


6-1-2018

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Recommended Citation

Marco A. Dueñas, *Charting a New Course in Cuba? Why the Time is Now to Settle Outstanding American Property Claims*, 43 Brook. J. Int'l L. 545 (2018).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol43/iss2/11>

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CHARTING A NEW COURSE IN CUBA? WHY THE TIME IS NOW TO SETTLE OUTSTANDING AMERICAN PROPERTY CLAIMS

“This was once the manor of one of the four feudal barons of the Isle of Pines. If I am not mistaken, he is at this moment enjoying his retirement in Miami.”¹

INTRODUCTION

On New Year’s Eve 1958, the United States-backed Cuban dictator Fulgencio Batista² notoriously fled Havana and escaped to the Dominican Republic, allegedly looting as much as \$700 million USD worth of art and money from the country’s coffers.³ Thus begins the tale of expropriations in Cuba. On New Year’s Day, 1959, Fidel Castro⁴ declared the triumph of the revolution (the “Cuban Revolution”), but it was not until April 1961

1. LEE LOCKWOOD, *CASTRO’S CUBA: AN AMERICAN JOURNALIST’S INSIDE LOOK AT CUBA 1959–1969*, 101 (Nina Weiner ed. 2016). Fidel Castro made this statement in August 1965, remarking on the provenance of his country retreat house on *Isla de Juventud*, née Isle of Pines, the second largest Cuban island. *See id.* Castro’s comment is telling: in two quick quips, Castro cynically alludes to various historical facts, including his nationalization of foreign and domestic private property after the overthrow of Fulgencio Batista’s government, the bravado with which the nationalizations were performed, and his disdain for American influence in Cuba. *See id.*

2. *See* MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 20–32 (1976). Fulgencio Batista was the elected President of Cuba from 1940–1944 and dictator from 1952–1959, before being overthrown by the Cuban Revolution at the hands of Fidel Castro. *See id.*

3. *See* CUBA: A COUNTRY STUDY 64 (Rex A. Hudson ed., Federal Research Division, Library of Congress 4th ed. 2002). *See also* RICHARD E. FEINBERG, *OPEN FOR BUSINESS: BUILDING THE NEW CUBAN ECONOMY* 9 (2016); *Cuba Marks 50 Years Since ‘Triumphant Revolution,’* NAT’L PUB. RADIO (Jan. 1, 2009), <http://www.npr.org/templates/story/story.php?storyId=98937598>; Tim O’Meilia, *Widow of Cuban Dictator Batista Dies in West Palm Beach*, PALM BEACH POST (Oct. 4, 2006), *reprinted in* Dominican Today, <http://www.dominicantoday.com/dr/world/2006/10/4/18267/Widow-of-Cuban-dictator-Batista-dies-in-West-Palm-Beach>.

4. For an authoritative bibliography of materials unpacking Fidel Castro’s rebirth as a revolutionary, see generally Rolando E. Bonachea & Nelson P. Valdes, *The Making of a Revolutionary: A Fidel Castro Bibliography (1947–1958)*, 5 LAT. AM. RES. REV. 83 (1970).

that Castro proclaimed that the Cuban Revolution was socialist.⁵ Any discussion of post-1959 Cuba must first consider the transition of power from Batista to Castro, as well as the radicalization of the Cuban Revolution.⁶

One of the major theories advanced to explain Cuba's metamorphosis into a Marxist-Leninist state is the so-called "backwardness thesis," which focuses on Cuba's "presumed economic and social backwardness prior to 1959."⁷ The backwardness thesis is bolstered by a corollary: "the alleged exploitative grip by which U.S. investors held the Cuban economy."⁸ The incestuousness and extent of American control over Cuba is evidenced by a few key statistics. By 1958, on the precipice of the Cuban Revolution, "the United States was purchasing two-thirds of the island's exports and was supplying 70 percent of its imports."⁹ As an island nation that "typified what economists have come to call an 'export economy[.]'"¹⁰ the impact of American investments in Cuba was unmistakable. Through specialization and "extreme interdependence" with mainly the United States (but also other Western nations), Cubans enjoyed a thriving middle class, which featured "what was probably the highest standard of living among tropical nations."¹¹ But this achievement was marred by contradictions within Cuba's society and economy, born out of "the neocolonial model imposed by the United States."¹² The Cuban economy was in essence what many scholars have called a

5. See CUBA: A COUNTRY STUDY, *supra* note 3, at 64–66. For an analysis of the Cuban Revolution more sympathetic to Castro and his revolutionaries, see generally AVIVA CHOMSKY, A HISTORY OF THE CUBAN REVOLUTION (2011). For an account of why the Cuban Revolution still matters, see generally Eric Selbin, *Conjugating the Cuban Revolution: It Mattered, It Matters, It Will Matter*, 36 LAT. AM. PERSPECTIVES 21 (2009).

6. See ERIC N. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE 31, n. 1 (1975) ("The historical and mainly political factors that account for the radicalization of the Cuban revolution are analyzed in two recommended scholarly works") (citing THEODORE DRAPER, *CASTRO'S REVOLUTION, MYTHS AND REALITIES* (Praeger, 1962) and BORIS GOLDENBERG, *THE CUBAN REVOLUTION AND LATIN AMERICA* (Praeger, 1965)).

7. See *id.* at 12.

8. *Id.*

9. See *id.* at 14.

10. See *id.* at 13.

11. See *id.* at 14.

12. See Francisco López Segrera, *The Cuban Revolution: Historical Roots, Current Situation, Scenarios, and Alternatives*, 38 LAT. AM. PERSPECTIVES 3, 4 (2011) ("Politically, the expression of this model was the Batista dictatorship;

“sub-economy” of the United States, with Batista as a puppet dictator.¹³ At the heart of Castro’s agenda was curing Cuba’s “backwardness” by ousting the Americans and achieving “full independence from the United States through a socialist revolution.”¹⁴

Castro quickly embarked on a nationalization campaign authorized by a series of bills signed swiftly into law, seizing both foreign and domestic private property.¹⁵ Castro conducted the nationalization process under the guise of the Cuban Revolution’s proclaimed socialist values, a process that was without question “one of the most sweeping reforms of ownership of the means of production and distribution in history, and certainly the most serious to United States investors.”¹⁶ Altering property relations eventually became Castro’s “main instrument for consolidating power: the [Cuban] government increasingly monopolized the sources of wealth and income while depriving its potential opponents of economic resources.”¹⁷ Following the fall of Batista and the symbolic “triumph” of the Cuban Revolution over *los Yankees*,¹⁸ Fidel Castro set about consolidating power by nationalizing the assets of Cuban nationals and non-nationals alike.¹⁹

From 1959 through 1961, the newly installed Cuban government expropriated nearly all American-owned assets, which pro-

economically, it was underdevelopment; in the social sphere, it was a rate of unemployment close to 20 percent and a high level of underemployment; internationally, it was the absence of an independent foreign policy; and culturally, it was an increasing crisis of cultural identity threatened by images of the ‘American way of life.’”).

13. See BAKLANOFF, *supra* note 6, at 12–15.

14. See *id.* at 13.

15. For a detailed account of the Cuban nationalizations, see generally GORDON, *supra* note 2.

16. *Id.* at 108.

17. See RICHARD E. FEINBERG, RECONCILING U.S. PROPERTY CLAIMS IN CUBA: TRANSFORMING TRAUMA INTO OPPORTUNITY, LAT. AM. INITIATIVE AT BROOKINGS 1 (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf>.

18. *Yankee* is a derogatory term used to refer to a person who lives in, or is from, the United States. See *Yankee*, NAT’L GEOGRAPHIC ENCYCLOPEDIA, <https://www.nationalgeographic.org/encyclopedia/yankee/> (last visited Mar. 22, 2018).

19. See GORDON, *supra* note 2, at 69–108.

cess amounted to “the largest uncompensated taking of American property by a foreign government in history.”²⁰ Expropriated American assets were primarily comprised of the following assets: improved and unimproved real property, such as agricultural lands, oil refineries, and hotels; infrastructure, including almost all of the electrical power grid and the entire telephone system; and liquid and illiquid assets held in bank accounts, insurance policies, and various securities.²¹ A modest estimate of the present day value of nationalized American assets in Cuba nears \$7 billion USD,²² while the combined value of all expropriated assets exceeds \$50 billion USD.²³

While there is an abundance of scholarship on the potential for settling outstanding claims against Cuba for expropriations of American assets, the recent warming of relations between the United States and Cuba²⁴ provides a unique and timely lens through which to analyze these decades-old issues. Three pieces of scholarship form the bedrock of existing analysis. Creighton University’s 2007 report (the “Creighton Report”), funded in part by the United States Agency for International Development

20. Timothy Ashby, *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanism*, 40 U. MIAMI INTER-AM. L. REV. 413, 413–14 (2009).

21. *See id.*

22. *See* Leon Neyfakh, *Cuba, You Owe Us \$7 Billion*, BOSTON GLOBE (Apr. 18, 2014), <https://www.bostonglobe.com/ideas/2014/04/18/cuba-you-owe-billion/jHAufRfQJ9Bx24TuzQyBNO/story.html>.

23. Mari-Claudia Jiménez, *The Future: Restituting Looted Cuban Art*, 109 AM. SOC’Y INT’L L. PROC. 116, 117 (2015) (“Cuba faces expropriation claims by many hundreds of thousands of its nationals, both on the island and abroad, as well as claims by almost six thousand U.S. nationals whose assets in Cuba were expropriated without compensation during the early years of the Cuban revolution. The current combined worth of these assets is estimated at more than \$50 billion [USD]. The property seizures range from land, homes, industries, and businesses to the personal property and art collections of Cuban and U.S. citizens that were seized before and after they left the island.”) (citing David Glovin & Toluse Olorunnipa, *Cuba Property Claims: Yielding Pennies, May Spur Talks*, BLOOMBERG (Dec. 22, 2014), <https://www.bloomberg.com/news/articles/2014-12-23/cuba-seized-property-claims-seen-as-yielding-pennies-on-dollar>).

24. *Charting a New Course in Cuba*, WHITE HOUSE, PRESIDENT BARACK OBAMA, <https://www.whitehouse.gov/issues/foreign-policy/cuba> (last visited Jan. 15, 2017) [<https://web.archive.org/web/20170116030059/https://www.whitehouse.gov/issues/foreign-policy/cuba>].

(USAID),²⁵ argues for a multi-tiered approach, establishing a pecking order ranging from the largest corporate claims to the smallest individual claims, to be settled by either a “Cuba-U.S. Claims Tribunal” or a “Cuban Special Claims Court.”²⁶ Timothy Ashby’s²⁷ 2009 article (the “Ashby Proposal”) in the University of Miami Inter-American Law review suggests that “Special Situations Funds” would be better poised to confront the political and legal quagmire, whereby claim holders would sell their claims to an international fund (that specializes in distressed debt) that would, in turn, settle the claims on a large scale level.²⁸ Richard Feinberg’s²⁹ 2015 Brookings policy paper (the “Feinberg Proposal”) finds that a two-tiered approach may be more realistic, allowing for the primary settlement of large corporate claims (through development incentives, tax credits, and

25. *Mission, Vision and Values*, USAID, <https://www.usaid.gov/who-we-are/mission-vision-values> (last visited Nov. 13, 2016). Founded by President John F. Kennedy, USAID is a U.S. government agency responsible for administering civilian foreign aid; its mission is to “end extreme poverty and promote resilient, democratic societies while advancing [the United States] security and prosperity.” *Id.*

26. CREIGHTON UNIVERSITY SCHOOL OF LAW & DEPARTMENT OF POLITICAL SCIENCE, REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES (2007) [hereinafter CREIGHTON UNIVERSITY]. The authors note that the “views expressed in this Report are those of the investigators, not USAID nor the U.S. Government.” *See id.* at 2.

27. *Timothy F. Ashby*, DENTONS, <http://www.dentons.com/en/timothy-ashby> (last visited Jan. 8, 2017). Timothy Ashby is Senior Counsel to the global law firm Dentons. *Id.* The London-based attorney holds a JD from Seattle University Law School, a PhD in International Relations from the University of Southern California, and an MBA from the University of Edinburgh, Scotland. *Id.*

28. *See* Ashby, *supra* note 20, at 428–31.

29. Richard E. Feinberg, *Experts*, BROOKINGS, <https://www.brookings.edu/experts/richard-feinberg/> (last visited Jan. 8, 2017). Richard E. Feinberg is a “nonresident senior fellow in the Latin America Initiative at Brookings[,]” as well as a “professor of international political economy in the School of Global Policy and Strategy . . . at the University of California, San Diego.” *Id.* Feinberg previously served as “special assistant to President Clinton for National Security Affairs and senior director of the National Security Council’s . . . Office of Inter-American Affairs.” *Id.* Feinberg has also served as President of the Inter-American Dialogue (another center for policy analysis) and Executive Vice President of the Overseas Development Council, and he has held various positions with the U.S. Department of State and the U.S. Treasury Department. *Id.* Feinberg is also a “book reviewer for the Western Hemisphere section of Foreign Affairs magazine.” *Id.*

other business incentives) and the potential for modest secondary settlements (cash and bonds) paid to smaller claim-holders, whether corporate or individual.³⁰

While these proposals are noteworthy and undoubtedly well-developed, they collectively and largely ignore the Cuban government's own claims against the United States. Cuban Foreign Minister Bruno Rodríguez has outlined the following four areas of interest, which must be resolved before Cuba will seriously consider moving forward with the normalization of relations: the "total lifting" of the United States embargo against Cuba (the "Embargo"), the return of the "illegally occupied territory of Guantanamo," "full respect for the Cuban sovereignty," and compensation for both human and economic damages.³¹ The latter issue of damages includes personal injuries sustained by Cuban nationals (following U.S. Central Intelligence Agency (CIA) sponsored hostilities in Cuba and the Bay of Pigs invasion) and, on a purely economic level, \$121 billion USD worth of accumulated damages stemming from the Embargo.³²

Because the purported value of Cuban claims far exceeds the stated value of American claims, many Cuban officials have argued that claimants from both nations should simply "call it a wash" by deducting the total value of U.S. claims from the combined value of all Cuban counterclaims.³³ One senior Cuban diplomat succinctly expressed this reductionist solution, stating that "[t]he compensation issue could be decided easily and quickly: simply offset U.S. claims with Cuban counter-claims! Or else the issue can drag on for years. . . ."³⁴ The obvious flaw in this proposed means of settlement is that it is politically and diplomatically untenable, as every Cuban official knows "that the United States is never going to discuss such counter-claims[.]"³⁵

30. See FEINBERG, *supra* note 17, at 25–34, 35.

31. See *id.* at 13 (citing *Press Availability with Cuban Foreign Minister Bruno Rodriguez*, U.S. DEP'T STATE (July 20, 2015), <https://www.state.gov/secretary/remarks/2015/07/245094.htm> (last visited Jan. 15, 2017) [<https://web.archive.org/web/20170116033000/https://www.state.gov/secretary/remarks/2015/07/245094.htm>]).

32. See *id.* at 13–14.

33. See *id.* at 12 (citing Author conversation with Cuban diplomat, June 2015).

34. See *id.*

35. Lars Schoultz, *Blessings of Liberty: The United States and the Promotion of Democracy in Cuba*, 34 J. LAT. AM. STUD. 397, 421 (2002).

reducing the Cuban diplomat's argument to mere diplomatic posturing.

Americans, in particular members of the Cuban American "exile" community,³⁶ do not recognize Cuban claims as legitimate, but are nevertheless intent on pursuing their own claims against Cuba.³⁷ This sentiment, focusing on the perceived "bogusness" of Cuban claims, was recently expressed in an open letter from Senator Marco Rubio to President Barack Obama. In his letter, Senator Rubio urges President Obama to place a higher priority on "obtaining compensation for the property stolen from Americans[.]" and to see Cuban claims for what he and most Americans perceive them to be: "ridiculous efforts by the Castro regime to manufacture counter claims against the U.S. government to avoid making Americans whole again."³⁸ But if the United States is truly intent on "charting a new course in Cuba" (as declared by the Obama Administration),³⁹ Cuban claims against the United States must form a central part of settlement negotiations.

To date, most of the proposals and frameworks set forth by scholars and academics revolve around settling only U.S. nationals' claims against Cuba, an approach that lacks grounding in the legacy and dynamics of the Cuban Revolution. While some scholars have noted that "[r]evolutionary propaganda can still be found in Cuba, nearly 50 years *after* the revolution[.]"⁴⁰ as late as 1999, Fidel Castro proclaimed the Cuban Revolution had not yet started,⁴¹ a view reflected in the political consciousness of

36. See CREIGHTON UNIVERSITY, *supra* note 26, at 4. Cuban Americans form a politically and economically empowered lobby with enclaves in South Florida, New Jersey, New York, and elsewhere across the United States. See *id.* See also discussion *infra* note 245.

37. See FEINBERG, *supra* note 17, at 5.

38. Letter from Marco Rubio, United States Senator from Florida, to President Barack Obama (Oct. 12, 2016), http://www.rubio.senate.gov/public/_cache/files/b285f024-1102-4458-b1cb-7dc46ad158bb/66B5EF39DA8672E3E9D855BCAFC03199.10-12-16-letter-to-obama---castro-confiscation.pdf (last visited Jan. 15, 2017) [https://web.archive.org/web/20170116040056/http://www.rubio.senate.gov/public/_cache/files/b285f024-1102-4458-b1cb-7dc46ad158bb/66B5EF39DA8672E3E9D855BCAFC03199.10-12-16-letter-to-obama---castro-confiscation.pdf].

39. See *Charting a New Course in Cuba*, *supra* note 24.

40. See CREIGHTON UNIVERSITY, *supra* note 26, at 12 (emphasis added).

41. JOAQUÍN ROY, CUBA, THE UNITED STATES, AND THE HELMS-BURTON DOCTRINE 182 (2000).

many Cubans. Outstanding Cuban claims must be taken seriously, since summarily dismissing these claims as “frivolous” or “unsubstantiated” (as Senator Rubio and many others have naively done) will lead to a breakdown of negotiations and relations. In order to bridge the divide, all parties must have a seat at the table.

