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“Resolving Issues with Confiscated Property in Cuba,
Havana Club Rum and Other Property”

Thank you Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee.

I have worked to help victims of property confiscations from different countries for over 27 years, including eight years as chairman of the Foreign Claims Settlement Commission at the Department of Justice. Currently, our law firm represents a number of claimants against the government of Cuba, and individuals and families with claims against Iraq and Libya, as well as others who have suffered damages caused by foreign governments.

I commend this Subcommittee for convening this important hearing and hope it continues to play an active role in the long and overdue resolution and full settlement of these certified claims.

It is my hope that the testimony provided at this hearing today will help the Committee, the Congress, and the Administration, to resolve and settle the certified claims before any further concessions are offered to the government of Cuba. It is also an opportunity to review other issues that may arise in this process, which the Congress addressed in the Cuban Liberty and Democratic Solidarity Act of 1996.

Background on Confiscations by Cuba.

Caveat Emptor, or “buyer beware”, is the general rule in international commerce. But that is not the rule when a foreign government injures an American, or confiscates his or her property. In those cases it is the responsibility and the expectation that the U.S. government will do all it can to secure justice and compensation for its own nationals. Under international law, all countries are expected to do the same for their own nationals.

Over fifty-five years ago, the Communist government of Cuba confiscated the real and personal property of thousands of Americans, and others, who were living and doing business in Cuba. To this day, these confiscations represent the largest confiscation of American property ever, and until now there has been no progress in settling these claims.

These confiscations had a profound impact on thousands of families. You can hear the pain in the claimant’s voices as they tell others about how their families were forcibly removed from their homes and businesses. Their lives were shattered; destroyed. Their grandparents and parents struggling to hold their families together and rebuild what took them a lifetime to create. Many never recovered economically or emotionally.

Confiscations, such as these, where one’s entire life is uprooted, without warning; without compensation, scars the victims for life. I believe, they affect families the same way that the loss of a child would. Many don’t fully understand this, because they think it was just property, but they would be wrong. It was far more than land and material items, it was their legacy. They poured everything into their businesses, homes, or farms, and, then in a very short span of time the life they knew, and everything they owned, was taken from them. They can never forget the devastation and seek understanding and closure from the U.S. Government who promised them justice a long time ago. Justice they have yet to receive.

This confiscation of American property by Cuba was significant enough that the U.S. Government passed certain trading restrictions, commonly known as the Cuban embargo. Since the embargos inception, the U.S. Congress has repeatedly declared that the embargo will not be lifted until the American certified claims have paid and settled by Cuba. Unfortunately, while there are exceptions, U.S. sanctions have been continually weakened over many years by both Republican and Democratic administrations and nothing has been done about the claims. This is especially true for the past two years.

New Negotiating Opportunity Over Certified Claims

The U.S. and Cuba have finally begun what appear to be serious talks to try to normalize trade relations between the United States and Cuba. They have mentioned certified claims, but these discussions are preliminary and progressing very slowly.

While I am hopeful as to a settlement of these claims, we should remain guarded. I am concerned that this may not materialize or that negotiations may not reach a settlement. The Administration continues to prime the pump with goodwill gestures and regulatory gifts to Cuba in order to get the conversation started. But historically, before these sorts of favorable US actions are taken, there is at least, an outline of an agreement for settling certified claims. I have yet to see claims as a variable in any of these discussions; they should've been addressed, for example, before the embassies were reopened.

Some will often refer to Libya as an example for the Administration's actions on Cuba. It is true that the US removed Libya from the State Sponsors of Terrorism list before the U.S. - Libya claims settlement agreement was signed and paid for by Libya. However, there was at least a basic outline of an agreement on claims drafted before Libya was removed from the terrorism list—not to mention that the Qaddafi government had already dismantled weapons of mass destruction programs and had met other requirements laid out in US law and UN resolutions.

