an improved system that accommodates the land tenure preferences of foreign investors.\footnote{See Ashby & Jablonski, supra note 49, at 268-69, 277.} Settling U.S. certified claims in one form or another is indispenisible to developing that system. In examining the two models set forth in the previous section restitution would likely not be a practical option for both Cuba and the claimants.\footnote{See supra Part IV.a.} However, any attempt to make Cuba compensate the former owners in cash would be dangerous and unfair considering the weak state of Cuba’s economy.\footnote{See Castañeda & Plinio Montalván, supra note 175, at 240; Garcia, supra note 192; Cox & Pino-Marina, supra note 183.} As a result, a well-rounded

\footnotesize{\begin{itemize}
\item \footnote{Id. § 3.1; see also Resolução No. 1.460, de 1 de fevereiro de 1988. (Brazil).}
\item \footnote{Castañeda & Plinio Montalván, supra note 175, at 230. When a state-owned enterprise is sold to private individuals or entities, additional financing in the venture often follows. Id. at 239.}
\item \footnote{Castañeda & Plinio Montalván, supra note 175, at 227-28.}
\item \footnote{See Ashby & Jablonski, supra note 49, at 268-69, 277.}
\item \footnote{See supra Part IV.a.}
\item \footnote{See Castañeda & Plinio Montalván, supra note 175, at 240; Garcia, supra note 192; Cox & Pino-Marina, supra note 183.}
\end{itemize}}
solution would be to convert the debt owed claimants into capital shares in state firms to be privatized.\textsuperscript{233}

After determining the value of the individual property claims\textsuperscript{234} (Cuba’s debt to the claimant), the debt would be converted into an equity interest in one of Cuba’s joint venture companies. The company could be the same joint venture that is operating on the claimant’s confiscated property. Furthermore, the U.S. company will avoid being assessed taxes on the compensation received until the shares are sold for cash. If the company receives dividends though, it will pay taxes but at the more preferable capital gains rate.\textsuperscript{235} Theoretically, Cuba has not had to pay anything in hard currency and the claimant has received the equivalent of cash but with the potential to recover more in the future through dividends and the eventual sale of its interest. Cuba also benefits from the know-how and capital investment of an American multinational.\textsuperscript{236} On the other hand, this might not be the ideal form of compensation for the claimant. No one can guarantee that Cuba’s economy will become capitalistic or democratic.\textsuperscript{237} The U.S. shareholder will be bound by Cuba’s property and corporations laws, which are more restrictive than those in the U.S.\textsuperscript{238} Also, the company will be forced into a joint venture with another company that it might not be compatible with. From Cuba’s standpoint, if its goal is to increase foreign investment while maintaining control of the companies investing in Cuba, this

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\textsuperscript{233} See Castañeda & Plinio Montalván, \textit{supra} note 175, at 240; Travieso-Diaz, \textit{supra} note 194, at 114; Cox & Pino-Marina, \textit{supra} note 183.
\textsuperscript{234} See \textit{supra} Part IV.a.
\textsuperscript{235} I.R.C. § 1201(a) (2008).
\textsuperscript{236} The infrastructure and neighborhoods near Cuba’s key investment areas are in such bad shape that any company looking to build there will have to fix up the surrounding areas as well. Also, the water and sewer systems are in need of a major overhaul. Eaton, \textit{supra} note 146, at 14-15.
\textsuperscript{237} Many scholars have predicted that a radical transition to democracy is only remotely possible. The more probable scenario for the future of Cuba’s socio-economic structure is the maintenance of socialist premises and policies. The result is a hybrid system of mild economic reforms and a strong central government with socialist principles. See Ashby & Jablonski, \textit{supra} note 49, at 281.
\textsuperscript{238} See Zamora, \textit{Cuba’s Business Enterprises, supra} note 31, at 361-62.
\end{flushleft}
would not be a viable option because it would be relinquishing too much control to foreigners. Overall, debt to equity conversions will not be the end-all for a successful transition to a system that encourages greater investment in Cuba. It could however be just what is needed to solve the specific problem related to the payment of compensation for U.S. certified property claims, while coincidently increasing foreign investment and speeding up Cuba’s lagging economy.

V. Conclusion

The current state of foreign investment in Cuba presents a catch-22 for investors because the property system is so encumbered as to make it unattractive to invest in Cuba, although some companies are beginning to see the benefits and reap the rewards. As a result of recent political changes on the island, the demand for tourism-related real estate developments, commercial office space, and infrastructure-related projects will continue to increase, making Cuba one of the most lucrative new investments in the Western hemisphere. The ability for foreign investors to partake in these profitable ventures has the potential to benefit Cuba as well. Regrettably, 5,911 certified property claims and an obsolete foreign policy present another hurdle that inhibits Cuba’s chance to attract more foreign investment, especially from its capitalist neighbor. Future political shifts in Cuba and the U.S. will provide a platform for opening up talks about compensating the confiscated property owners. Fostering Cuba’s economic growth and giving the claimants an opportunity to flourish with the island should be among the main goals of settlement.

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239 See supra note 226.
241 See Garcia, supra note 192; but see Eaton, supra note 146 (warning the U.S. that Cubans are offended by the United States’ forwardness in planning for Cuba’s future).