Part I of this Note will unpack the historical underpinnings, as well as the consequences, of the expropriation of foreign and domestic private property in Cuba. Part II will explore the various avenues of claims resolution proposed, pursued, and achieved to date. First, there will be an analysis of the three major American proposals discussed in this Note: the Creighton Report, the Ashby Proposal, and the Feinberg Proposal. Next, it will provide an overview of the Cuban position on outstanding American and Cuban American claims, as well as the various official (and unofficial) proposals that have come out of Cuba to date. Additionally, it will examine five claims resolution settlements that Cuba has reached with countries other than the United States, including Switzerland, Spain, France, Great Britain, and Canada. Part III will set forth an inclusive proposal for settling the claims of three distinct groups: U.S. nationals, Cuban American exiles (resident in the United States and abroad), and Cuban nationals (still in Cuba). Claims will be resolved through the following three-tier framework of settlement mechanisms, including: restitution of nationalized American and Cuban American exile assets in Cuba, including improved and unimproved real property; bilateral trade agreements, including development rights and tax incentives; and direct compensation, including partial interest payments.

I. A BRIEF WALK THROUGH HISTORY

Although the Spanish-American War freed Cuba from colonial rule, the fist of the Spaniards was replaced by decades of direct and indirect investment and intervention by the United States.⁴² In the years preceding the Cuban Revolution, Cuba became the playground of the wealthiest and most famous (or often notorious) Americans.⁴³ From the lens of popular Americana, Cuban

42. See CREIGHTON UNIVERSITY, *supra* note 26, at 12.

43. Samuel Farber, *Cuba Before the Revolution*, JACOBIN (Sept. 6, 2015), <https://www.jacobinmag.com/2015/09/cuban-revolution-fidel-castro-casinos-batista>. See also FEINBERG, *supra* note 3, at 8–9 (“In the 1950s Cuba was a

society was one “consumed by the illnesses of gambling, the Mafia, and prostitution.”⁴⁴

Even prominent American intellectuals conceived of Cuba in this fashion. Susan Sontag⁴⁵ described Cuba as “a country known mainly for dance, music, prostitutes, cigars, abortions, resort life, and pornographic movies[,]” while Arthur Miller⁴⁶ described Cuban society as “hopelessly corrupt, a Mafia playground, a bordello for Americans and other foreigners.”⁴⁷ As writer Samuel Farber points out, perhaps mainstream America’s perception of Cuba revealed more about “the North American colonial worldview than anything about Cuba itself,”⁴⁸ as many of the illicit features associated with then-Cuba predominate in the modern American pop-consciousness.

Still, casino gambling, the Italian-American Mafia, and prostitution were undeniable features of pre-Castro Cuban landscape.⁴⁹ As early as the 1920s, casinos began to develop along with the tourist industry, and by the 1950s, many of Havana’s top hotels were home to bustling casinos, including the Riviera, the Capri, and the Havana Hilton.⁵⁰ Both the Batista regime and the several resident Mafia families profited immensely from

popular playground for American tourists seeking escape from the northern winters. Overnight railroad sleeping cars combined with steamships crossing the Florida Straits—and increasingly, regular airplane service—brought Havana nightlife and Varadero beaches easily within reach. The island was all the more comfortable for the presence of many brand-name U.S. corporations that supplied the nation’s electricity and banking services and owned much of the industry and agriculture. Many leading hotels were also familiar to U.S. visitors; some of the hotel owners were infamous mafia capos such as Myer Lansky and Santo Trafficante Jr. (the [American crime film] *The Godfather [Part III]* . . . famously fictionalized a mob conclave in Havana on the eve of the 1959 revolution). Celebrities of the day, such as swimmer Esther Williams and Senator John F. Kennedy, and a regular stream of performing artists, including Ginger Rogers, Eartha Kitt, and Frank Sinatra, filled in the scene.”).

44. Farber, *supra* note 43.

45. Susan Sontag, SUSAN SONTAG FOUND., <http://www.susansontag.com/SusanSontag/index.shtml> (last visited Jan. 15, 2017). Susan Sontag was a celebrated American writer, filmmaker, and human rights activist. *Id.*

46. ARTHUR MILLER FOUND., <http://www.arthurmiller.org/> (last visited Jan. 15, 2017). Arthur Miller was an American playwright, essayist, and fixture in the twentieth-century American theatre scene. *Id.*

47. Farber, *supra* note 43.

48. *See id.*

49. *See id.*

50. *See id.*

“skimming the casinos’ proceeds, cheating investors, and trafficking drugs.”⁵¹ Female sex workers kept these machos company, highlighting the irony of the sexual double standard—the most coveted “decent” girls were virgins until marriage, while men were free to be as promiscuous as they pleased.⁵² Meanwhile, the “great majority of Cubans saw casinos . . . as odious expressions of the corruption of Batista and his henchmen.”⁵³ Even so, the combined economic impact of tourism was “greatly exaggerated” in the United States, as the economic sector earned only \$30 million USD from tourism in 1956 (“barely 10 percent of what the sugar industry made that year”), an industry in which casinos and prostitution played a key role.⁵⁴

But Cuba was much more than just America’s playground. While the combined economic impact of tourism was \$30 million USD in 1956, Cuba’s sugar industry earned \$300 million USD that same year.⁵⁵ *Caña de azúcar* (sugar cane), not gambling and prostitution, was the real driver of the Cuban economy, among other industries. By the time Fidel Castro came to power, U.S. nationals,⁵⁶ not Cubans, owned and controlled the majority of the island nation’s assets, including approximately 80 percent of the sugar lands and 90 percent of all electricity generated in

51. *See id.*

52. *See id.*

53. *Id.*

54. *Id.* (“This relatively modest performance was due in part to the fact that mass international tourism facilitated by widespread commercial jet travel had not yet begun.”).

55. *Id.*

56. *See* International Claims Settlement Act, 22 U.S.C. § 1643 *et seq.* (1949). As defined by Title V of the International Claims Settlement Act (ICSA) of 1949, a “national of the United States” means:

(A) a natural person who is a citizen of the United States, or
(B) a corporation or other legal entity which is organized under the laws of the United States, or any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding stock or other beneficial interest of such corporation or entity. The term does not include aliens.

Id.

Cuba, along with most of the mining industry, oil refineries, bottling plants, and warehouses.⁵⁷ Americans also owned hotels and other commercial properties, private properties, and liquid and illiquid assets, including bank accounts, insurance policies, and securities.⁵⁸ In total, U.S. nationals owned and controlled about *two-thirds* of the Cuban economy.⁵⁹

If the Cuban Revolution was born out of “disgust with government excesses” under Batista,⁶⁰ its fires were fanned by a deep distrust of American profiteers and burgeoning globalization.⁶¹ The nationalization of American assets was perhaps the greatest rebuke Castro could offer. When Castro took power in 1959, the new Cuban government “inherited a \$50 million [USD] budget deficit plus a \$1.4 billion [USD] national debt.”⁶² To add insult to injury, Batista had allegedly absconded with an estimated \$200 million USD from the Cuban national treasury.⁶³ Castro swiftly embarked on a nationalization campaign designed to “correct” the situation.⁶⁴

Beginning on February 13, 1959, Castro passed a series of laws to return “stolen” properties to their rightful owners.⁶⁵ Among the first properties to be nationalized were those “belonging to former collaborators of Batista.”⁶⁶ Next, Castro passed the first of two key laws enabling the expropriations. The 1959 Agrarian

57. See Ashby, *supra* note 20, at 413–14.

58. See *id.* at 414.

59. See *id.*

60. Farber, *supra* note 43.

61. See LOCKWOOD, *supra* note 1, at 140–44. Speaking to American journalist Lee Lockwood in 1965, Fidel Castro recalled how the “United Fruit Company[,]” an American-owned and controlled business, “[had] owned some 325 thousand acres of land. Its stockholders lived in the United States and received a profit there, an income, without ever having visited those lands. . . . The North American company was in constant social conflict with the workers. . . .” *Id.*

62. See Ashby, *supra* note 20, at 414, n.6 (citing MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 101 (1976)).

63. See *id.*

64. See GORDON, *supra* note 2, at 70–72.

65. See *id.* at 72 (citing Ley No. 78, Feb. 19, 1959, GACETA OFICIAL, Feb. 19, 1959 (Cuba); Ley No. 112, Feb. 27, 1959, GACETA OFICIAL, Mar. 4, 1959 (Cuba); Ley 151, Mar. 17, 1959, GACETA OFICIAL, Mar. 18, 1959 (Cuba); Ley 438, July 7, 1959, GACETA OFICIAL, July 13, 1959 (Cuba); Ley 545, Sept. 2, 1959, GACETA OFICIAL, Sept. 10, 1959).

66. See *id.*

Reform Law was “first promulgated in May but amended and finalized in June.”⁶⁷ As early as 1953, in his famous “History Will Absolve Me” speech, Castro declared that land redistribution was an essential component of the Cuban Revolutionary agenda, and the Agrarian Reform Law was the first step on this path.⁶⁸ The second key law—Law 851, which expressly targeted properties and assets then-owned by U.S. nationals—was not passed until summer of 1960.⁶⁹ Law 851 granted the Cuban government the authority to nationalize American-owned properties and assets “when they consider it convenient for the defense of the national interest.”⁷⁰ The Cuban government also expropriated sim-

67. *Id.* at 75 (citing Ley de Reforma Agraria, May 17, 1959, 7 LEYES DEL GOBIERNO PROVISIONAL DE LA REVOLUCIÓN 135 (1959); REVOLUCIÓN, May 18, 1959; Decreto No. 1426, May 17, 1959, GACETA OFICIAL (EDICIÓN EXTRAORDINARIA), June 4, 1959).

68. *See id.* at 76, n.31 (“Castro has stated in his defense: The Second Revolutionary Law would have granted property to all planters, subplanters, lessees, partners, and squatters who hold parcels of five or less *caballerías* of land, and the state would indemnify the former owners on the basis of the rental they would have received on these parcels over a period of ten years.”) (citing *La Historia Me Absolverá*, EL PENSAMIENTO DE FIDEL CASTRO 21 (1963)). The Cuban government also passed the Urban Housing Reform Law of October 14, 1960, whereby property rights were transferred from owners to tenants.). *See* FEINBERG, *supra* note 17, at 1. Under Article 21 of the Reform Law, “landlords who remained in Cuba were compensated with life-long pensions[.]” while the residences of those who fled, *i.e.*, Cuban exiles, were summarily “declared ‘abandoned’ and redistributed to regime constituents.” *Id.* *See also* discussion *infra* note 245.

69. *See* GORDON, *supra* note 2, at 98 (citing Ley 851, July 6, 1960, GACETA OFICIAL, July 7, 1960).

70. *See id.* at 98. Some scholars view Law 851 as, at least in part, Castro’s response to two American actions: first, the United States Congress passing an amendment to the Sugar Act of 1948 (giving the President discretionary authority to establish the Cuban sugar quota “at any figure”); and second, President Eisenhower exercising that authority to reduce the quota arrangement from 739,752 tons to 39,752 tons, “a potential loss of some \$92,500,000 [USD], and a probable permanent loss to Cuba of that portion of the price which represented the subsidy, since it was not expected that other purchasers would pay the subsidized price offered by the United States.” *See id.* at 97–99. This sequence of events was a “clear indication” that President Eisenhower had declared “economic war,” and Law 851 allowed Castro to, at least temporarily, resolve the issue. *See id.* at 98–99. The American-owned sugar mills expropriated pursuant to Law 851 were valued “at up to \$260 million [USD],” leaving Cuba with a windfall of \$167.5 million USD, at least for that year (1960). *See id.* at 97–98.

ilar assets of U.S. allies during the 1960s, including the nationals of Switzerland, Spain, France, Great Britain, and Canada.⁷¹ Castro passed Laws 890 and 891, which together nationalized 382 major companies, all but two Canadian banks, and properties and assets owned by foreigners and Cuban nationals alike.⁷² By seizing foreign and domestic assets, Castro shifted the balance of power, “transformed” the island nation’s international relations, and “dramatically reduc[ed] the influence of the United States” in one fell swoop.⁷³

Ironically, the initial U.S. response to expropriation of its nationals’ agricultural holdings was mostly positive.⁷⁴ American optimism was tempered by the proviso that the United States expected “prompt, adequate and effective compensation.”⁷⁵ One American diplomat expressed “serious concern” regarding “the adequacy of the provision for compensation to its citizens whose property may be expropriated.”⁷⁶ The Cuban government swiftly

71. See Ashby, *supra* note 20, at 421–22. See also Neyfakh, *supra* note 22; and FEINBERG, *supra* note 17, at 11 (“Cuba has already negotiated bilateral settlements of outstanding property claims with other governments, including Canada (1980), Great Britain (1978), France (1967), Spain (1967), and Switzerland (1967).”).

72. See GORDON, *supra* note 2, at 103, n.110 (stating that the purpose of these laws was to “transfer control of basic industry to the Cuban government and [to] ‘liquidat[e] the economic power of the privileged classes.’”) (citing Ley 890, Oct. 13, 1960, GACETA OFICIAL (EDICION EXTRAORDINARIA), Oct. 13, 1960; and Ley 891, Oct. 13, 1960, GACETA OFICIAL (EDICION EXTRAORDINARIA), Oct. 13, 1960).

73. See FEINBERG, *supra* note 17, at 2.

74. See Ashby, *supra* note 20, at 414. For example, U.S. Ambassador Philip Bonsal delivered a diplomatic note in June 1959:

[R]ecognizing ‘that under international law a state has the right to take property within its jurisdiction for public purposes in the absence of treaty provisions or other agreements to the contrary,’ and stated that the United States ‘understands and is sympathetic to the objectives’ of the land reform program because it ‘can contribute to a higher standard of living, political stability and social progress.’

See *id.* (citing U.S. Dep’t of State, U.S. Informs Cuba of Views on Agrarian Reform Law, 40 DEPT ST. BULL. 958 (1959)).

75. *Id.* at 414.

76. *Id.* Law 851 “authorized compensation for property takings of U.S. nationals in the form of thirty-year government bonds with an annual interest rate of 2%. For real property, Cuban law allowed for compensation to include

responded, recognizing its obligation and declaring its intent to provide "prompt and adequate compensation."⁷⁷ But the Cuban government qualified its message with the caveat that the United States' receipt of any monies owed for said compensation could be delayed, and the payment scheme modified, because of "the chaotic economic and financial situation into which the overthrown tyranny plunged the country and the marked imbalance in the balance of payments between the United States and Cuba."⁷⁸ Then, following the "second wave of foreign asset nationalizations," the Cuban government reminded its American creditors that "it was too poor to pay compensation promptly or in cash, reinforcing their intent to primarily use bonds for settlement."⁷⁹

From 1959 through 1961, "[a]lready frayed ties between Washington and Havana" continued to wear, as the United States reprimanded the Cuban government over its seizure of American property and the executions of various officials from Batista's former regime.⁸⁰ Fidel Castro threatened to expel American diplomats resident in Cuba for "meddling in Cuban affairs."⁸¹ Eventually, American patience wore thin (indeed, U.S. nationals are still waiting to be compensated). In 1961, President Dwight D. Eisenhower declared the cessation of diplomatic relations, stating, "[t]here is a limit to what the United States in self-respect can endure. That limit has now been reached."⁸²

One year later, on February 3, 1962, President Kennedy signed Proclamation 3447, formally establishing *El Bloqueo*—the

a 15% profit and actual expenses in addition to the base value for vacant residential lots, and a 12% profit for lots suitable for commercial use." See *id.* at 415 (citing Ley 851, July 6, 1960, GACETA OFICIAL, July 7, 1960; and Ley 218, Apr. 7, 1959, GACETA OFICIAL, Apr. 13, 1959).

77. See GORDON, *supra* note 2, at 128.

78. See *id.* at 128–29 (quoting Cuban Note of June 15, 1959, cited in Rafat, *Legal Aspects of the Cuban Expropriation of American-Owned Property*, 11 ST. LOUIS L. J. 45, 58 (1966)).

79. See Ashby, *supra* note 20, at 415 (citing MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 101 (1976)).

80. Patrick Oppmann, *U.S., Cuba Re-Establish Diplomatic Relations, Reopen Embassies*, CNN (July 20, 2015), <https://www.cnn.com/2015/07/20/politics/cuba-u-s-embassies-opening/>.

81. *Id.*

82. *Id.*

derogatory Cuban term for the Embargo.⁸³ In 1964, the American government also established the Cuban Claims Program, which authorized the Foreign Claims Settlement Commission (FCSC)⁸⁴ to gather information regarding claims against the Cuban government for nationalized assets.⁸⁵ The certification pro-

83. Proclamation No. 3447, 76 Stat. 1446 (Feb. 3, 1962), <https://www.gpo.gov/fdsys/pkg/STATUTE-76/pdf/STATUTE-76-Pg1446.pdf> (last visited Jan. 16, 2017). Proclamation 3447 signaled the most severe escalation of the previously announced trade embargo, prohibiting the “importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba[.]” authorizing the Secretary of the Treasury “to carry out such prohibition,” and authorizing the Secretary of Commerce . . . to continue to carry out the prohibition of all exports from the United States to Cuba. . . .” *Id.* Ironically, the United States had publicly announced an arms embargo as early as March 1958, aimed at depriving Batista, *not Castro*, of shipments of weapons and munitions. *See CUBA: A COUNTRY STUDY*, *supra* note 3, at 63. Then, on October 19, 1960, the United States declared “an embargo on trade with Cuba, except for medical supplies and most foodstuffs.” *See id.* at xxvi.