Even so, I am cautiously hopeful that these current talks will bear the long awaited fruit of a fair and just claims settlement agreement. But no one should be under any delusions. Just as in the case with Libya, these talks are going to be very difficult and could still take a long time.

It is important to American claimants that our negotiating team be well prepared for the talks and that they make this matter a top priority, and that they are firmly committed to making these certified claimants whole. Settlement of these claims are not just important to individual American claimants, there are also numerous economic and strategic reasons why Cuba must pay these certified claims. If the world, and especially Latin America, observes that the United States has allowed Cuba access to US markets and enable normal trading relations with Americans, regardless of Cuba's \$7 billion debt for stolen property owned by US citizens, then Americans anywhere around the world become vulnerable and may suffer even larger confiscations in the future which could dwarf the Cuba certified claims.

We have seen this happen, as certain Latin American countries, like Venezuela, are seizing property of American corporations with impunity. It can spread further and hurt US competitiveness. When American families and corporations who go overseas have their property taken, or have their contracts interfered with by a foreign government, that causes the loss of jobs and capital here in the states. Other countries protect their citizens and companies overseas, and the US must do the same.

Background on Certified Claims Process

The Foreign Claims Settlement Commission of the United States at the Department of Justice has been adjudicating American claims for over sixty-six years. The

Commission has adjudicated over 52 different claims programs against 23 different countries. All claims programs have been settled except for the Cuba programs.

Once the Commission has completed its work on a claims program, they certify the claimants and their values to the State Department whose responsibility it is to negotiate a settlement agreement with the other country. These negotiations usually are very difficult and take an extensive amount of time. The other country may seek to challenge some aspect of the certified claims such as the valuation, or their nationality. The other country may also have counter claims against the United States. Typically the U.S. has something desired by the country and trade-offs occur. That is why the Commission is an independent agency and not under the control of any Department or outside government official and why the Commission's decisions are not subject to review or appeal to any agency or court. Additionally there is no cost to the American taxpayer for administering this claims processes because a portion of each settlement agreement pays for the costs of the Commission.

The claims process is conducted with complete transparency, in a non-adversarial proceeding, in which the claimant must show support for his claim. He must prove he or she owned the property when it was seized, and provide evidence for the value of the property at the time it was taken. He or she must also show proof of American citizenship at the time the property they owned was taken, and show that it was taken, or interfered with, by the Cuban government.

The transparency aspect of the Commission's claims process is very important and I believe the main reason this process works so well. The Commission's Decisions states clearly how the value of each certified claim was calculated. The Commission's Decisions also state clearly how it uses internationally accepted accounting practices to determine the true value of the certified claim amounts.

Other countries have their own commissions, which evaluate the claims of their own citizens. Under international law, each country advocates and espouses the claims of its own citizens against the wrongful injury, interference or takings by another country. A claims process is used when there is no independent or reliable judiciary in the other country for Americans to find justice or a fair trial.

The Foreign Claims Settlement Commission has a three-member tribunal, composed of one full time chairman (currently vacant) who also serves as the administrator of the Commission, and two part-time commissioners. They are each appointed by the President for three-year terms and are confirmed by the Senate. The Commission can only adjudicate and certify American claims when it is authorized to do so. That authorization can come from the Congress via legislation, by treaty, or by referral of a category of claims by the Secretary of State.

Certified American Claims Against Cuba

We have heard different values as to the total number of certified claims. There are in fact 5,913 certified claims against the government of Cuba. Of those, the Commission adjudicated 5,911 in the first Cuba Claims Program during the 1960s and 1970s, with two more added during the Second Cuba Claims Program in 2006.

There are several types of certified claims against Cuba. Most are for confiscation of personal property, such as bank accounts, stock shares, bonds and debts. Some claims are for the confiscation of real property or land, some are personal injuries, and a number of them are for wrongful death claims. None of them have been settled or paid.