84. *See About the Commission, Foreign Claims Settlement Commission of the U.S.*, U.S. DEPT JUST., <https://www.justice.gov/fcsc/about-commission> (last visited Jan. 16, 2017) [<https://web.archive.org/web/20170116205253/https://www.justice.gov/fcsc/about-commission>] (“The Foreign Claims Settlement Commission of the United States (FCSC) is a quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments, under specific jurisdiction conferred by Congress, pursuant to international claims settlement agreements, or at the request of the Secretary of State. Funds for payment of the Commission’s awards are derived from congressional appropriations, international claims settlements, or liquidation of foreign assets in the United States by the Departments of Justice and the Treasury.”). *Id.*

85. *See Ashby*, *supra* note 20, at 417. More specifically, Title V of the ICSA authorized the FCSC to:

[C]onsider claims of nationals of the United States against the Government of Cuba, based upon: (1) losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property by that government; and (2) the disability or death of nationals of the United States resulting from actions taken by or under the authority of that government. The program covered claims for losses which occurred on or after January 1, 1959, when the Castro regime took power. Ordinarily, the Commission would have held that its jurisdiction extended only to claims arising before October 16, 1964, the date the

cess was conducted *ex parte*, with the FCSC reviewing and evaluating claimants' documentation to ascertain the validity and amounts of property claims eligible for certification.⁸⁶ All told, the FCSC certified 5,911 out of 8,816 claims filed with a total value of approximately \$1.82 billion USD.⁸⁷ Applying the simple interest rate of 6 percent recommended by the FCSC, the current value of outstanding claims approaches \$7 billion USD.⁸⁸

While the U.S. government, egged on by a recalcitrant Cuban American community, was (and remains) unwilling to accept Castro's settlement terms, other nations, including Canada, France, Spain, and Switzerland, opted to settle their outstanding property claims in large, lump-sum amounts.⁸⁹ Cited as support for the United States' tough position, the foreign settlements were a mere pittance compared to the original value of

program was authorized. In this case, however, the Commission reasoned that, because the statute was remedial, and because it had as one of its main purposes the collection, examination and preparation of evidence and information relating to the claims while it was still fresh and available, it would adjudicate any otherwise valid claim even if it arose after the filing deadline of January 1, 1967. When the program was authorized, there were no funds available with which to make payment on the claims, and the statute precluded Congress' appropriation of funds for such payments. As was the case with the First China Program, the statute provided only for the determination of the validity and amounts of such claims, and for the certification of the Commission's findings to the Secretary of State for use in the future negotiation of a claims settlement agreement with the Government of Cuba. The Cuban Claims Program was completed on July 6, 1972. The Commission adjudicated a total of 8,816 claims in the program, of which it found 5,911 to be compensable. The adjudicated total principal value of those claims was \$1,851,057,358.00 [USD].

Completed Programs—Cuba, Foreign Claims Settlement Commission of the U.S., U.S. DEP'T JUST., <https://www.justice.gov/fcsc/claims-against-cuba> (last visited Jan. 16, 2017) [<https://web.archive.org/web/20170116205902/https://www.justice.gov/fcsc/claims-against-cuba>].

86. See Ashby, *supra* note 20, at 417. See also *Completed Programs—Cuba, Foreign Claims Settlement Commission of the U.S.*, *supra* note 85.

87. See Ashby, *supra* note 20, at 417.

88. See *id.* See also Neyfakh, *supra* note 22.

89. See CREIGHTON UNIVERSITY, *supra* note 26, at 3. See also *infra* Part II.

the claims. For example, “Spanish claims were valued at \$350 million [USD] but were ultimately settled for about \$40 million [USD] in 1994, nearly thirty years after nationalization took place.”⁹⁰ Canada settled its claims in one “government-to-government lump sum agreement in 1980,” worth only CAD \$875,000 and “pa[id] by check in installments over several years.”⁹¹ These settlements, however, were more than a token gesture. They were the first step towards reconciliation and forging a path towards renewed diplomatic, political, social, and economic ties, a feat the United States has been unable to achieve despite the change in tone announced by the Obama Administration.⁹²

Still, the Obama Administration has put forth more than rhetoric.⁹³ December 17, 2014 marked dual announcements by Presidents Barack Obama and Raúl Castro of “intentions to renew diplomatic relations—first suspended in January 1961. . . .”⁹⁴ Less than one year later, on July 20, 2015, the United States and Cuba “reopened embassies in each other’s capitals.”⁹⁵ In addition, the two governments decided to establish a “bilateral commission charged with addressing a number of vital issues,” including the outstanding claims of U.S. nationals.⁹⁶

The obstacles to full restoration of relations loom large, not least of which is the Cuban Liberty and Democratic Solidarity Act of 1996 (the “Libertad Act” or the “Helms-Burton Act”),⁹⁷

90. See Ashby, *supra* note 20, at 421–22.

91. See *id.* at 422.

92. See *Charting a New Course in Cuba*, *supra* note 24.

93. See *id.*

94. FEINBERG, *supra* note 17, at 3.

95. *Id.*; see also Oppmann, *supra* note 80.

96. See FEINBERG, *supra* note 17, at 3.

97. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021–91 (1996), <https://www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf>. [https://web.archive.org/web/20170116213644/https://www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf].

For an authoritative and in-depth discussion of the Helms-Burton Act, which codified the Embargo, see generally ROY, *supra* note 41. It bears mentioning that in February 1996, “a Cuban air force MiG-29 shot down two civilian planes sponsored by the Miami-based exile group Brothers to the Rescue near Cuba,” creating an uproar within the Cuban American exile community resident in the United States. David Rieff, *Cuba Refrozen*, 75 FOREIGN AFF. 62, 62 (1996). At least one scholar has cynically noted that the Helms-Burton Act was passed by Congress and signed by President Clinton that same year (an election year), suggesting that the “important

which predicates the "satisfactory resolution of property claims by the Cuban Government . . . as an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba."⁹⁸ Further, while the Cuban Government has never "repudiated" the U.S. claims, "it has consistently stated that it does not recognize the property claims of Cuban exiles in the United States."⁹⁹ If the United States is truly intent on "charting a new course in Cuba" as the Obama Administration has promised,¹⁰⁰ it will have to get out the silk gloves, as there are many competing interests at stake, any one of which could foil even the most agreeable of settlement proposals at any given moment.¹⁰¹ This does not mean, however, that a negative

swing vote" of Cuban Americans in New Jersey played a greater role in getting the law passed than any of its underlying merits. *Id.* Another scholar alleges the "hypocrisy" of the Helms-Burton Act, noting that while the United States "claims that it has instituted a policy of tightening the economic noose around Cuba with the Helms-Burton bill on the grounds that Cuba refuses to compensate [U.S. nationals,] . . . [t]his is patently untrue, as Cuba not only successfully negotiated compensation agreements with other countries, but has and is ready to negotiate with the US." S.J. Noumoff, *The Hypocrisy of Helms-Burton: The History of Cuban Compensation*, 33 ECON. POL. WKLY. 955, 955 (1998). See also *infra* Part III.

98. See CREIGHTON UNIVERSITY, *supra* note 26, at 3.

99. See Ashby, *supra* note 20, at 418 (citing Ley de Reafirmación de la Dignidad y Soberanía (Ley 80), 24 Dec. 1996 (Cuba), 36 I.L.M. 472 (1997)).

100. See *Charting a New Course in Cuba*, *supra* note 24.

101. The three main groups jockeying for position include U.S. nationals, Cuban American exiles, and Cuban nationals. See *supra* Introduction. William M. LeoGrande has attempted to explain U.S.-Cuba policy utilizing Robert D. Putnam's 1988 theory or "metaphor" of international bargaining as a two-level game (the "Putnam Theory"). See William M. LeoGrande, *From Havana to Miami: U.S. Cuba Policy as a Two-Level Game*, 40 J. INTER-AM. STUD. WORLD AFF. 67 (1998). The Putnam Theory posits that in any international bargaining situation, national leaders are involved in two, simultaneous negotiations. *Id.* at 67. At level one, a "leader seeks to reach agreement with other international actors" (the international negotiation); at level two, that same "leader must persuade his domestic constituency to accept ('ratify') the level one agreement (the domestic negotiation). *Id.* Rational moves at level one "may prove impolitic" at level two, or vice versa, and the leader must perform a series of complex negotiations to "win," locating the intersection between the level one "win-set" and the level two "win-set." *Id.* According to LeoGrande, "Putnam's contribution lies in his emphasis on the interactive nature of the international and domestic processes." *Id.* LeoGrande assesses that from 1959 through 1974, U.S.-Cuba relations "were dominated by Washington's level [one] security issues." *Id.* at 82. Then, from 1974 through 1979, "the reduction of security concerns because of detente and the dovish bent of level [two] domestic constituencies

outcome is a *fait accompli*. In fact, the United States is in a unique position to leverage positive outcomes for all parties involved.

II. DISPARATE APPROACHES & PERSPECTIVES

Part II will examine the three prevailing modes of claims settlement resolution strategies. The first section, dubbed “American Approaches,” will look at prevailing U.S. attitudes regarding claims resolution across three fronts (official policy, business sector, and think tank), best captured by the three major works examined in this Note, namely the Creighton Report (official policy), the Ashby Proposal (business sector), and the Feinberg Proposal (think tank). The second section, dubbed “Cuban Approaches,” will examine the rhetoric coming out of the Castro regime regarding claims settlement solutions. It will also question whether U.S. official policy (Cuba is not willing to settle) matches actual Cuban government practice (Castro proposed a settlement as early as 1964). The third and final section, dubbed “Foreign Approaches,” will present an overview of claims settlements Cuba has reached with five countries other than the

spawned two interludes of negotiations aimed at normalizing relations.” *Id.* Then, the tension switched back, and from 1979 through 1991, “security issues reemerged as detente was replaced by renewed Cold War tensions[, and] . . . the rise of the hawkish Cuban American lobby reconfigured the domestic political balance to reinforce the U.S. government’s policy of hostility.” *Id.* Entering the modern period, LeoGrande speculates that a “policy of engagement would give the Cuban government an incentive to continue cooperating on immigration issues, whereas hostility aggravates the economic difficulties that increase emigration pressures.” *Id.* Complicating the issue is the fact that during “noncrisis periods,” the Cuban American lobby exercises its “preponderant power” in the level two domestic game, which serves as a “serious obstacle to formulating level [one] policy positions that might avert new crises.” *Id.* at 83. Putnam Theory is applicable to the debate over resolution of outstanding claims. *See id.* at 67–68. It is in this author’s view that any U.S. leader looking to set forth a realistic plan to resolve the outstanding FCSC claims (which, pursuant to the Helms-Burton Act, is a prerequisite to full restoration and normalization of relations) must carefully consider the claims of all three groups whose interests are at stake, not just those of U.S. nationals with FCSC-certified claims. *See id.* at 80–83. Continued hostility in the form that Senator Rubio suggests (summarily dismissing Cuban claims) will only serve to “aggravate” the situation (foiling the level one international game), whereas finding Cuban American claims “inapplicable” will disenfranchise the constituency whose support is most needed (foiling the level two domestic game). *See id.* at 67–68; *see also infra* Part III.

United States. The five settlements provide models for evaluating Cuba's future bargaining position and preferences in negotiating a claims settlement with the United States.

A. American Approaches

As noted earlier, the three American works that follow form the bedrock of existing analysis on the subject of settling American property claims with Cuba. While the 2015 Creighton Report is exhaustive, it fails to meaningfully consider the Cuban Exile Community's claims or cross-claims by Cuba. The Ashby Proposal aims for a speedy resolution, but it similarly fails to meaningfully consider either of these distinct groups' claims. The Feinberg Proposal is optimistic and grapples with some of the thornier issues addressed in the other two works, yet it also falls short of presenting a holistic solution for all involved parties. Each of these works share one common theme: recognizing American claims as "legitimate," while dismissing other parties' claims as dubious at best.

1. Creighton University's 2007 Proposal

In October 2015, USAID awarded Creighton University a \$750,000 USD grant "to develop a model for a property claims settlement mechanism between Cuba and the United States."¹⁰² Led by Patrick J. Borchers,¹⁰³ Creighton University gathered a team of three law faculty members and three political science faculty members, with support from graduate students at both schools.¹⁰⁴ The object of the study was to provide "a template to be utilized by the United States Government in future negotiations with a post-Castro democratic regime in Havana."¹⁰⁵

The Creighton Report, given its direct funding from the United States, is pegged to the 1996 Helms-Burton Act, the definitive and still-current statement of official U.S. policy towards Cuba.¹⁰⁶ The Helms-Burton Act predicates resumption of rela-

102. See CREIGHTON UNIVERSITY, *supra* note 26, at 2.

103. *Id.* Borchers is "Vice President for Academic Affairs, Professor and former Dean" of Creighton University's Law School. *Id.* Borchers also served as the Creighton Report's Principal Investigator. *Id.*

104. See *id.*

105. *Id.*

106. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, *supra* note 97. See generally CREIGHTON UNIVERSITY, *supra* note 26.

tions on the resolution of outstanding claims, but it also envisions a foundational shift to a democratic form of government in Cuba, “seeking a full-scale transition to democratic governance.”¹⁰⁷ This premise presages the breakdown of diplomatic negotiations between the United States and Cuba, even before they have had a chance to begin. While the call for democracy in Cuba can be heard in private conversations with Cuban nationals and seen in various blogs and websites, the assumption that the establishment of democracy in Cuba is a prerequisite to settling outstanding claims is the mark of a particularly American brand of western arrogance.¹⁰⁸ If anything, the reverse is true. The settlement of outstanding claims is a prerequisite to the sustained warming of relations between the United States and Cuba and

107. See CREIGHTON UNIVERSITY, *supra* note 26, at 15.

108. See Julia E. Sweig & Michael J. Bustamante, *Cuba After Communism: The Economic Reforms That Are Transforming the Island*, 92 FOREIGN AFF. 101, 114 (2013) (arguing that when Raúl Castro’s successor, Díaz-Canel, “takes the reins, Cuba in all likelihood will continue to defy post-Cold War American fantasies even as it moves further away from its orthodox socialist past. For the remaining members of Cuba’s founding revolutionary generation, such a delicate transformation provides a last opportunity to shape their legacy. For Cubans born after 1991, the coming years may offer a chance to begin leaving behind the state of prolonged ideological and economic limbo in which they were raised.”). See also Soraya M. Castro Mariño, *U.S.-Cuban Relations during the Clinton Administration*, 29 LAT. AM. PERSPECTIVES 47, 62 (2002) (arguing that the “spirit and the letter of [the Helms-Burton Act] demonstrated the essential conflict existing between Cuba and the United States: sovereignty versus domination. That ideological aversion to socialism as a political and social model was only an excuse was revealed by the fact that the United States had achieved commercial and diplomatic understandings with China and Vietnam.”). Castro Mariño quotes Harvard professor Jorge Domínguez, who once observed:

The Helms-Burton Act is quite faithful to the theme of the Monroe Doctrine and the Roosevelt Corollary. It claims for the United States the unilateral right to decide a wide array of domestic policies and arrangements in a nominally sovereign post-Castro Cuba. In the Monroe Doctrine, the United States asserted its right to specify which system of government was acceptable in the Americas. In the Roosevelt Corollary, the U.S. government claimed the additional right to stipulate specific economic and other policies *and specifically to redress the nonpayment of debts*.

Id. (emphasis added).

movement towards the various freedoms and rights guaranteed in a democratic society.¹⁰⁹

Admittedly, the Creighton Report recognizes that while the Helms-Burton conditions "have some obvious merit, hinging resolution of long-festered property issues on dramatic changes in government may prove burdensome."¹¹⁰ The Creighton Report also acknowledges that "the probability of succession is in some ways far more likely than full-scale transition in the short and (possibly) medium term—as we have seen in the last year with the ascension of Raúl Castro."¹¹¹ This latter assessment proved to be true, at least in terms of Raúl Castro, "whose second and final five year term in office will [only] come to an end in early 2018."¹¹² Who succeeds Raúl Castro remains to be seen, but it is unlikely that there will be any marked shift towards a more democratic form of government. Indeed, the pro-reform voices in Cuba are growing in volume and number, but the "more orthodox thinkers within the government and the [*Partido Comunista de Cuba*, i.e., the Communist Part of Cuba] seem to have . . . the upper hand at every turn."¹¹³ As such, the Creighton Report authors do not go far enough in warning against the geopolitical pitfall of putting the cart before the horse and prioritizing a democratic transition ahead of the settlement of claims.

In its Executive Summary, the Creighton Report starts by identifying the following three classes of property claimants: U.S. National Claimants, Cuban Exile Community Claimants, and Cuban Claimants Still in Cuba.¹¹⁴ The first group, U.S. National Claimants, includes both natural and non-natural persons, including "American individuals and corporations who were Americans at the time of the unlawful expropriation (mostly in 1959 and the [sic] early 1960)."¹¹⁵ These persons have

109. See Kathleen C. Schwartzman, *Can International Boycotts Transform Political Systems? The Cases of Cuba and South Africa*, 43 LAT. AM. POL'Y SOC'Y 115, 115–16, 140 (2001) (arguing that the Embargo, and by extension the Helms-Burton Act, "cannot have its intended results," as international boycotts are not decisive in transforming political systems. . . . Change will come, but if comparative history offers a lesson, it will not be through economic sanctions.").

110. CREIGHTON UNIVERSITY, *supra* note 26, at 16.

111. *Id.*

112. See FEINBERG, *supra* note 3, at 65.

113. See *id.* at 72.

114. CREIGHTON UNIVERSITY, *supra* note 26, at 3.

115. *Id.*

certified their claims through the FCSC, and as previously described, the current value of outstanding claims approaches \$7 billion USD.¹¹⁶ Moreover, the Helms-Burton Act further preconditions the lifting of the Embargo and the resumption of full economic and diplomatic relations between the United States and Cuba on “the satisfactory resolution of property claims by a Cuban Government recognized by the United States.”¹¹⁷ If the referred to “property claims” are defined as the outstanding claims certified by the FCSC, both the Creighton Report and prevailing U.S. policy take for granted the legitimacy and value of the claims asserted by Americans. This is a fatal strategic and diplomatic flaw.¹¹⁸

The second group, Cuban Exile Community Claimants, includes individuals who “were Cuban at the time of the expropriation of their property.”¹¹⁹ The Creighton Report suggests that this “second group of property claims is held by Cuban-American exiles[,]” but the definition should be expanded to include Cuban exiles who fled to, live(d) in, and became nationals of states *other* than the United States. While the majority of Cubans sought asylum in the United States, many Cuban exiles ended up elsewhere, including Canada, Spain, Mexico, France, and the United Kingdom. The Creighton Report correctly notes that “because members of this claimant group were nationals of Cuba when their property was expropriated, international law does not recognize right of recovery.”¹²⁰ This fact, however, should not serve as an auto-exclusionary mechanism, due in large part to political and economic factors. Even though “claims by this group are not [technically] supported by either domestic or international law,”¹²¹ ignoring their claims would undermine attempts to resolve claims on behalf of other groups. Politically, Cuban exiles, particularly Cuban American exiles, enjoy “support among policy-makers in Washington and activism against the [Castro] regime make them a group that cannot be ignored.”¹²² Economically, Cuban exiles would likely be “among the first investors in

116. See Neyfakh, *supra* note 22.

117. CREIGHTON UNIVERSITY, *supra* note 26, at 3.

118. See *infra* Part III.

119. CREIGHTON UNIVERSITY, *supra* note 26, at 3.

120. *Id.* at 4.

121. *Id.*

122. *Id.*

an open Cuban market[.]” and alienating this group would preclude their infusion of capital into Cuba, which would “help to jump-start the Cuban economy . . . and could do much to spark the suppressed but ever-present entrepreneurial spirit of the Cuban people.”¹²³ From a geopolitical perspective, acknowledging and settling the Cuban Exile Community claims could prove to be the key lynchpin in turning the tide of American policy attitudes towards Cuba.¹²⁴

The third group, Cuban Claimants Still in Cuba, includes individuals who were and remain(ed) nationals of Cuba at the time of, and following, the nationalization of property.¹²⁵ The Creighton Report notes that these “claims are wholly an internal matter for Cuba to resolve[.]” and accordingly, “[t]here is no international dimension to them.”¹²⁶ While in principle this latter statement may be true, in practice, the voices and claims of Cuban claimants still in Cuba will be critical to the successful resolution of other groups’ claims. Successful implementation of a claims resolution mechanism will require Cuban claimants’ support, because if “Cubans in Cuba . . . view the settlement process as a venue for capital flight from the island, then they will not support it.”¹²⁷ If they do not support it, the prospect of creating a political and economic environment supportive of and receptive to the outcomes of settlement (and other items on the Western agenda, such as a transition to democracy) will prove a difficult, if not insurmountable, obstacle.¹²⁸

The Executive Summary also proposes the following two main vehicles of claims settlements: A Cuba-U.S. Claims Tribunal (the “Tribunal”) and a Cuban Special Claims Court (the “Claims Court”).¹²⁹ The Cuba-U.S. Claims Tribunal would “be established by bilateral treaty or executive agreement between a successor government to the Castro regime and the U.S.”¹³⁰ The Tribunal would have “international legal capacity as an arbitral body[.]” and its sole purpose would be “to resolve outstanding property dispute issues between Cuba and the United States

123. *Id.*

124. See discussion *supra* note 101; see also *infra* Part III.

125. See CREIGHTON UNIVERSITY, *supra* note 26, at 4.

126. *Id.*

127. *Id.*

128. See discussion *supra* note 101; see also *infra* Part III.

129. CREIGHTON UNIVERSITY, *supra* note 26, at 5–6.

130. *Id.* at 5.

and the respective nationals thereof.”¹³¹ The Tribunal would have “authority to promulgate rules of procedure,” “the power to order interim measures of relief,” and the ability to “apply international law to resolve the claims before it.”¹³² Claims would be settled primarily through two mechanisms. Small claims, defined as those “over which the Tribunal has jurisdiction and in which recovery of \$10,000.00 [USD] or less, exclusive of any claim for interest, is sought and is brought by a national against a Government[.]”¹³³ would be “compensated monetarily through a streamlined process.”¹³⁴ Medium and large claims, defined under similar terms, but ranging from “more than \$10,000.00 [USD] but less than \$250,000.00 [USD]” and “more than \$250,000 [USD,]”¹³⁵ respectively, could also “be compensated monetarily, by specific restitution (under limited circumstances), or by alternative remedy awarded by the Government against which the claim is brought in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment”¹³⁶ in Cuba, assuming these alternatives are satisfactory to each claimant. The Tribunal would operate to resolve the first and third group’s claims (U.S. National Claimants and Cuban Claimants Still in Cuba).¹³⁷

Since the Cuban Exile Community’s claims are not technically recognized under international law, their claims are proposed to be resolved by a Cuban Special Claims Court.¹³⁸ Much like its Tribunal counterpart, the Claims Court would “be established by bilateral treaty or executive agreement between a successor government to the Castro regime and the U.S.[.]” but rather than operating under international law, it would “be an independent chamber within the Cuban judicial system[.]” would have sole “authority to promulgate its rules of procedure, and w[ould] conduct business according to the arbitration rules

131. *Id.*

132. *Id.*

133. *Id.* at 147.

134. *Id.* at 5.

135. *Id.* at 148.

136. *Id.* at 5.

137. *See id.* at 5–6.

138. *See id.* at 6.

promulgated in 1976 by the United Nations Commission on International Trade Law.”¹³⁹ Further, the Claims Court would decide all cases “on the basis of civil law, particularly as derived from the Spanish Civil Code of 1889.”¹⁴⁰ Much like the Tribunal, the Claims Court would settle claims based on whether they qualify as small, medium, or large. The Claims Court’s awards would be “final, binding and fully enforceable within Cuba and the United States.”¹⁴¹

The problems endemic to this approach are twofold. First, the Creighton Report approach suggests, both structurally and didactically, a “pecking order” of claims. U.S. National Claimants’ claims are to be resolved first, followed by Cuban Exile Community Claimants, and then by Cuban Claimants Still in Cuba.¹⁴² While this may seem natural to politicians and diplomats who view the United States as the center of the geopolitical sphere, it is antithetical to that favored by the Castro regime, its likely successors, many (if not the majority of) Cubans, and various other states, who all share “similar views on ‘antihegemonism’ and ‘nonintervention’ along with preferences for a more multipolar world order.”¹⁴³ If the United States is to approach the settlement of claims seriously, it must treat all claimants as being on equal footing. To position U.S. national and Cuban Exile claimants “ahead” of Cuban claimants would sound the death knell of the claims settlement process, which in turn would further jeopardize and stall the United States’ ultimate goal of seeing a peaceful transition to democracy in Cuba.¹⁴⁴

Second, the Creighton Report (in its 250-plus pages) dedicates all of two paragraphs on one page to “Cross Claims by Cuba.”¹⁴⁵ This demonstrates the extent to which they have been thoughtfully considered as part and parcel of the overall claims settlement process. Cross-claims by Cuba¹⁴⁶ include, but are not limited to, “economic losses” stemming primarily from the Embargo

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.* at 3.

143. *See* FEINBERG, *supra* note 3, at 54.

144. *See infra* Part III.

145. *See* CREIGHTON UNIVERSITY, *supra* note 26, at 5.

146. *See* FEINBERG, *supra* note 17, at 6–7, 12–15 (addressing Cuban cross-claims).

“and tort claims.”¹⁴⁷ Because of the difficulty in distinguishing “between harm done by the embargo and that done by the Cuban government,” the Creighton authors summarily and neatly conclude that, “it is impossible to verify the claims and claim amounts.”¹⁴⁸ They emphasize that “[t]o the extent that Cuban claims are allowed [at all], making the claim settlement process a two-way street, only valid property-based claims should be considered under the jurisdiction of the bilateral Tribunal.”¹⁴⁹ This last qualification is drenched in skepticism.¹⁵⁰

This latter line of rhetoric is counterproductive and potentially incendiary, as the Cuban government’s current position is not likely to change.¹⁵¹ As just discussed, the Cuban government maintains the existence of “two categories of claims: economic damages from the long-standing U.S. economic sanctions, and personal injury damages sustained by Cubans killed or harmed by alleged U.S. hostilities. . . .”¹⁵² The claims include, but are not limited to, “\$3.8 billion [USD] for losses in the tourist industry[,] . . . \$200 million [USD] for the purchase of sugarcane crop equipment to substitute for U.S.-manufactured equipment[,] . . . [and] CIA-supported hostilities in Cuba resulting in 549 deaths between 1959–1965 alone. . . .”¹⁵³ Despite the difficulty verifying the parties responsible for the damages (posited by the Creighton Report authors), “a lawsuit went forward in Cuban Court in May 1999 asserting massive tort claims against the U.S. for human losses and hardships flowing from the embargo.”¹⁵⁴ Following the presentation of evidence over a thirteen-day period (and the lack of a formal response from the United

147. CREIGHTON UNIVERSITY, *supra* note 26, at 5. *See also infra* Part II.

148. CREIGHTON UNIVERSITY, *supra* note 26, at 5.

149. *Id.*

150. *See id.* The Creighton Report acknowledges the possibility of settling claims related to “frozen assets of the Cuban government[.]” but otherwise suggests that most “Cuban claims, including tort claims, should be undertaken within the domestic Cuban judicial system and treated as normal litigation. . . . Cases alleging other bases for compensation [simply] fall outside the jurisdiction of the judicial bodies recommended for establishment[.]” including the Tribunal and the Claims Court. *See id.*

151. *See* discussion *supra* note 108; *see also infra* Part III.

152. *See* FEINBERG, *supra* note 17, at 13.

153. *Id.*

154. CREIGHTON UNIVERSITY, *supra* note 26, at 5.

States), the Cuban court “awarded damages of \$181.1 billion [USD] and ordered the U.S. to apologize.”¹⁵⁵

In the face of U.S. obstinance regarding the legitimacy of Cuban counter-claims (and their relevance to the claims settlement process, which is limited to property claims and purportedly excludes most Cuban claims), official Cuban policy has in turn maintained a hardline approach. As discussed earlier, one Cuban diplomat has declared that the claims issue could be “decided easily and quickly: simply offset U.S. claims with Cuban counter-claims!”¹⁵⁶ Offsetting the \$181.1 billion USD owed to Cuba with the estimated \$7 billion USD owed to the U.S. nationals would leave the United States with a debt of \$174.1 billion USD. The United States is not likely to entertain such a debt. Of course, there is logic behind the Creighton authors’ intent to limit the claims settlement process to property claims, but summarily dismissing Cuban counter claims as “inapplicable” would likely lead to a breakdown of negotiations before they meaningfully begin.¹⁵⁷ By suggesting that U.S. nationals’ claims should be prioritized over other groups’ claims, and insisting that Cuban counter claims have no or little place in the claims settlement process, the Creighton Report renders its proposed settlement mechanisms impracticable.

2. Timothy Ashby’s 2009 Proposal

In 2009, the University of Miami Inter-American Law Review published a skeptical article authored by Timothy Ashby, entitled “U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms.”¹⁵⁸ Much like the 2007 Creighton Report,¹⁵⁹ Ashby’s article discusses the two most likely options for settlement, “Litigation in a Cuban Court” and a “Bilateral Property Claims Settlement Tribunal.”¹⁶⁰ To these two options, Ashby contributes a third proposed mechanism, a “Special Situations Fund,” to which claim holders would transfer

155. *Id.*; see also *infra* Part II.

156. See FEINBERG, *supra* note 17, at 12.

157. See discussions *supra* notes 101, 108; see also *infra* Part III.

158. See generally Ashby, *supra* note 20.

159. See *id.* at 426, n.55. Surprisingly, Ashby only cites the Creighton Report once, and only with respect to the Creighton Report’s discussion of a bilateral Tribunal. See *id.*

160. *Id.* at 424–25.

and sell their claims “for a premium over what they could reasonably expect to receive in a bilateral settlement negotiated by the U.S. government.”¹⁶¹ Ashby suggests this third option represents the “optimal solution for all stakeholders . . . that avoids contentious and protracted diplomatic negotiation.”¹⁶²

Ashby limits discussion of the potential for litigation in a Cuban court to one paragraph. After addressing the potential quagmire of travel restrictions imposed on claim holders wishing to travel from the United States to Cuba for the purpose of litigating their claims in Cuban courts (which may no longer be relevant following the Obama Administration’s easing of travel restrictions), Ashby contemplates the inherent difficulties in engaging “local counsel and endur[ing] a lengthy and expensive litigation process to establish rights to compensation, followed by valuation of the claim by the Cuban government.”¹⁶³ Ashby posits, “[even] if the action proved successful, the plaintiff would almost certainly receive bonds in compensation for the assets taken half a century ago[,]” which presumably would be of little value to claimants.¹⁶⁴ Further, “[u]nder current U.S. law, it would be illegal to receive Cuban sovereign bonds as payment, as these would be deemed ‘an interest in Cuban property.’”¹⁶⁵

Next, Ashby addresses the potential for a Bilateral Property Claims Settlement Tribunal,¹⁶⁶ much like the one offered by the Creighton Report. Ashby notes that such a Tribunal “would be similar to the Iran-U.S. Claims Tribunal, an international arbitral tribunal located in the Hague, which took many years to resolve outstanding claims for assets nationalized by Iran.”¹⁶⁷ From this analogy, Ashby infers that “[b]ilateral settlement negotiations with Cuba would similarly be a protracted process.”¹⁶⁸ There is logic behind the inference that negotiations would be a long and arduous process, but the protraction would more likely be attached to the negotiations over which settlement mechanisms should prevail.¹⁶⁹ Once settlement mechanism(s) are

161. *Id.* at 428.

162. *Id.* at 431.

163. *Id.* at 425.

164. *See id.*

165. *Id.* at 425 (citing 31 C.F.R. § 515.311(a) (2003)).

166. *See id.* at 425–28.

167. *Id.* at 426.

168. *Id.*

169. *See* discussion *supra* note 101; *see also infra* Part III.

agreed to, the process may be a swift one, as claimants are eager to minimize their costs and receive their settlements, while both the United States and Cuba are eager to normalize relations (with settlement of claims being among the most critical first steps).

Ashby also recalls that the "Cuban government emphatically does not agree with the valuations of the FCSC, which were not established in adversarial proceedings" and which, without interest, amount to "almost double the \$956 million [USD] book value of all U.S. investments in Cuba as reported in 1961."¹⁷⁰ To his credit, Ashby underscores the fact that "Cuba has two major counterclaims against the United States" and that by "Cuban law, the Cuban counterclaims must be considered part of the settlement negotiation process."¹⁷¹ Ashby, however, could not have anticipated the election of Donald J. Trump when he suggested the probability that "U.S. negotiators, under pressure from the Obama administration and the business lobby to quickly reach a settlement so that relations with Cuba could be normalized, would agree to use the original book value figure of \$956 million [USD]."¹⁷² While the business lobby remains, the Trump Administration, under its own pressure from the powerful Cuban American lobby, is not likely to be as amenable to making concessions to the Cuban government, which is still under the control of the Castro regime.

Ashby next turns to his proposal for "Special Situations Funds," which would offer private means for settlement of claims.¹⁷³ The funds "would have to acquire a large aggregate amount of claims and hold them until a time in the future—a 'window of opportunity'—when it could settle the claims via a debt-for-equity or debt-for-property swap with the Cuban government."¹⁷⁴ As precedent for this type of arrangement, Ashby notes, "Cuba is known to have negotiated at least two debt-for-asset swaps with private concerns (Mexican and Argentine) to

170. See Ashby, *supra* note 20, at 426.

171. See *id.* at 427.

172. See *id.*

173. See *id.* at 428. In essence, private interest capitalists, who are seeking to hedge inherent risks with an eye toward capitalizing on the potential for fee arrangements with the U.S. and Cuban governments, and settling claims at rates above those paid to the original claim holders, would establish "international special situations funds (specializing in distressed debt). . . ." See *id.*

174. *Id.* at 430.

settle sovereign debt purchased at a steep discount.”¹⁷⁵ While the benefits of such Fund(s) are clear, it remains to be seen whether private interests would be willing to take on the massive risk inherent in purchasing such claims. The fact that there is precedent for such an arrangement is a ray of hope, but ultimately, the Ashby Proposal is plagued with the same problems as the proposals set forth in the Creighton Report.

Ashby’s proposal for Special Situations Fund(s) is devoid of meaningful consideration of the cross-claims asserted by the Cuban government. In his nineteen page article, Ashby dedicates exactly one sentence to the reality of Cuban cross-claims, and to that end, he does not even bother to unpack what those cross-claims are, simply stating that the two categories of “counter-claims” exist.¹⁷⁶ As previously discussed, the Cuban government is unlikely to enter into negotiations under the premise that its own claims against the U.S. government and U.S. nationals are “inapplicable.”¹⁷⁷ While it is true that tort claims of the kind contemplated by the Castro regime are more appropriately contemplated outside the realm of a “property claims settlement mechanism,” the economic damages and personal injuries suffered by the Cuban people will not soon be forgotten.¹⁷⁸ Just as the settlement of U.S. nationals’ claims is a critical first step towards the United States resuming full economic and diplomatic relations, so too is the settlement of Cuba’s claims a necessary prerequisite for entering into the same process.¹⁷⁹ Because both nations are eager to normalize relations (as both nations have so much to gain and lose), each must meaningfully and respectfully consider the other’s claims.

3. Richard Feinberg’s 2015 Proposal

In 2015, the Latin America Initiative at Brookings¹⁸⁰ published a comprehensive policy paper authored by none other

175. *Id.*

176. *See id.* at 427.

177. *See infra* Part III.

178. *See infra* Part III.

179. *See* discussion *supra* note 101; *see also infra* Part III.