When the Commission originally certified the claims they were valued at \$1.8 billion dollars. Today, they are valued at approximately \$7 to \$8 billion due to a simple 6% interest called for under international law and certified by the Commission. Roughly 300 claims belong to corporations, but they represent about 80% of the total value, and the rest belong to individuals or families, representing roughly 20% of the total value. Interestingly enough, the top 124 claims represent 90% of the total value, or \$1.6 billion out of the total \$1.8 billion.

No other American claims program has been left pending and unpaid for this long, 55 years, not including the Soviet / Russian claims program because it was partially settled. As an aside, I urge the Committee take action on those Soviet, (now Russian), claims as well.

Settlement Proposals and Discussion

There have been suggestions for a settlement agreement with Cuba that would use restitution of the old confiscated property or substitution of comparable property to settle the certified claims. We have also observed over the years that certain Cuban government officials warn the Cuban people that the Americans are coming for their homes.

The media also seems to like the optics of this and keep asking the same type of questions about restoring the land to old owners. I've been asked by Reporters and research students what my opinions are on the "property problem between the US and Cuba". My answer to all these comments and arguments is that there is no property problem, because there is no property. Under international law the American property is gone. The Cuban government confiscated it. But the same international law states that, although the American property is gone, what remains is the debt that Cuba must pay. The U.S. has a right, under international law, to compensation for its citizens.

Cuba is a sovereign nation and as such it controls its own land and who owns it. As to the possibility of a settlement agreement, which may include some land as repayment or

restitution, is up to Cuba, and not the United States. But I would caution that any such settlement, if offered by Cuba, is going to be very difficult to reach and will require a high degree of confidence and trust between both countries.

Settlement agreements that involve a property restitution option have been successful in the past, but only under special circumstances. In a few settlement agreements to which the U.S. was a party, such as the agreements with the German Democratic Republic and the other under the current Albania Program. Each contained, or allowed for, an opt-out provision allowing claimants to go into the foreign country's courts, or a domestic property process, for restitution of their land.

But one key element, which would be needed for such a settlement, is a property court or property commission in the foreign country with a reasonable guarantee to due process protection and an independent judiciary, something that does not remotely exist in Cuba today.

Another suggested settlement approach would break up certified claims into separate categories, to be handled differently in the settlement negotiations process, such as by large value versus smaller value claims, or commercial related land claims versus residential land claims, or land claims versus personal property claims, thinking these may speed up the negotiations or make it easier to reach a settlement.

It is my view that equal treatment of all the certified claims is the simplest, least complicated, approach and is the quickest and most likely way to succeed

Any effort along the lines of creating different categories of claims are much more likely to result in divisions amongst the claimants, pulling in different directions and significantly reducing the likelihood of a settlement of any certified claims. It is also completely unnecessary as the government of Cuba is capable, if it wants, come up with the \$7 to \$8 billion it needs to pay all of the certified claims.

I have over the years heard a number of investment speculators in these claims and some financial experts opine that the US and the certified claimants must be prepared to receive pennies on the dollar for their claims. They are plain wrong.

Some of these same experts have tried to illegally purchase or transfer the certified claims from the claimants, without the proper license from the Office of Foreign Assets Control at the Treasury Department. That sort of behavior is not helpful to this claims settlement process. In fact, I recall from my years at the Commission that we always had to be very careful never to say anything publicly that could put the State Department negotiating team at a disadvantage when the day should come to negotiate the settlement agreement.

Not only do I believe that the US should settle for nothing less than the full price with 100% of the interest but I call on the Administration and the Congress to hold fast and not remove key elements of the embargo or the sanctions that remain until the claimants receive full and fair payment for the settlement of their certified claims.