180. *See* BROOKINGS INSTITUTION, <https://www.brookings.edu/about-us/> (last visited Jan. 8, 2017). Formed in 1916, The Brookings Institution is a Washington, D.C.-based think tank whose mission is “to conduct in-depth research that leads to new ideas for solving problems facing society at the local, national and global level.” *Id.*

than Richard E. Feinberg, entitled "Reconciling U.S. Property Claims in Cuba: Transforming Trauma into Opportunity."¹⁸¹ Rather than offering an exhaustive technical guide¹⁸² or a brief law review article,¹⁸³ Feinberg contributes a nuanced policy proposal through which he adds two additional solutions to those offered by the Creighton Report and the Ashby Proposal: an all-inclusive lump-sum settlement and a hybrid formula, two-tiered approach.¹⁸⁴ Feinberg ultimately finds in favor of the latter hybrid formula, which proposes a two-tiered solution whereby smaller, individual claimants receive whole or partial financial compensation while larger, often corporate, claimants select an opt-out option, electing to pursue and resolve their claims directly with Cuban authorities through a variety of instruments "alternative" to financial compensation.¹⁸⁵

After providing a thoughtful introduction and overview,¹⁸⁶ a breakdown of the United States' and Cuba's respective positions regarding the Castro nationalizations and prospects for compensation,¹⁸⁷ and the "key controversies" surrounding the FCSC claims,¹⁸⁸ Feinberg sketches out his two "Frameworks for Reconciliation."¹⁸⁹ The first proffered solution revolves around an all-inclusive, lump-sum settlement, whereby the United States enters into a settlement with Cuba to pay some agreed-upon amount.¹⁹⁰ Then, the U.S. Treasury Department would disburse the proceeds on a pro rata basis, "perhaps with a minimum payment to all claimants (say \$10,000 [USD])."¹⁹¹ Feinberg notes that since World War II, lump-sum settlements have been "the preferred mechanism" of the United States and other developed

181. See generally FEINBERG, *supra* note 17. Feinberg's policy paper was, and remains, the most up-to-date and authoritative analysis of the outstanding property claims, a cross-disciplinary project for which "lawyers, diplomats, social scientists, and political leaders" were consulted. *Id.* at iii.

182. See generally CREIGHTON UNIVERSITY, *supra* note 26. The Creighton Report runs in excess of 250 pages. *Id.*

183. See generally Ashby, *supra* note 20. The Ashby Proposal comes in at nineteen pages. *Id.*

184. See FEINBERG, *supra* note 17, at 28, 30.

185. See *id.* at 4, 25-34.

186. See *id.* at 1-5.

187. See *id.* at 6-15.

188. See *id.* at 16-24.

189. See *id.* at 25-34.

190. See *id.* at 28.

191. *Id.*

nations when tackling domestic nationalizations of foreigner-owned properties.¹⁹²

In a lump-sum settlement, two state governments negotiate an all-inclusive total amount of financial compensation that is transferred in one lump-sum to the plaintiff government.¹⁹³ The lump-sum constitutes a global indemnity guaranteed to the defendant government, and the plaintiff government is charged with distributing the monies to its national claimants.¹⁹⁴ From the perspective of the plaintiff government, lump-sum settlements offer various benefits, including “efficiency in coping with large numbers of claims; . . . consistency in the administration and adjudication of claims; . . . fairness among claimants in setting criteria for evaluating claims and distributing awards;” and greater leverage, which effectively preempts the defendant government from adopting a “divide and conquer” strategy.¹⁹⁵ From the perspective of the defendant government, lump-sum settlements conveniently “avoid any admission of wrong-doing. Neither state is called upon to admit . . . the validity of the accusations of the other state, nor to make politically painful apologies.”¹⁹⁶ Feinberg suggests that, “[a]s a rule, lump-sum settlements have found that ‘adequate’ payment . . . amounted to less-than-full compensation.”¹⁹⁷

The proposed lump-sum settlement between the United States and Cuba would thus not likely include the simple interest contemplated by the Cuban Claims Program or even the full amount of principal.¹⁹⁸ While a single transfer would be optimal from the vantage point of the United States and its claimants, Feinberg suggests that “[o]ne [perhaps more realistic] variant would permit the Cuban government to pay in installments over a number

192. *See id.* at 25. *See also infra* Part II.

193. *See* FEINBERG, *supra* note 17, at 25.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.* at 26. Feinberg observes that a “seminal study of 69 lump-sum settlement agreements among nations found that partial payment of principal has been the rule, often without interest[,]” but he notes that the study’s authors “cautioned . . . that lump sum settlements have often been linked together with *quid pro quos* ‘which are well-nigh impossible to assess.’” *Id.* (citing BURNS H. WESTON, RICHARD B. LILLICH & DAVID J. BEDERMAN, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995*, 85, 96 (New York: Transnational Publishers, Inc. 1999)).

198. *See id.* at 25–34.

of years. . . .”¹⁹⁹ While Feinberg resists the suggestion “that Cuba is too poor” to pay back the full \$1.9 billion USD in principal of FCSC-certified claims, his analysis of two key ratios²⁰⁰ reveals that Cuba may only be capable of managing these payments if the payments are extended over a “reasonable” timeframe and interest payments are excluded.²⁰¹

Feinberg suggests that interest payments are impracticable for a variety of reasons, including: the likelihood that the Cuban government would resist heavy interest charges; the burden that interest charges would place on the already-fragile Cuban economy; the fact that informed “Cubans are not accustomed to the idea . . . that capital deserves to earn interest income” and would likely point to “earlier lump-sum settlements” between the United States and other defendant governments that fell “well below the FCSC 6 percent benchmark;” the political infeasibility of the incumbent Cuban government explaining a “market-driven” settlement to its population; and the notion that a “punishing debt service” would be counterproductive for both nations, as it is in their mutual interest to transform Cuba into “a vibrant economic partner for U.S. traders and investors.”²⁰² While a lump-sum settlement, legitimized by significant historical precedent,²⁰³ would offer a number of attractive benefits to both governments, Feinberg speculates that a critical number of claimants would resist such a settlement, unsatisfied by the prospect of “principal-only” (or less) payments stretched out over too many years.²⁰⁴

199. *Id.* at 28. For this proposition, Feinberg cites to unspecified “precedents of agreements that the United States has signed with other countries and that Cuba previously negotiated with other claimant governments[,]” including “the Cuban settlement with France [that] allowed for 11 equal semi-annual payments.” *Id.* at 28, n. 60.

200. *See id.* at 28. The two ratios include Cuba’s “ratio of debt service to exports, and the ratio of debt service to gross domestic product (GDP).” *Id.*

201. *Id.*

202. *See id.* at 29.

203. *See id.* at 30. Feinberg notes that former FCSC Commissioner, Sidney Friedberg, “examined 11 lump-sum settlements (in Eastern Europe, Soviet Union, and China) where the Commission had initially awarded interest charges[, as is the case with the Cuban Claims Program,] but in only one case did the final negotiated agreement allow for the actual payments of any interest.” *Id.*

204. *Id.*

The second proffered solution involves a two-tiered approach, what Feinberg calls a “hybrid formula.”²⁰⁵ Feinberg suggests that the two-tiered solution derives its strength and logic from the structural differences inherent to the FCSC-certified claims and claimants, which can be “divided as between corporate claims, which are smaller in number and highly concentrated, and individual claims which are many in number and generally much smaller in size.”²⁰⁶ Because of these distinctions in magnitude, Feinberg argues that the two categories of claims might—or even should—be handled separately.²⁰⁷

Feinberg observes that of the 5,913 FCSC-certified claims, 5,014 constitute individual claims (the first tier), totaling about \$229 million USD.²⁰⁸ He further observes that of these individual claims, only thirty-nine were valued at over \$1 million USD, of which only four were valued at over \$5 million USD.²⁰⁹ Feinberg posits that for expediency’s sake and as “a matter of equity among the claimants,” it would be useful to cap individual claim payments at \$1 million USD per claim.²¹⁰ Total claims would be reduced by \$59 million USD. While the larger holders of claims valued at over \$1 million USD might protest, the benefits outweigh the adverse impacts and, in any event, “it could be argued that they were still receiving a non-negligible (‘non-derivative’ in legal terminology) percentage of their claim.”²¹¹ In this way, Feinberg argues, individual claims would be reduced to \$171 million USD (\$229 million USD less \$59 million USD), a number certain to be more attractive to the Cuban government.²¹² Were the Cuban government to agree to such a settlement, all of the

205. *See id.* at 30–33.

206. *See id.* at 30.

207. *Id.*

208. *See id.* at 30–31. Feinberg observes that there are 5,913 FCSC-certified claims, two more than the 5,911 described in Title V of the International Claims Settlement Act. *See discussion supra*, note 85. This author has not been able to reconcile the numerical discrepancy from publicly available sources.

209. *See id.* at 31.

210. *See id.* Such a cap would adversely affect only thirty-nine out of 5,014 claimants and is not without historical precedent. *See id.* Feinberg notes that caps were utilized “in some Eastern European property claims settlements following the end of the Cold War. . . .” *Id.*

211. *Id.*

212. *See id.*

5,014 individual claims “would be resolved in one blow[.]” leaving only the 899 remaining corporate claims.²¹³

This leaves only the second tier corporate claims, which Feinberg observes are “heavily concentrated.”²¹⁴ The top ten corporate claims alone are valued at almost \$1 billion USD, with the top fifty valued at \$1.5 billion USD, while the total value of all FCSC-certified claims stands at \$1.9 billion USD (principal only, excluding interest).²¹⁵ Feinberg notes that the final figure may be substantially less, as some claims “have probably not been continuously held by U.S. citizens or firms majority-owned by U.S. citizens and hence are no longer compensable according to FCSC rules.”²¹⁶ Also, the Cuban government itself is likely to challenge the valuation of the FCSC awards, further diminishing the total value of expected settlement payments.²¹⁷ Because the larger corporate claimants face the risk of an “equity haircut,”²¹⁸ Feinberg posits that it is in this group’s interest to “opt out” of the general settlement altogether and instead seek alternative remedies.²¹⁹

An opt-out option, Feinberg argues, is not without historical precedent,²²⁰ and would present corporate claimants with the opportunity to select from a variety of potentially more valuable

213. *See id.*

214. *See id.*

215. *See id.* at 2, 31.

216. *Id.* at 31.

217. *See id.* at 31.

218. *Id.* If larger corporate claimants choose to “opt in” to a general settlement, the settled value of their claims could be substantially reduced “to limit the burden on Cuba and to ensure a minimum payment to the smaller claimants. . . .” *Id.*

219. *See id.* For a deeper discussion of alternative remedies, *see also id.* at 31, n. 64 (citing Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals’ Expropriation Claims Against Cuba*, 17 U. PA. J. OF INT’L ECON. L. 659 (1996)).

220. *See id.* at 31. For instance, Feinberg observes that a “1992 agreement with Germany allowed claimants to elect either to accept payment of their FCSC awards or to waive their right to payment in order to pursue claims for their properties under German law.” *Id.* (citing *Final Report on the German Democratic Republic Claims Program*, FCSC, https://edit.justice.gov/sites/default/files/pages/attachments/2014/08/27/final_report_on_the_german_democratic_republic_claims_program.pdf; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Settlement of Certain Property Claims, art. 3, FCSC (1992), https://www.justice.gov/sites/default/files/pages/attachments/2014/08/26/jeremy.r.lafrancois_082614_111022.pdf).

options.²²¹ A key caveat is that implementation of alternatives, intended to offer claimants better value than the lump-sum option, would require “important changes” to U.S. laws and regulations,²²² as well as the Cuban legal system.²²³ The “menu of options” includes: a voucher, or form of debt-equity swap;²²⁴ a “right to operate;”²²⁵ a final project authorization;²²⁶ a “preferred

221. *See id.* at 31–32.

222. *See* ROY, *supra* note 41, at xi. Many have decried the “draconian” U.S. laws and regulations, which severely restrict U.S. nationals’ investments in Cuba. *See id.* The Helms-Burton Act, for instance, “was clearly intended to choke off the oxygen to Cuba—that is, foreign investment—at a time when Havana was reeling from the demise of the Soviet Union, and had decided as a last resort to open the doors to entrepreneurs from around the world.” *Id.*

223. *See* FEINBERG, *supra* note 17, at 32. Feinberg emphasizes that “[t]o allay concerns among U.S. investors,” who in an informed market have borne witness to Cuba’s countless loan defaults over the last several decades, Cuba would need to not only “authorize legislation enabling these various types of transactions,” but also pass “tailored resolutions” at least purporting to “guarantee” these types of investments. *See id.*

224. *See id.* A claimant would hold a right to an equity investment (ranging from partial ownership in a joint venture with a Cuban state enterprise partner to 100 percent ownership) in a project, and then the voucher or coupon could be “applied to the equity investment, against future tax liabilities, or possibly relief from certain performance requirements. . . . If used for tax liabilities, the voucher could be registered with the Cuban government and be marketable on a secondary market.” *Id.*

225. *See id.* Such a right would give claimants an entrance ticket into Cuba’s otherwise opaque, “highly protected [market], such that firms that are allowed entry often enjoy oligopolistic advantages in their market niches. The Cuban government could ensure such market advantages for a fixed timeframe.” *Id.*

226. *See id.* The authorization would be for a claimant’s “proposed investment in the new Mariel development zone, which enjoys special tax advantages, and is generally oriented toward export markets. To date, the Cuban government has approved only a few such projects,” and this option might “allow claimants to short-circuit the frustratingly lethargic project approval process.” *Id.*

acquisition" right;²²⁷ sovereign bonds;²²⁸ and restoration of properties to former owners.²²⁹ Corporations pursuing these opt-out alternatives would be given deadlines to negotiate their deals, "perhaps one to two years," with the dual goal of ensuring "timely" resolution and expediting the much-needed injection of American capital.²³⁰ In practice, Cuba would need to both "facilitate" the typically long and arduous investment approval process and allow for majority foreign (in this case American) ownership of the various investments and projects, or else claimants would have little promise of a truly more valuable settlement instrument.²³¹

Feinberg departs from both the Creighton Report and the Ashby Proposal by suggesting that a formal arbitral body, such as the Tribunal proposed by Creighton University, is not only unnecessary, but may in fact hinder the claims settlement process.²³² Both individual and corporate claimants should be free to proceed "individually and in isolation" in negotiating their claims directly with the Cuban government.²³³ In the alternative, negotiations "could be coordinated under an umbrella bilat-

227. *See id.* This right would permit the claimant to "pass to the front of the line in competitive bidding, for example for an attractive beachfront property, the formation of a joint venture with a state enterprise, the provision of power to the state energy grid, or entry into the telecom service sector." *Id.* Here, as with the other options, the claimant would be "obliged to inject new capital and technology and its business plans would be subject to Cuban government approval." *Id.*

228. *See id.* at 32-33. These bonds would be issued by the Cuban, not U.S., government, and could be structured in a number of ways, including "10-year bonds" promising "equal annual or semi-annual installments beginning the sixth year, bearing a market-rate of interest." *See id.* at 32. In light of Cuba's myriad loan defaults over the last several decades, it bears repeating that Cuba would need to reform its laws and pass new legislation, "perhaps even tailored resolutions guaranteeing the property rights of specific investments[,] if it wants to inspire claimant/investor confidence in such alternative options. *See id.*

229. *See id.* at 33. Feinberg quickly qualifies that this option exists "only in exceptional cases and where local conditions permit. *Id.* More likely, some claimants might be offered substitute investment opportunities in vacant locations of comparable value. Pro-development conditions, requiring injections of fresh capital and technology, would also apply." *Id.*

230. *See id.*

231. *See id.*

232. *See id.* at 34.

233. *See id.*

eral claims resolution committee[,]" which would seek to facilitate business deals, but "would not have arbitration powers."²³⁴ Feinberg insists that legal experts "familiar with the Iran-United States Claims Tribunal warn against the establishment of such a formal arbitral mechanism for the Cuba case."²³⁵ The Iran-United States Claims Tribunal was initiated in 1981, yet it still "drags on," with mounting costs tied to arbitrators and staff that Feinberg suggests Cuba cannot afford.²³⁶ Further, there is concern about the claims settlement process deviating from its intended course in a formal forum, lingering on "contentious replays of historical grievances" and reducing a moment of economic and diplomatic opportunity to political mudslinging.²³⁷ In Feinberg's view, a less formal umbrella claims committee would provide much of the "useful architecture"²³⁸ for speedily settling claims, while avoiding the expense and dangerous tropes of a formalized tribunal.²³⁹

Feinberg sets forth a sober, careful, and nuanced proposal, but it suffers from similar flaws as those of the Creighton Report and the Ashby Proposal. While acknowledging the very real claims held (albeit neither filed with nor certified by the FCSC) by Cuban American exiles, Feinberg declares early on that his policy paper "focuses solely upon those claimants who were U.S. nationals at the time of the taking."²⁴⁰ The reasons for this are legitimate, not least of which is the fact that under customary international law and by U.S. legal practice, the U.S. government "advocates ('espouses') only for claimants who were U.S. citizens 'at the time of the taking,' that is, when the properties were confiscated."²⁴¹ By this well-settled rule, then, Cuban American exiles are seemingly precluded from claims settlement negotiations. Feinberg concedes that the massive "political clout of the two million strong Cuban-American diaspora" could push the U.S. government to pursue their claims as well, but then he

234. *See id.*

235. *Id.*

236. *See id.*

237. *See id.*

238. *See id.* A claims committee could adopt many of the aspects of a more formal tribunal's "architecture," including expert-led negotiations, timeframe prescriptions, bilateral representation, and "transparency and consistency across negotiations." *See id.*

239. *See id.*

240. *See id.* at 5.