Many of the same experts who declare the claims have little value also promote the view that Cuba is poor and cannot afford to pay these claims amounts. Cuba itself pleads poverty, saying that it has no money. But this is just not true. Cuba has ample funds. It is not for lack of money that Cuba has been a high risk to investors and creditors for many years. Cuba's leadership has prioritized other plans for use of their revenue instead of honoring their business contracts. Fidel Castro is rumored to have a net worth of over \$900 million, probably the same amount for Raul Castro, and the rest of Cuba's generals and leadership class also are all rumored to be quite rich.

Accurate or reliable information as to the state of the Cuban economy and their budget revenues is hard to come by but there is enough empirical data available to conclude that Cuba has the financial resources to pay the full price of these claims or easily finance the settlement. According to the World Bank, Cuba's GDP is more than \$80 billion. We also know that Cuba receives over \$2 billion annually from the US alone, in the form of remittances and commodities and gifts and trade. Plus maybe the same amount from Venezuela. We hope shortly to have access to the recently announced Paris Club - Cuba debt restructuring agreement, which would hopefully shed more light on Cuba's assets and revenues in much more detail.

The present value of the certified claims, \$7, to \$8, billion, in today's global economy, is really not that hard to finance. Private investment and financial sectors could, and probably would, extend Cuba those funds if they saw that Cuba's economy would be free of the U.S. embargo. The Paris Club group said as much as the reason for their willingness to restructure their loans. I agree with those finance experts in that Cuba's economy would expand dramatically if it were able to restore a normal trading relationship with the United States, and if Cuba's government allowed it. So realistically speaking, financing the settling of certified claim would not be a problem for Cuba.

Recommendations To The Congress, The Administration, & Certified Claimants.

First, and foremost, of these recommendations is to urge the Congress not to lift the Cuban embargo, but especially the credit, finance and banking restrictions and sanctions (which are still in effect) on any trade deals with Cuba. Congress must not pass any legislation further easing the embargo unless the certified claims are first paid and settled. We should remember our American certified claimants. I repeat, Congress must not lift the current embargo on Cuba unless these certified claims are paid in full with interest.

There will be zero confidence in any promise made by the government of Cuba to pay these claims at some future time after the embargo is lifted. That's not the way settlement agreements are made. That is not the way the Vietnam Settlement Agreement was made.

And please keep in mind that comparing the past claims programs with their reduced settlement amounts to the Cuba program is just not a reasonable or fair comparison. The world has changed significantly since the Cold War-era programs were settled. Today the global financial sector makes \$7 billion loan agreements routinely.

The United States gets only one shot at this. We only have one thing Cuba wants. It is access to the US marketplace and the lifting of the embargo. If the Congress gives that away without getting these claims paid, then Congress will have failed to protect and defend these American families and companies.

Such a failure by the U.S. government will also condemn other American companies and families around the world to suffer the same fate because the same thing will happen to them. Solving the Cuba program correctly will send a message to the world that the United States stands by its nationals property rights, no matter how long it takes. This is more than just a Cuba problem.

Second recommendation is to urge the Congress to enact legislation to grant limited authority to the Foreign Claims Settlement Commission to update the certified claims as to whom is the current holder of interest for each certified claim. As I have already explained, claims programs are not designed to go unpaid for 55 years. Multiple generations of individual and corporate claimants have come and gone and the identity information needs to be updated to expedite the resolution of the certified claims. Not only is it good governmental housekeeping to keep these records current but it sends a message to Cuba. This legislation should also do the same for the remaining Soviet claims.

During my tenure as Chairman, the Commission took it upon itself to research and unofficially update, as best we could, the claimant contact information the Commission has on record for certain (roughly one tenth of 5,913) each claimant. The Commission's authority over the claims ended by statute in 1972, when it certified the claims to the State Department. Lacking authority to demand proof, the Commission really does not technically know if it has the correct person listed as the claimant.

When the Treasury Department tries to distribute the settlement funds paid by Cuba, it will have a very difficult time documenting and ascertaining the true owner of each claim. The U.S. can put this time during the negotiations to good use by updating our records so we will be better prepared for the day of settlement and the distribution of payments.