241. *Id.*

quickly retreats by suggesting that such a pursuit would be a fool's errand in the face of a recalcitrant Cuban government, "loath to admit any wrongdoing in this regard. . . ." ²⁴²

Feinberg insists that any "large-scale restoration of properties [to their original exiled owners] . . . would be political suicide for the incumbent regime in Havana." ²⁴³ This implies the impracticability of such a solution, but Feinberg too quickly suggests that "alternative concessions" could meet diasporans' financial expectations and psychological needs sufficient to "overcome trauma and achieve national reconciliation. . . ." ²⁴⁴ The Cuban American exile community would lend more than token support, as their support is the lynchpin to any effort to settle outstanding claims and forge a path towards holistically renewed diplomatic and economic relations. ²⁴⁵ While Feinberg points to the fact that many of the properties that might be sought by Cuban Americans are "household residences," ²⁴⁶ he ignores the fact that Cuban American exiles left behind more than just residential properties. Many of the properties were commercial, which now include state-owned lands. Even if the Cuban government refused to return these lands outright to the original owners and their successors and heirs, the Cuban government could instead elect to issue investment credits towards the purchase of new properties.

242. *See id.*

243. *Id.*

244. *See id.*

245. *See* CREIGHTON UNIVERSITY, *supra* note 26, at 4 ("While claims by [Cuban American exiles] are not supported specifically by either domestic or international law, *politically and economically their claims should not be ignored*. Politically, the exile community's support among policy-makers in Washington and activism against the Cuban regime make them a group that cannot be ignored. Their influence in Washington brought about the Libertad Act (codifying the U.S. embargo against Cuba), achieved special immigration status for Cubans leaving the island, . . . and leveraged millions of dollars in federal money to support democracy programming for Cuba. Economically, this group will be among the first investors in an open Cuban market. . . . However, if the property claims of the Cuban-American exile community are left unresolved, their political and economic power could be turned against stabilizing a new government in Cuba, much to the detriment not only of the island, but also to potentially fruitful Cuba-U.S. relations. Thus, from the perspective of elemental justice and reason, the positive aspects of including this group in a broader property claims settlement policy far outweigh the general lack of domestic or international legal justification for doing so.") (emphasis added).

246. *See* FEINBERG, *supra* note 17, at 5.

The Feinberg Proposal also summarily dismisses Cuba's economic damages claims, which are "likely to be rejected by the United States government."²⁴⁷ According to Feinberg, Cuba might have a better chance pursuing its personal injury claims, which "may have stronger standing."²⁴⁸ Feinberg cites U.S. settlements with Libya and Iraq as precedent.²⁴⁹ But ultimately, the Feinberg Proposal fails to meaningfully consider not only the actionable claims Cuba has against the United States, but the claims that Cuban citizens have against their own government. All of these interests must be considered in one complete package if both countries are to heal and set their sights on the more positive, productive, and prosperous days ahead. The Cuban government has already stated unequivocally that "compensation to [the Cuban people] for human and economic damages" is a condition precedent to the resumption of normalized relations between the United States and Cuba,²⁵⁰ and there is no reason to suspect that Cuban citizens themselves would tolerate exclusion from the negotiating table.

B. Cuban Approaches

The Cuban government has never technically "repudiated" the U.S. claims certified by the FCSC.²⁵¹ In fact, the Cuban government has repeatedly indicated that it recognizes U.S. nationals' right to "adequate and just compensation" for the properties expropriated pursuant to Cuba's nationalization laws.²⁵² Pursuant to customary international law and U.S. policy, however, the legality of "expropriation is contingent upon adequate, effective and *prompt* compensation."²⁵³ The Cuban government's recognition of claimants' rights to claims settlements conveniently

247. *See id.* at 14.

248. *Id.*

249. *See id.*

250. *See id.* at 13 (citing *Press Availability with Cuban Foreign Minister Bruno Rodriguez*, U.S. DEP'T STATE (July 20, 2015), <https://www.state.gov/secretary/remarks/2015/07/245094.htm> (last visited Jan. 15, 2017) [<https://web.archive.org/web/20170116033000/https://www.state.gov/secretary/remarks/2015/07/245094.htm>]).

251. *See* Ashby, *supra* note 20, at 418.

252. *See* FEINBERG, *supra* note 17, at 10.; *see also* Ashby, *supra* note 20, at 418 ("Cuba recognizes its obligation under international law to provide compensation to U.S. nationals whose assets were taken.").

253. *See* FEINBERG, *supra* note 17, at 8 (emphasis added).

leaves out the third prong: speediness.²⁵⁴ Also, while the Cuban government does recognize claimants' right to compensation, it recognizes neither the FCSC valuation nor the property claims of Cuban American exiles, much less the claims of Cuban nationals.²⁵⁵

Despite its recognition of the validity of U.S. nationals' claims, the Cuban government simultaneously maintains a slew of cross-claims stemming from alleged economic and personal injury damages.²⁵⁶ As a baseline measure, the Cuban government has consistently asserted over \$100 billion USD in economic claims related to the Embargo.²⁵⁷ Regarding the alleged personal injury damages, the Cuban government has asserted that the U.S. government is responsible for "acts of terrorism against Cuba" that have resulted in 3,478 deaths and 2,099 disabling injuries.²⁵⁸ The Creighton Report suggests that because it is "difficult to distinguish between harm done by the embargo and that

254. See Ashby, *supra* note 20, at 420. Arguably, however, the U.S. government is as much to blame for the lack of prompt compensation as the Cuban government is. See *id.* As far back as 1964, Fidel Castro himself "made a secret offer to the U.S. government via the Swiss ambassador to pay \$1 billion [USD] in compensation for expropriated American properties and to release all political prisoners in exchange for restoring the Cuban sugar quota." *Id.* Castro's offer (seeking to modify a significant term of the Embargo, which a cynic would view as largely rhetorical) made it as far as the White House, which promptly dismissed the offer "without any acknowledgment to the Cuban government." See *id.* The offer may have even been seen as being made in good faith, as it "followed both the failed Bay of Pigs Operation and the Cuban Missile Crisis. . . ." See *id.* The U.S. government's "internal position[.]" however, "was 'Castro won't last,' and thus settling the claims would prevent the restitution of U.S. assets when the Cuban government was [eventually] toppled." *Id.* No one, save God, is omniscient, but the U.S. government could not have been more wrong, as Castro maintained his grip on Cuba until his passing in November 2016. See *id.*

255. See *id.* at 418.

256. See FEINBERG, *supra* note 17, at 13.

257. CREIGHTON UNIVERSITY, *supra* note 26, at 5. For instance, a 1992 statement detailed a variety of losses, including: \$3.8 billion USD "for losses in the tourist industry"; \$400 million USD "for losses in the nickel industry"; \$375 million USD "for the higher costs of freighters"; \$200 million USD "for the purchase of sugarcane crop equipment to substitute for U.S.-manufactured equipment"; and \$120 million USD "for the substitution of electric industry equipment. . . ." FEINBERG, *supra* note 17, at 13. Indeed, in its 2015 annual report to the United Nations General Assembly, Cuba maintained that "accumulated economic damages" had reached the grand total of \$121 billion USD. *Id.*

258. See *id.* (citing Bruno Rodríguez Parrilla, "Necesidad de poner fin al bloqueo económico, comercial y financiero impuesto por los Estados Unidos de

done by the Cuban government, . . . it is impossible to verify the claims and claim amounts.”²⁵⁹ But the lack of clarity over who is responsible did not prevent the Cuban government from pursuing its claims, and a lawsuit moved forward in Cuban court in 1999.²⁶⁰ The U.S. government failed to appear, or even respond, and the court awarded \$181.1 billion USD in damages as compensation for “both human losses and hardships flowing from the embargo.”²⁶¹ Cynically, the Cuban court even “ordered the U.S. to apologize.”²⁶²

The Cuban government has suggested that the question of claims settlement and compensation has a simple answer. In an unofficial statement, a senior Cuban diplomat has even told Richard Feinberg that the “compensation issue could be decided easily and quickly: simply offset U.S. claims with Cuban counter-claims! Or else the issue can drag on for years. . . .”²⁶³ This reductionist solution is mirrored in official Cuban statements, which insist that “the total lifting of the blockade is essential to move on towards the normalization of relations . . . , *as well as the compensation to [the Cuban] people for human and economic damages.*”²⁶⁴ Both privately and publicly, the Cuban government maintains this “let’s call it a wash” position, one that

América contra Cuba, Sixty-Eighth Session of the U.N. G.A. (Oct. 29, 2013)). These alleged acts purportedly include: CIA-sponsored hostilities, “resulting in 549 deaths between 1959-1965 alone”; the Bay of Pigs invasion “resulting in 176 deaths and over 300 wounded of which 50 were left incapacitated”; the explosion of the French vessel *La Coubre* in Havana Harbor on March 4, 1960, “resulting in 101 deaths including some French sailors”; the alleged terrorist bombing of Cuban Airlines Flight 455 in 1976, “killing all 73 persons on board including 57 Cubans”; the September 11, 1980 assassination of Cuban diplomat Félix García Rodríguez; alleged aggressions relating to the Guantanamo naval base; and even suspicions that “the United States employed biological warfare to spread fatal dengue fever in Cuba. . . .” *Id.* at 13–14.

259. CREIGHTON UNIVERSITY, *supra* note 26, at 5.

260. *Id.*

261. *Id.*

262. *See id.*

263. *See* FEINBERG, *supra* note 17, at 12 (quoting Author conversation with Cuban diplomat, June 2015).

264. *See id.* at 13 (quoting *Press Availability with Cuban Foreign Minister Bruno Rodríguez*, U.S. DEP’T STATE (July 20, 2015), <https://www.state.gov/secretary/remarks/2015/07/245094.htm> (last visited Jan. 15, 2017) [<https://web.archive.org/web/20170116033000/https://www.state.gov/secretary/remarks/2015/07/245094.htm>] (emphasis in the original)).

should not be so easily disregarded, however dubious its credibility.

The total value of FCSC-certified claims (approximately \$1.9 billion USD), even with interest (approximately \$7 billion USD), is de minimis compared to the \$181.1 billion USD damages awarded by the Cuban court in 1999. As alluded to earlier, Richard Feinberg has suggested that the economic damages claims related to the Embargo are “likely to be rejected” by the U.S. government for two reasons.²⁶⁵ First, the United States could invoke the Article XXI “security exception” of the Agreement of the World Trade Organization, which allows Member States “to pursue ‘essential security interests.’”²⁶⁶ Second, the U.S. government is not likely to forsake its “preferred instrument of international coercion”—economic sanctions—as “so successfully” employed against Iran.²⁶⁷ Assuming consistency between the 1999 damages award (approximately \$181 billion USD) and Cuba’s 2015 report to the United Nations General Assembly (which cites \$121 billion USD in economic damages), and assuming further that the economic damages are not likely to be recognized by the United States, that still leaves approximately \$60 billion USD in personal injury damages. If Richard Feinberg is correct that Cuba “may have stronger standing” with respect to these claims,²⁶⁸ Cuba’s total estimated damages still overshadow the FCSC-certified claims more than eight times over. Thus, while the Cuban government’s “let’s call it a wash” position is admittedly untenable (and perhaps even mere diplomatic posturing, as alluded to in the Introduction), the U.S. government cannot simply disregard Cuban claims outright. Any settlement negotiations must include meaningfully bilateral participation and consideration of each “side’s” claims.

C. Foreign Approaches

By contrast, the Cuban government has settled claims with the nationals of at least the following five other countries: Switzerland (1967), Spain (1967), France (1967), Great Britain

265. *See id.* at 14.

266. *See id.*

267. *See id.*

268. *See id.*

(1978), and Canada (1980).²⁶⁹ Cynics argue that these settlements serve as poor precedent and are largely irrelevant for purposes of considering the outstanding claims of U.S. nationals, primarily because the value of FCSC-certified claims “dwarfs” the total combined value of these five settlements, which “doesn’t even amount to 5% of the value of U.S. claims.”²⁷⁰ To dismiss their precedential value, however, is to ignore the only on-point precedent that exists.²⁷¹ These five settlements repre-

269. See *id.* at 11 (citing Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property between Cuba and Foreign Nations Other than the United States*, 5 *LAWYER OF THE AM.* 457 (1973)).

270. Ana Radelat, *Settlement of U.S. Claims Against Cuba Unlikely as Long as Fidel Stays in Power*, 13 *CUBA NEWS* 1, 1 (2005).

271. See FEINBERG, *supra* note 17, at 34 (suggesting that the establishment of such a formal arbitral mechanism as the Iran-U.S. Claims Tribunal is ill-suited to the American-Cuban settlement because, inter alia, the Iran-U.S. Claims Tribunal had the “critical advantage” of a \$1 billion USD initial award and an “unending stream” of Iranian petroleum revenues—“conditions not present in the Cuba case”). When analyzing prospects and potential frameworks for an American-Cuban settlement, many scholars rely on examples of other international tribunals (*e.g.*, the Iran-U.S. Claims Tribunal; the Eritrea-Ethiopia Claims Commission; and the U.N. Claims Commission) and claims commissions or tribunals in Latin America (*e.g.*, the Nicaraguan Mixed Claims Commission) and Eastern Europe (*e.g.*, Czech Republic; Slovakia; Hungary; Poland; Bulgaria; and Romania), comparing and contrasting to account for inherent differences between the history, economy, politics, and social structure of the chosen example’s plaintiff and defendant governments and the United States and Cuba, respectively. See, *e.g.*, Ashby, *supra* note 20, at 426 (comparing and contrasting the Tribunal proposed by the Creighton Report to the Iran-U.S. Claims Tribunal); CREIGHTON UNIVERSITY, *supra* note 26, at 35–104 (comparing and contrasting the Tribunal and Claims Court proposed by the Creighton Report to other historical examples of claims tribunals and settlement options). While historical examples of settlement tribunals and commissions *not* directly involving Cuba are relevant, it is this author’s view that, because the settlements Cuba has reached with other countries stem from the same set of historical facts (the Cuban Revolution) and involve largely similar actors (individuals and corporations whose properties and investments were lost pursuant to the Castro nationalizations), these settlements serve as a better lens through which to evaluate the terms and conditions the Cuban government may be willing to consider in resolving the claims of all groups involved in any prospective American-Cuban settlement. See Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property between Cuba and Foreign Nations Other than the United States*, 5 *LAWYER OF THE AM.* 457, 467 (1973) (noting that the information available regarding the Cuban government’s settlement of claims with other countries “may be of substantial use both in identifying the type of agreement that Cuba is willing to consider

sent the closest approximation of terms and conditions the Cuban government might be willing to accept in future negotiations with the United States, and as such, they serve as *the* go-to evidence when modeling any prospective American-Cuban settlement.²⁷²

The Swiss, Spanish, and French settlement agreements were all signed in 1967, all "within fourteen days of one another."²⁷³ The Swiss accord, signed March 2, 1967, did not resolve the claims of all Swiss nationals.²⁷⁴ Rather, the settlement resolved only the claims of three Swiss-owned Cuban food processing enterprises, "all of which were nationalized by Cuban law 890 on October 13, 1960."²⁷⁵ The Cuban government agreed to a settlement of 18,039,000 Swiss francs, to be paid out over an eight-year payment schedule, with 1,752,360 Swiss francs due each of the first three years and 2,555,525 Swiss francs due each of the remaining five years.²⁷⁶ Converted to U.S. dollars, the total value of the Swiss-Cuban settlement was \$4,140,000 USD.²⁷⁷ As with the other four agreements discussed in this section, no information was officially released regarding the total value of the Swiss interests' claims. As such, it is impossible "to determine the relative percentages which the agreed upon payments represent in proportion to the total claims of the nationals" of Switzerland and each other country.²⁷⁸

The agreed-upon Swiss-Cuban settlement would serve as indemnification only for the nationalization "of the enterprises

and to illustrate those conditions which the Cubans deem mandatory for any settlement."). In addition, the Cuban government's underlying motivation for resolving claims with other countries, *i.e.*, seeking and securing commercial concessions, is likely to be the determinative factor motivating Cuba's resolution of claims in any American-Cuban settlement. See FEINBERG, *supra* note 17, at 11–12 ("[T]he Cuban government recognizes that unresolved U.S. property claims . . . raise a significant barrier to new capital inflows. . . . In so far as Cuba wishes to restore normal commercial relations with the very large market immediately to its north, the outstanding property claims remain a significant barrier, legally, politically, and commercially.").

272. See *infra* Part III.

273. Gordon, *supra* note 271, at 459.

274. *Id.* at 459–60, 463.

275. *Id.* at 460.

276. *Id.*

277. *Id.* at 465, 470, n. 42. This figure is based upon prevailing exchange rates as of March 1967. *Id.*

278. *Id.* at 460. See also FEINBERG, *supra* note 17, at 11, n. 19.

themselves, the payment of fees due to the entities prior to nationalization and for the use of brand names by the Cuban government following the nationalizations.”²⁷⁹ Again, no other Swiss nationals’ claims were indemnified, whether individual or corporate. In exchange, the Swiss government and the Swiss interests representing the former owners of the Cuban food processing enterprises established “a market for 40,000 tons of Cuban sugar annually for eight years,” to be purchased at then-prevailing global market prices for sugar.²⁸⁰

The Cuban government was only able to negotiate a quid-pro-quo agreement because of Cuba’s lack of foreign currency, which “precluded the possibility of compensation by direct cash payments.”²⁸¹ Furthermore, the Cuban government refused to apply all of the proceeds from sugar sales to the annual indemnification payments.²⁸² Following “what the Swiss government described as ‘bitter discussions[,]’” only approximately one-third of the hard currency Cuba received served as an indemnity, with the Cuban government simply pocketing the rest.²⁸³ This “unique” arrangement is “partially attributable to the food processing nature of the expropriated Swiss owned companies” and their ability to create and benefit from a market for Cuban sugar.²⁸⁴ At least one scholar has argued that the Swiss government and interests’ “willingness and ability” to accept sugar “resulted in their receiving a great percentage” more of their total claims than “had they, like the individual claimants, been interested solely in receiving cash indemnification.”²⁸⁵ There is, however, a greater lesson to be gleaned. The settlement of outstanding claims is neither a virtue unto itself, nor is it the Cuban government’s primary object in any negotiation. Rather, seeking and obtaining “commercial” and “foreign exchange” considerations is the Cuban government’s main imperative.²⁸⁶

279. Gordon, *supra* note 271, at 460.

280. *See id.*

281. *Id.*

282. *Id.*

283. *Id.* at 460–61.

284. *Id.* at 461.

285. *Id.* at 462.

286. *See id.* at 466 (“The actual increased trade with France and Spain, as well as the direct trade provisions in the Swiss accord, additionally illustrate that Cuba has not agreed to any settlement of claims merely to resolve legitimate claims for property deprivations, but that the settlements are considered

The Spanish settlement was executed on March 14, 1967, but pursuant to a non-disclosure agreement, no details were made public.²⁸⁷ Scholars have suggested that the existence of a non-disclosure agreement "may [serve as] evidence that Cuba had to settle for a larger payment than it wished to have disclosed to the public."²⁸⁸ In recent years, however, some new information has come to light. At least one source has "revealed that Spanish claims were settled for around \$40 million [USD,]" while the total value of Spanish claims "was estimated at about \$350 million [USD]."²⁸⁹ If this source is correct, the Spanish-Cuban settlement represents a mere fraction (just over 10 percent) of the value of pre-settlement claims. Still, such an analysis obscures a more relevant clue that should not be understated. As of 1967, the Cuban government was (and perhaps remains) willing to negotiate multi-million-dollar settlements for claims of foreign nationals whose properties were nationalized.

Unfortunately, little else is known about the terms and conditions of the Spanish-Cuban settlement. Without such information, it is difficult to predict what terms the Cuban government may deem acceptable in any negotiation with the United States. But the fact that Cuba may have entered into a multi-million-dollar settlement with Spain as far back as the late sixties provides new hope to U.S. nationals seeking resolution of their own claims, albeit with one caveat. Cuba did not "fulfill its payment obligations under the agreement until 1994[,]"²⁹⁰ which suggests that even if the Cuban government enters into a mutually-acceptable agreement with the United States and its claimants, it could take years, even decades, for Cuba to satisfy the settlements.²⁹¹

as a quid pro quo for the acquisition of needed commodities or foreign exchange.").

287. *Id.* at 459.

288. *Id.* See also CREIGHTON UNIVERSITY, *supra* note 26, at 102 ("One source speculates Cuba wanted to keep the agreement terms confidential because the settlement amount was larger than Cuban negotiators had hoped or anticipated.").

289. *Id.*

290. *Id.* (citing Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriations Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, n. 15 (1995)).

291. See *id.* Because there is no available information about the payment schedule Spain negotiated with Cuba, it is impossible to verify whether the

The French-Cuban accord, the final 1960s settlement, was executed in Havana on March 16, 1967.²⁹² Unlike the Swiss-Cuban agreement, the French-Cuban accord universally indemnified all French claimants and contained no direct trade agreement.²⁹³ Whereas the claims under the Swiss accord were “subjected to a mutual determination of the validity” of the Swiss interests’ claims,²⁹⁴ the French-Cuban accord was entered into pursuant to and only “after a bilateral examination of the claims raised by French persons, natural and juridical.”²⁹⁵ Thus, while the French nationals’ claims were subjected to less severe Cuban scrutiny and contestation, the Cuban government nevertheless played a role in determining the appropriate and acceptable values of the claims.²⁹⁶

The Cuban government agreed to a settlement of 10,861,532 francs, to be paid in twelve nearly equal installments over a period of approximately five years.²⁹⁷ This equates to roughly \$2,170,000 USD.²⁹⁸ Because the French-Cuban accord contained no direct trade provision, the Cuban government was obligated to and did satisfy the settlement, through a series of direct transfers (cash payments) from the *Banco Nacional de Cuba* “to the

Cuban government either met or failed to meet its obligations under the Spanish-Cuban settlement. *See id.* Compared to the Swiss-Cuban settlement, which called for an eight-year payment schedule, it appears that even when Cuba agrees to potentially more favorable settlement sums, the Cuban government may try to extend and prolong (to the extent it is permitted pursuant to the subject settlement agreement) satisfaction of settlement. *See id.* That said, the Department Politique Fédéral, Bern, Switzerland reported that compensation payments pursuant to the Swiss accord were made with “exemplary punctuality[.]” which provides additional hope for more favorable outcomes. *See Gordon, supra* note 271, at 460, 469, n. 22.

292. *Id.* at 463.

293. *Id.* at 463–64.

294. *Id.* at 463.

295. *Id.* at 464, n. 41 quoting French Accord at preamble.

296. *Id.* at 463–66 (“Such a provision should not be unexpected; no nation agreeing to the payment of a settlement amount for the taking of foreign property is likely to accept the unilateral declaration of the claimant nation as to the amount of claims owed. In any future agreement between Cuba and the United States, Cuba is unlikely to unquestionably accept as conclusively determinative of the value of the property expropriated, the approximately \$1.8 billion [USD] of United States claims adjudicated by the [FCSC].”).

297. *Id.* at 465.

298. *Id.* at 465, 470, n. 42 (this figure is based upon prevailing exchange rates as of March 1967).

credit of a special account opened in the Bank of France.”²⁹⁹ In exchange, and “not unexpected in this form of agreement,” the French-Cuban accord provided for the “full release” of Cuba upon complete payment, a “guarantee” by the French government against any future related claims pursued by French nationals, a “grant” to France of exclusive jurisdiction for distribution of settlement proceeds, “free exchange” of any/all information necessary to effect the settlement, and the settlement of related “disagreements” only by mutual negotiations.³⁰⁰

While at first glance the absence of a direct trade provision is notable, it appears that, as with the Swiss (and likely the Spanish) accord, here too the Cuban government was motivated by a quid-pro-quo arrangement. In the years preceding execution of the French-Cuban settlement agreement, Cuban trade with France steadily dropped “from 21.5 million pesos in 1960” to a low of 2.9 million pesos in 1962.³⁰¹ Trade steadily surged back, with an increase to 29.6 million pesos in 1965, followed by a brief dip to 22.3 million pesos in 1966.³⁰² Then, in the same year the French-Cuban accord was signed, Cuban trade with France “more than doubled over the previous year, reaching 56.1 million pesos.”³⁰³ There is little doubt that any settlement negotiated with Cuba is driven primarily by the Cuban government’s tripartite goal (which held true both then and now). This goal is to reestablish markets, “diversify its trade in the non-socialist world,” and lessen the nation’s dependence on other countries.³⁰⁴

299. *Id.* at 465.

300. *Id.*

301. *Id.* at 464.

302. *Id.*

303. *Id.*

304. *Id.* at 457 (“[T]he settlements have allowed Cuba to diversify its trade in the non-socialist world and to a very small degree lessen the nation’s dependence on the Soviet Union.”). Whereas in 1967 Cuba sought to lessen its dependence on the Soviet Union, today Cuba hopes to lessen its dependence on Venezuela. See FEINBERG, *supra* note 3, at 50–52 (“Having suffered severely from the loss of one energy patron, [the Soviet Union,] the Cubans do not want to be shocked a second time. In 2012 Cuba sought to lessen its dependency on imported oil [from Venezuela] by exploiting what appeared to be promising offshore oil reserves, but drilling platforms failed to discover commercially viable deposits. . . . Even if Venezuela were a healthier economy, it could be a piece, but only a piece, of Cuba’s emerging market strategy.”).

Entering the 1970s, the Cuban government negotiated settlements with both Great Britain and Canada.³⁰⁵ As early as 1973, the Cuban government commenced settlement discussions with Canada, but negotiations were delayed, perhaps “because Canadian trade with Cuba did not decrease significantly after the revolution, and therefore Cuba did not have an incentive to negotiate an immediate settlement to maintain trade levels.”³⁰⁶ Cuba would reach a final resolution with Great Britain first, with the final agreement executed on October 18, 1978.³⁰⁷ Much like the settlement with Spain, no details were publicly disseminated, leaving scholars to speculate that the Cuban government may have negotiated a similar non-disclosure agreement in an effort to mask a settlement amount or terms that it found to be less-than-favorable.³⁰⁸

Following nearly seven years of negotiations, an agreement was finally reached with Canada on November 7, 1980.³⁰⁹ The Canadian-Cuban agreement called for Cuba “to pay [CAD] \$850,000 as a global indemnity (with an initial installment followed by four semi-annual payments) to be distributed by the Government of Canada to its claimants.”³¹⁰ Little else is known about the terms and conditions of the settlement, but it appears that as with the French accord, a direct trade provision was not an element.³¹¹ What is known is that “Canada’s total investment

305. See FEINBERG, *supra* note 17, at 11. See also Gordon, *supra* note 271; and Richard B. Lillich & Burns H. Weston, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 AM. J. INT’L L. 69, app. at 78–79 (1988).

306. CREIGHTON UNIVERSITY, *supra* note 26, at 101.

307. See Lillich & Weston, *supra* note 305, app. at 79.

308. See FEINBERG, *supra* note 17, at 11. The lack of public dissemination of information is matched by the veritable absence of scholarly discussion, or even mention, of the British-Cuban settlement. Of the three-major works cited here (the Creighton Report, the Ashby Proposal, and the Feinberg Proposal), only one contains a reference to the British-Cuban settlement (the Feinberg Proposal). See *id.* at 11 (mentioning that a “bilateral settlement of outstanding property claims” was negotiated with Great Britain in 1980). This author was only able to find one other mention of the British-Cuban settlement, *sans* discussion, in a journal article appendix, which chronologically lists various agreements from 1969–1987. See also Lillich & Weston, *supra* note 305, app. at 79.

309. *Id.*

310. See FEINBERG, *supra* note 17, at 11–12.

311. See CREIGHTON UNIVERSITY, *supra* note 26, at 101. Relative to the United States, Switzerland, and France, Canada had a “relatively small amount of

in Cuba was estimated at only [CAD] \$9.4 million in 1956[.]" and that two "Canadian banks owned [CAD] \$8.8 million of that total investment value[.]" the Bank of Nova Scotia and the Royal Bank of Canada.³¹² Both banks negotiated separate and individual settlements with the Cuban government "near the time their properties were confiscated and before the Canadian government negotiated any lump sum settlement."³¹³ Assuming that the settlement reached in 1980 was to resolve the total Canadian investment in Cuba (CAD \$9.4 million in 1956 dollars) minus the two Canadian banks' investments (CAD \$8.8 million), rough arithmetic suggests that the total value of all remaining outstanding Canadian claims was only CAD \$600,000, which, adjusted for inflation, might more or less equal the CAD \$850,000 global indemnity (in 1980 dollars) actually paid. That the Cuban government may have agreed to a 1:1 ratio of claim value to settlement value bodes well for future claimants, countenanced by the fact that the total claim value (CAD \$850,000) was de minimis compared to the total value of FCSC-certified claims (\$1.8 billion USD). Here too, the Cuban government's primary and ultimate motivation was still quid-pro-quo, as Canada would become one of Cuba's main commercial partners.³¹⁴

III. SOLUTION: ESTABLISHING AN INCLUSIVE FRAMEWORK FOR CLAIMS RESOLUTION

This Part will unpack the major flaws that co-exist in the three sets of approaches examined in Part II (American, Cuban, and Foreign). It will then set forth a concise three-tier framework through which outstanding claims of all parties (U.S. nationals, Cuban American exiles, and Cuban nationals) may be resolved.

investment in Cuba, which increased the feasibility of settlement with Canada as opposed to nations with greater investment levels." *Id.*

312. *Id.*

313. *Id.*

314. See FEINBERG, *supra* note 3, at 45–48 ("In the 1990s, following the traumatic disappearance of COMECON (Council for Mutual Economic Assistance) and its Eastern European economic partners, Cuba turned first to western Europe and Canada to provide commerce and, most important, for direct investments that would bring capital, know-how, and access to international markets.").

A. Previous Proposals Are Flawed

The Creighton Report, Ashby Proposal, and Feinberg Proposal together represent the most complete and up-to-date examination of claims stemming from Castro's nationalization of properties following the Cuban Revolution. These proposals, however, suffer from several flaws that undermine the practicability of the solutions proposed therein. This section will explore three major flaws that thwart the major proposals to date, *i.e.*, the issues of "inclusivity" (proposals that either include or exclude select groups of parties with outstanding claims), *ex parte* valuations (the FCSC-certified claims were valued without Cuba's participation or input), and official U.S. policy prescriptions (that encourage domination of the Cuban economic and political spheres, rather than respect for Cuba's sovereignty).

1. Inclusivity

The first major flaw of existing proposals is that they are all, for the most part, under-inclusive. As the Creighton Report correctly observes, there are three groups or "classes" of claimants, including U.S. nationals, Cuban American exiles, and Cuban nationals.³¹⁵ The Creighton Report acknowledges the political clout of the Cuban American community, but nevertheless finds that their claims are likely excludable because they do not fall within the definition of "U.S. national" contemplated by the Cuban Claims Program.³¹⁶ The Creighton Report also recognizes the validity of Cuban nationals' claims, but ultimately finds that there is "no international dimension" to their claims, and so they should seek to adjudicate their claims before a "Cuban Special Claims Court."³¹⁷ The Creighton Report expertly examines all three groups, but also insinuates that the only claims capable of resolution on an international level are those of U.S. nationals, to be settled before a single "Cuba-U.S. Claims Tribunal."³¹⁸

Similarly, the Ashby Proposal is devoid of any meaningful consideration of Cuban American exiles' or Cuban nationals'

315. See CREIGHTON UNIVERSITY, *supra* note 26, at 3–5.

316. See *id.* at 3–4 (Because Cuban American exiles were not U.S. nationals "at the time of the expropriation of their property[,] they could not take part in the certification process, and "thus are not protected under U.S. law to the same extent as U.S. national claimants.")). See also discussion, *supra* note 56.

317. See CREIGHTON UNIVERSITY, *supra* note 26, at 4–6.

318. See *id.* at 3, 5.

claims.³¹⁹ The Feinberg Proposal does a better job of carefully considering the legitimate claims of Cuban Americans, but ultimately opts to focus solely on "those claimants who were U.S. nationals at the time of the taking."³²⁰ Surprisingly, the Feinberg Proposal does not address the claims of Cuban nationals at all.³²¹ Likewise, the Cuban approaches dismiss the claims of Cuban Americans and cast serious doubt over the Cuban government's willingness to fully recognize the claims of all U.S. nationals.³²²

The problematic nature of under-inclusivity cannot be overstated. The competing interests of these various groups must be coextensively reconciled. An analysis of these groups' positions, under the Putnam Theory,³²³ suggests that the competing interests of parties within two intersecting group-sets, Cuban Americans versus Cuban nationals and the U.S. government versus the Cuban government, are likely to undermine any future leader's attempt to reach a level two domestic "win set."³²⁴ If the U.S. government seeks to exclude Cuban nationals, the Cuban government will not have the support of its domestic Cuban national constituency. If the Cuban government seeks to exclude Cuban American nationals, the U.S. government will not have the support of its domestic constituency. This is called a "lose-lose."

On the surface at least, the solution is obvious, however difficult it may be to implement. The claims of *all* interested parties must be simultaneously considered in one grand bargain. Cuban Americans may not have been U.S. nationals for purposes of the Cuban Claims Program, but Cuban Americans were victims of innumerable violations of their human rights,³²⁵ not least of

319. See generally Ashby, *supra* note 20. See also *id.* at 427 (devoting two sentences to "Cuban counterclaims.").

320. See FEINBERG, *supra* note 17, at 5. In fairness, Feinberg does note that Cuban American claims, and the "financial demands and psychological needs" of their claimants, will be addressed and "spelled out in a sequel study." See *id.*

321. See FEINBERG, *supra* note 17, at 5 ("This paper . . . focuses solely upon those claimants who were U.S. nationals at the time of the taking.").

322. See *supra* Part II.

323. See *supra* text accompanying note 101.

324. See *id.*

325. See David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Relations Theory*, 4 IND. J. GLOB. LEGAL STUD. 297, 335-36 (1997).

which is the right against discriminatory confiscation of private property (whether real or personal) on the basis of political opinion.³²⁶ The same holds true for Cuban nationals (and their heirs) whose properties were allegedly “nationalized,” many of whom are yet to be compensated.³²⁷ Under both customary international law and U.S. practice, nationalization of property is legal only if followed by “adequate, effective and prompt compensation.”³²⁸ Otherwise, the so-called “nationalization” amounts to illegal “confiscation.” Therefore, although Cuban American exiles were not nationals at the time of the confiscations (confiscations only because the Cuban government has yet to compensate them for their losses), they are equally entitled to have their claims heard. Cuban nationals too deserve a seat at the negotiating table. Any proposed settlement may not be under-inclusive, and so the claims of all three groups (U.S. nationals, Cuban American exiles, and Cuban nationals) must be equally heard, considered, and settled.

2. Ex Parte Valuations

The second major flaw of existing proposals is that they either enshrine or ignore the FCSC-certified claims valuations. The Cuban government is unlikely to accept the FCSC-certified valuations at face value. Put another way, the Cuban government is likely to challenge the FCSC-certified valuations, and under customary international law, the Cuban government has every right to challenge such valuations.³²⁹

The Cuban government is equally entitled to due process of law, and to declare that the FCSC-certified claim valuations are uncontestable flies in the face of customary international law and U.S. practice.³³⁰ The U.S. position, and often the position of the major American settlement proposals to date,³³¹ is that Cuba “owes” the United States the full principal value of the FCSC-certified claims (approximately \$1.8 billion USD) plus interest

326. *Id.*

327. *Id.*

328. See FEINBERG, *supra* note 17, at 7–8 (quoting *Foreign Relations of the United States 1940*, Vol. V, Notes from Secretary of State Hull to the Mexican Ambassador (1938), 1009–10).

329. See Fidler, *supra* note 325, at 349.

330. *Id.*

331. See *supra* Part II.

(approximately \$7 billion USD).³³² This blanket assertion does not comport with customary international law or state practice as of the last several centuries.