Reauthorizing a Cuba program for this limited and necessary purpose would also send a message to the Cuban government that the U.S. seriously stands behind its certified claimants and insist that the Cuban government pay its bills.

The Commission is perfectly suited to administer this review update, and revision of all the certified Cuba claimants. It has the claim files and the staff and expertise to conduct such a program, and I believe it could do so with its current funding of staff, thereby it would not add any cost to the U.S budget.

Thirdly, this recommendation is to Congress to enact legislation, but first I need to provide some background of the problem.

As I have already stated, I believe these current talks are extremely difficult. I am not only concerned that the Cuban government will continue with its intransigence, but also that with the US government's level of commitment in forcing the Cuban government to pay the certified claims. I am hopeful that the debts will be settled, but you never know, we have been waiting 55 years we may get more of the status quo.

Let's face it, the embargo, such as it is, is full of holes. Even with the current credit and banking restrictions, there is a great deal of trade and commerce going on between Cuba and the United States. The current Cuban embargo is the only hope of forcing Cuba to pay the certified claims. What about the promise made to the certified claimants? The current travel and commerce transpiring between the U.S. with Cuba is using stolen American property. That has been taking place for many years under both Republican and Democratic administrations.

We know that stolen American property is being trespassed upon in the course of this commerce because at least one runway expansion at Jose Marti Airport sits on land subject of a certified claim. The same is most likely also true of other Cuban airports as well, and every major seaport in Cuba, including the Port of Mariel. All of those lands are subject of certified claims. All examples make use of land which is the subject of multiple American certified claims, and the list is much longer than this.

The US government is licensing and or allowing travel and trade that trespasses on the property stolen from it's own citizens. Certain large special interest groups in the US show no hesitation when it comes to doing business with Cuba, even if it means using the property stolen from their fellow Americans

I urge the Congress, if these talks fail or if the embargo is lifted, either without settling these certified claims, to enact a trespass penalty of 10% on all trade, commerce, remittances, toll calls, gifts, fly over fees, port duty, - everything, relating to Cuba. All those conducting business in Cuba would pay this trespass penalty. The proceeds collected from the trespass penalty would go into a fund, which would pay all certified claimants equally their full amount including interest.

This trespass penalty would not release Cuba of its debt to the US, but would give the U.S. government ownership and not to the certified claimants. The U.S. government should also consider adding additional penalties on the government of Cuba for every month or year that it fails to make, as required by current U.S. law, progress on the claims issue.

If the settlement negotiations are successful and these claims are paid by Cuba, then there will be no need for this unilateral action by Congress. But if the settlement negotiations fail in paying the certified claims, then it is time to end the suffering of the certified claimants. Justice demands that a trespass penalty be paid by all doing any business in Cuba.

Those traveling and trading with Cuba should consider this trespass penalty as the cost of doing business trafficking in another American's stolen property. The Congress may direct that the trespass penalty be enacted into law should we fail to achieve a settlement agreement, by a certain date. Since Cuba has not paid for American property, during this trespass penalty payment process the U.S. should continue the current embargo until it pays. The present ongoing embarrassment and never-ending wait by the certified claimants is unacceptable and intolerable. It is the responsibility of the U.S. Congress to bring an end to this embarrassing 55-year wait by our fellow Americans. We would be happy to assist the Congress in drafting the trespass penalty legislation.

The Fourth and final recommendation is a call to action to all those American families and companies who are holding certified claims against Cuba. I urge you to get engaged in this discussion and write to your congressman, your senators, the President, and the State Department, and keep writing and calling them.

American certified claimants need to demand that their claims be settled and if they are not going to be settled then they should be paid for by the trespass penalty. This is no longer the time to sit on the sidelines. Let your voices be heard.

I urge the Congress and the Administration to forcefully advocate for Americans, defend their rights, and finally settle these certified claims.

Thank you.