A claimant state “may not deprive a foreign national of the right in accordance with due process of law to effectively contest the bases and the quantum of claims that may affect his property.”³³³ Further, as the Feinberg Proposal helpfully notes, the FCSC procedures were “*ex parte* and non-adversarial: the defendant (the Cuban government in this case) was not present and had no opportunity to question the assertions of the claimant, to examine and challenge the evidence presented by the claimant or its legal representatives, nor to present contradictory evidence.”³³⁴ As such, the Cuban government was unilaterally deprived of due process of law, as the FCSC did not have access to Cuban property registries, nor was it capable of conducting on-site visits.³³⁵ Further, the FCSC has no external appeals process, whether to a superior U.S. court or to an international tribunal.³³⁶ The Cuban government, under FCSC procedures, had no representation and no legal recourse.

In addition, there is no one best method to arrive at a valuation. As the Feinberg Proposal lays bare, the commonly-accepted methods of claims valuation widely vary.³³⁷ If the Cuban government is to be expected to negotiate and resolve the outstanding claims in good faith, it must be guaranteed the full panoply of due process of law, which includes participation in selecting the method of valuation. As one attorney who represented the ITT Corporation before the Iran-U.S. Claims Tribunal has observed, mutual agreement over claims valuation methods and results is

332. See Neyfakh, *supra* note 22.

333. See Fidler, *supra* note 325, at 349, n. 246 quoting *Freedom of Trade and Investment in the Hemisphere*, CJI/SO/II doc 67/96 rev. 5 (Aug. 23, 1996) (Opinion of the Inter-American Juridical Committee in Response to Resolution AG/DOC 3375/96 of the General Assembly of the Organization [of American States]).

334. See FEINBERG, *supra* note 17, at 21.

335. See *id.*

336. See *id.*

337. See *id.* at 22–24.

critical to establishing a foundation of legitimacy for any international claims settlement, and at the very least, facilitates and expedites the process.³³⁸

3. Official U.S. Policy Prescriptions

The third major flaw of existing proposals is that they assume that to-date official U.S. policy prescriptions will continue to predominate. There is no question that the Helms-Burton Act, the codification of the U.S. Embargo against Cuba, enjoys wide support throughout the American electorate.³³⁹ The underlying purpose of the Helms-Burton Act is to push for a regime change in Cuba, to liberalize and democratize a Cuba that has known only “*Fidelismo*” for nearly sixty years.³⁴⁰ Despite recent changes announced under the Obama Administration,³⁴¹ this remains the official policy of the United States towards Cuba in both official policy and practice.³⁴² This position is flawed, because it prioritizes domination over respect for sovereignty, and United States obstinance on the issue undermines prospects for successful claims resolutions.³⁴³

338. Telephone interview with Anonymous (Dec. 4, 2016) (notes on file with author). Anonymous is a former attorney for ITT Corporation (ITT), who represented IKO Kabel, a wholly owned subsidiary of ITT, before the Iran-U.S. Claims Tribunal. This attorney has expressed their desire to retain full anonymity.

339. See Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 326 (1995/1996) (“Whether one agrees or disagrees with the purpose, provisions, or probable consequences of the newly-enacted [Helms-Burton Act] is beside the point. On March 12, 1996, President Clinton signed the [Helms-Burton Act] into law, having previously been approved by the U.S. Congress by wide margins. *The substantial support for the [Helms-Burton Act] makes it highly unlikely that U.S. policy towards Cuba will change in the foreseeable future absent some significant political changes in the Cuban government.*”) (emphasis added).

340. See *id.*

341. See *Charting a New Course in Cuba*, *supra* note 24.

342. See FEINBERG, *supra* note 3, at 1–22.

343. See Castro Mariño, *supra* note 108, at 60 (noting that the Helms-Burton Act “dictated the terms under which any future Cuban government was to be recognized by the U.S. government and made bilateral relations dependent on the resolution of property claims under U.S. law.”). See also discussion *supra* note 108.

It is about time that the United States move away from the "neocolonial" model imposed on Cuba,³⁴⁴ the modern day manifestation of the Monroe Doctrine and the Roosevelt Corollary.³⁴⁵ As one scholar has noted, Raúl Castro's successor, Díaz-Canel, is unlikely to cave to U.S. pressure to liberalize and democratize, but is likely to "continue to defy post-Cold War American fantasies even as it moves further away from its orthodox socialist past."³⁴⁶ Given the overlapping of U.S. nationals and Cuban American exiles (many of whom are by now also U.S. nationals), the U.S. government owes it to its people to refresh and modernize its thinking, approach, policy, and practice towards Cuba. Cuba is not a pawn to be played with.

Further, the United States has been broadcasting an unfounded message for decades, that Cuba, and Cuba alone, is responsible for the fact that FCSC-certified (and other) claims remain outstanding. Both the Helms-Burton Act and the Creighton Report employ the term "confiscate" rather than "nationalize," suggesting that Cuba has illegally "confiscated" the properties and assets of U.S. nationals by virtue of the fact that the claims remain outstanding.³⁴⁷ Arguably, however, the United States is (at least partially) responsible for the delay in claims resolution.³⁴⁸ As early as 1964, Cuba expressed its interest in resolving claims, when Fidel Castro made a "secret" offer through the Swiss ambassador "to pay \$1 billion [USD] in compensation for expropriated American properties and to release all political prisoners in exchange for restoring the Cuban sugar quota."³⁴⁹ Later on in 1975, Cuba's First Deputy Prime Minister made a "convincing argument" to a well-known American journalist that Cuba was, and always had been, "prepared to reach

344. See Segrera, *supra* note 12, at 3–4.

345. See Castro Mariño, *supra* note 108, at 62; see also discussion *supra* note 108.

346. Sweig & Bustamante, *supra* note 108, at 114.

347. See ROY, *supra* note 41, at 37. "Nationalization" is the government's taking of property with adequate, effective, prompt compensation. See Ashby, *supra* note 20, at 414. "Confiscation" is the government's taking of property without such compensation. See ROY, *supra* note 41, at 37 (discussing the significance and meaning of the term "confiscated" as defined by the Helms-Burton Act, and noting that the "legislators found it advisable to offer a sort of detailed glossary in section 4 ('Definitions')."). See also Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, *supra* note 97.

348. See Noumoff, *supra* note 97, at 955.

349. See Ashby, *supra* note 20, at 420. See also discussion *supra* note 254.

a realistic settlement.”³⁵⁰ Scholars have since argued that the only reason claims remain unsettled is because the United States’ ultimate objective is not claims resolution, but the overthrow of the Castro regime and the return of Cuba as a neocolonial U.S. outpost.³⁵¹ The full and immediate recognition of Cuba as a sovereign state would amount to a full-stop reversal in U.S. policy, but it would also signal that the United States is ready and willing to enter into those “realistic” talks of settlement envisioned years ago.

Further, the United States need not be so worried about “socialism” in its backyard. The post-Cold War era is over, and Fidel Castro himself once admitted, “[t]he Cuban model doesn’t even work for us anymore. . . .”³⁵² Castro’s admission is not so much a rejection of the Cuban Revolution as it is a recalibration—intended to acknowledge “that under ‘the Cuban Model’ the state has much too big a role in the economic life of the country.”³⁵³ Since the collapse of the Soviet Union (and its “financial underwriting” of Castro’s “adventurism”) and the subsequent falling through of Venezuelan support, Castro and his revolutionaries have “struggled to engineer its survival[,]” signaling that it may be high time for a shift in economic, political, and diplomatic strategy.³⁵⁴ By extension, *now* is the time to rethink approaches towards outstanding claims resolution and settlement.

B. Solution: The United States and Cuba Should Commit to Three Tiers of Settlement Mechanisms

This section will propose and evaluate the merits of a new three-tier framework, one which simultaneously incorporates

350. See Abraham F. Lowenthal, *Cuba: Time for a Change*, 20 FOREIGN POL’Y 65, 77 (1975) (“Such a settlement would involve not only recognition of the principle of compensation (which Cuba has already paid to several European countries) but some net transfer of funds from Cuba to the U.S. government, with [the U.S.] government acting as trustee for the expropriated firms.”).

351. See Segrera, *supra* note 12, at 3–4. See also Noumoff, *supra* note 97, at 955.

352. See Jeffrey Goldberg, *Fidel: ‘Cuban Model Doesn’t Even Work for Us Anymore,’* ATLANTIC (Sept. 8, 2010), <http://www.theatlantic.com/international/archive/2010/09/fidel-cuban-model-doesnt-even-work-for-us-anymore/62602/>. See also Daniel Fisk & Courtney R. Perez, *Managed Engagement: The Cast of Castro’s Cuba*, 42 U. MIAMI INTER-AM. L. REV. 47, 47–48 (2009).

353. See *id.*

354. See Fisk & Perez, *supra* note 352, at 48. See also FEINBERG, *supra* note 3, at 50–52; see also discussion *supra* note 304.

the more meritorious elements of existing proposals (primarily, the Feinberg Proposal) while balancing these elements against the major flaws that this Note has exposed. The first tier consists of restitution of nationalized assets in Cuba, including improved and unimproved real property, which would stimulate the Cuban economy. The second tier consists of bilateral trade agreements, including development rights and tax incentives, which would further accelerate the Cuban economy. The third tier consists of direct compensation, including partial interest payments, made possible by the stimulation and acceleration of Cuba's economy (and, as a consequence, the Cuban government's improved foreign exchange balances).

1. Restitution

In light of the above-noted flaws, and despite the cries of cynics to the contrary, restitution remains a viable option for settling outstanding claims.³⁵⁵ The main reasons for this are twofold: Cuba cannot afford a single lump-sum payout,³⁵⁶ and more than eighty percent of FCSC-certified claims stem from expropriation of *commercial*, not residential, lands and debts.³⁵⁷ The argument in chief against restitution has been that this method of settlement would "displace" persons occupying residential properties.³⁵⁸ As it turns out, this concern is for the most part unfounded, as the majority of the properties that would be restituted are commercial ones.³⁵⁹

Restitution of commercial lands would provide effective means to settle a substantial portion of the outstanding claims, alleviating the Cuban government of the burden of paying in cash those properties' negotiated values. Restitution also provides the Cuban government with a unique opportunity to reinvigorate

355. See CREIGHTON UNIVERSITY, *supra* note 26, at 202–204 (noting the "limited role of restitution"); FEINBERG, *supra* note 17, at 4; and Ashby, *supra* note 20, at 413–14 (failing to mention restitution as an option).

356. See FEINBERG, *supra* note 17, at 28–30.

357. See Larry Luxner, *Mauricio Tamargo: Settling Cuba Claims Won't Be Easy*, 13 Cuba News 8, 8 (2005).

358. See CREIGHTON UNIVERSITY, *supra* note 26, at 203 ("There is also the significant moral problem presented by the possibility of displacing ordinary Cubans who have been living and working within the existing structure of Cuban society and can hardly be faulted for their current circumstances. It would be highly counterproductive to create a system that would displace these persons.").

359. See Luxner, *supra* note 357, at 8.

commercial properties and arable lands that have been chronically underproductive.³⁶⁰ This is called a “win-win.”

Further, without restitution as a main mechanism for claims resolution, Cuba stands little chance to adequately, effectively, or promptly compensate claimants for their losses.³⁶¹ As the Creighton Report,³⁶² the Ashby Proposal,³⁶³ and the Feinberg Proposal³⁶⁴ all concede, Cuba suffers from a substantially deteriorated economic condition, one which would not allow for more than “token” compensation in the near long term.³⁶⁵ Restitution provides a route to achieve a higher claim value to settlement value ratio, and contrary to the widely disseminated but faulty assumption that restitution would “jeopardize” the rights of current owners,³⁶⁶ the 20 percent or less of claims that relate to residential properties could be excluded from this first mechanism. The fact that many of the commercial properties underlying the claims are now owned, controlled, or jointly operated by the Cuban government further strengthens the case for restitution.

2. Bilateral Trade Agreements

The second proposed mechanism involves a modified lump-sum plus direct trade agreement, akin to the agreements

360. See FEINBERG, *supra* note 3, at 200 (noting that Cuba suffers from a “[b]adly depleted capital stock and infrastructure, subpar national savings and investment rates, and low productivity, *especially in agriculture*”) (emphasis added).

361. See Daniel P. Faust, *American Investment in Cuban Real Estate: Close but No Cigar*, 34 U. MIAMI INTER-AM. L. REV. 369, 386–87 (2009).

362. See CREIGHTON UNIVERSITY, *supra* note 26, at 103 (“Despite an apparent record of compliance with past lump-sum property claim settlement agreements with foreign governments, Cuba’s ability to engage in a similar arrangement with the United States is doubtful. In light of the large value of United States claims against Cuba and Cuba’s poor economic situation, no meaningful lump sum payment is feasible for United States claims as a whole.”).

363. See Ashby, *supra* note 20, at 427 (arguing that because of Cuba’s poor economic condition, any “[s]ettlement would probably be paid pro rata”).

364. See FEINBERG, *supra* note 17, at 7 (“The economic costs alone—direct costs of compensation and disruptions to economic activity—could be prohibitive.”).

365. See Faust, *supra* note 361, at 386–87 (“Unfortunately, unless payment is delayed for a substantial period of time, Cuba’s economic condition will not allow more than token compensation to the former owners.”).

366. See *id.* at 387 (“Hopefully, the resolution of claims of former land-owners will be through compensation instead of through the return of property so that the ownership rights of current and future owners do not remain in jeopardy.”).

reached between Cuba and Canada, Great Britain, France, Spain, and Switzerland, respectively.³⁶⁷ If restitution is the primary mechanism of claims settlement, and that mechanism is utilized to wipe out 80 percent of the total value of all FCSC-related claims (approximately \$1.8 billion USD in principal),³⁶⁸ that leaves a balance of only \$360 million USD, which is on par with the alleged total value of all claims settled in the Spanish-Cuban accord.³⁶⁹ Although the Spanish claims were purportedly settled for only \$40 million USD,³⁷⁰ there is no question that Cuba is more likely to entertain a \$360 million USD lump-sum claim than a \$1.8 billion USD claim.

Just like Cuba did with Switzerland, France, and Spain, it could be inclined to enter into a lump-sum settlement agreement with U.S. national, Cuban American exile, and Cuban national claimants if there were either direct or indirect trade provisions attached to the deal.³⁷¹ In addition, despite Cuba's poor economic conditions, the small island nation has emerged as a global medical powerhouse, attracting millions of dollars of "medical tourism" business every year.³⁷² Cuba is poised to wield its medical clout as a bargaining chip, perhaps helping to provide the United States with an ironic answer to its current medical crisis. Further, academics across various epistemological fields have observed that Cuba is ready to "think like capitalists but continue being socialists," which provides at least partial relief to those Americans clinging to Cold War fears.³⁷³ Again, Fidel Castro himself once admitted that the "Cuban model doesn't even work" anymore, suggesting that the Cuban political hierarchy is ready

367. See *supra* Part II.

368. See Neyfakh, *supra* note 22.

369. See CREIGHTON UNIVERSITY, *supra* note 26, at 102 ("The total value of Spanish claims was estimated at \$350 million [USD].").

370. See *id.* ("Spanish claims were settled for around \$40 million [USD].").

371. See Gordon, *supra* note 271, at 466 ("The actual increased trade with France and Spain, as well as the direct trade provisions in the Swiss accord, additionally illustrate that Cuba has not agreed to any settlement of claims merely to resolve legitimate claims for property deprivations, but that the settlements are considered quid pro quo for the acquisition of needed commodities or foreign exchange.").

372. See Julie M. Feinsilver, *Cuba as a "World Medical Power": The Politics of Symbolism*, 24 LAT. AM. RES. REV. 1 (1989).

373. See P. Sean Brotherton, "We Have to Think like Capitalists but Continue Being Socialists": Medicalized Subjectivities, Emergent Capital, and Socialist Entrepreneurs in Post-Soviet Cuba, 35 AM. ETHNOLOGIST 259 (2008).

to evolve and adapt to new modes of economic modeling and social planning.³⁷⁴

3. Direct Compensation

It stands to reason that the second mechanism just proposed, bilateral trade agreements, and the third mechanism, direct compensation, go hand in hand. If the United States and all parties involved agree to the three-tier settlement framework proposed here, Cuba would gain a massive injection of economic, technological, and human capital, reinvigorating the economy, spurring growth and development, and igniting a Cuban renaissance—an economic one, poised to transform Cuban society writ large.³⁷⁵

With that same injection of capital stimulated by renewed bilateral trade, Cuba's economic condition would improve exponentially, increasing its foreign reserves by multiples.³⁷⁶ With the renewed availability of cash-on-hand, Cuba would have a better chance of settling claims through this third proposed mechanism—direct compensation. Although the claims left to be settled would be minimal, imagine the irony of a Cuban American in Miami or New York receiving a check from the Cuban government.

CONCLUSION

The history of outstanding claims resulting from the Castro nationalizations is a long and tortured one.³⁷⁷ Despite calls to the contrary, the Cuban government has been—and remains—ready to enter into realistic and meaningful claims resolution negotiations.³⁷⁸ Any insinuation that Cuba “refuses” to negotiate the claims ignores decades of precedent, including the five cases discussed in Part II.³⁷⁹ The recent warming of relations between the United States and Cuba³⁸⁰ provides a novel and timely opportunity to reexamine these long-outstanding claims. But in doing so, international leaders representing any of the interested parties must be mindful of the major flaws of most proposals to

374. See Goldberg, *supra* note 352.

375. See FEINBERG, *supra* note 3, at 202, 212–21.

376. See *id.*

377. See *supra* Part I.

378. See *supra* Part II.

379. See *supra* Part II.

380. See *Charting a New Course in Cuba*, *supra* note 24.

date, including under-inclusivity, the issue of ex parte valuations, and archaic U.S. foreign policy attitudes and objectives.³⁸¹ The three-tier framework proposed in this Note is but one of the myriad of options available to negotiators. At the very least, it provides a much-needed update—a “Gedanken” experiment, if you will.

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381. See *supra* Part III.

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