

U.S.-CUBA BIT: A GUARANTEE IN REESTABLISHING TRADE RELATIONS

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INTRODUCTION

Now is the time for the United States (“U.S.”) and Cuba to sit down to negotiate a settlement of the expropriation claims of U.S. nationals. The expected economic conditions under which the settlement will be negotiated will greatly restrict the remedies that Cuba will be able to offer to the U.S. claimants. Therefore, both the Cuban government and the U.S. claimants should be prepared to exhibit flexibility in working toward a fair and reasonable resolution of the claims.

Concluding a Bilateral Investment Treaty (“BIT”) or a similar bilateral agreement between the U.S. and Cuba will presuppose the prior resolution of pending expropriation claims, which will add credibility to the compensation provisions of the BIT. A U.S.-Cuba BIT may present other issues as long as Cuba’s economic interests in a transition-era do not coincide with U.S. investors’ interests, mainly in the area of local protectionism, export quotas and reinvestment of profits into the local economy. The benefits of reestablishing trade with U.S. and the guarantees offered in a future U.S.-Cuba BIT will provide additional stimulus for foreign investment in Cuba.

SETTLING CLAIMS/COUNTERCLAIMS/ DEFAULT JUDGMENTS

Fifty-six years after the Cuban Revolutionary Government took power and started nationalizing property in Cuba, the same government remains in control, and U.S. property owners who suffered property expropriations have not received compensation. It is unlikely that full compensation will come directly

from Cuba. By continuing its policy of prohibiting U.S. nationals from investing in Cuba, and by chilling investment in Cuba from foreign interests through the Helms-Burton Act, the U.S. continues to hinder the effective utilization of resources in the island. Permitting the flow of foreign investment into Cuba with transparency, under the rule of law and in accord with accepted international investment principles is more likely to lead to a 21st century Cuban economy.

U.S. Certified Claims

In 1964, the U.S. Congress amended the International Claims Settlement Act to establish a Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States (“FCSC”) was given authority to determine the validity and amount of claims by U.S. nationals against the Government of Cuba for the taking of their property since January 1, 1959¹. The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims by U.S. corporations (1,146) and individual citizens (7,670). It certified 5,911 of those claims, with an aggregate value of \$1.8 billion; denied 1,195 claims, with an aggregate value of \$1.5 billion; and dismissed without consideration (or did not consider) another 1,710 claims. The program was reopened in 2005 to certify two more claims for assets that were expropriated after 1967 and that had not been reviewed during the initial Cuban Claims Program, raising the total certified claims to \$1.9 billion in value and 5,913 in number.

Of the \$1.9 billion in certified claims, over 85% (about \$1.6 billion) correspond to 899 corporate claimants, and the rest (about \$220 million) is spread among 5,014 individual claimants. There are only 131 claimants—93 corporations and 40 individuals—with certified claims of \$1 million or more; only 49 claimants, all but five of them corporations, had claims certified in excess of \$5 million. These figures show that the U.S. claimants fall into two general categories: a small number of claimants (mostly corporations) with large claims, and a large number of claimants (mainly individuals) with small claims.

U.S. Certified Claims: Property or Right of Compensation

The concept of property for purposes of the Fifth Amendment of the U.S. Constitution has been interpreted broadly and can include “every sort of interest the citizen may possess.”² From various legal authorities it can be stated unequivocally that a certified claimant’s interest will be recognized as “property” for purposes of the Fifth Amendment.

The U.S. has consistently taken the view that foreign governments are entitled to confiscate property be-

longing to U.S. nationals provided such a taking is accompanied by appropriate compensation.³ According to the FCSC,⁴ the properties owned by U.S. claimants in Cuba were “declared” a loss and all the tangible assets (cash, property, land and equipment) in Cuba were converted into a claim which is certified in terms of money damages owed by the Cuban government and do not purport to represent interests in, or to be secured by, any particular property—real or personal, tangible or intangible—situated in Cuba or owned or possessed by the Cuban government or Cuban nationals. Therefore, a U.S. certified claim is an intangible personal property right recognized and protected by the law, which has no existence apart from recognition given by the law, or which confers no present possession of a tangible object.⁵

The certified claims owned by U.S. certified claimants are therefore personal property rights, representing an obligation for compensation owed to the U.S. persons (corporate or individual) holding the claims against the Cuban government. It is also assumed that the Cuban State currently holds to the nationalized properties “previously owned” by U.S. certified claimants.⁶

1. Cuban Law 851 of July 6, 1960 authorized the nationalization of the properties of U.S. nationals and provided for payment for those expropriations. Cuban Law 80 of 1996 states in its article 3: “The claims for compensation for the expropriation of U.S. properties in Cuba may be part of a negotiation process between the government of the U.S. and Cuba, on the basis of equality and mutual respect. The indemnification claims due to the nationalization of said properties shall be examined together with the indemnification to which the Cuban state and the Cuban people are entitled as a result of the damages caused by the economic blockade and the acts of aggression of all nature which are the responsibility of the Government of the United States of America.”

2. U.S. Const. Amend. V (“nor shall private property be taken for public use without just compensation”).

3. The concept of property for purposes of the Fifth Amendment has been interpreted broadly and can include “every sort of interest the citizen may possess.” *United States v. General Motors Corp.*, 323 U.S. 373, 378, (1945). There is no question but that United States citizens who possess claims certified against the government of Cuba have a constitutionally protected property interest in those claims. *See*, *Shanghai Power Company v. The United States*, 4 CL. Ct. 237, 240 (1983) (plaintiff’s claim certified by the Foreign Claims Settlement Commission against the Peoples’ Republic of China for losses resulting from the confiscation of its assets in Shanghai held to constitute a property interest). *See also*, *In Re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982): (“There is no question that claims for compensation are property interests that cannot be taken for public use without compensation.”) (*Citing* *Ware v. Hylton* 3 U.S. (3 Dall.) 199 (1796) and *Gray v. United States*, 21 Ct. Cl. 340 (1886)).

4. See 22 U.S.C. § 1643 et seq.

5. See 73 C.J.S. Property § 5 (2008), quoted by Timothy Ashby in “U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms,” *University of Miami Inter-American Law Review* (2009), page 422.

Cuban Nationals Claims—Usucapio/Adverse Possession

The Cuban nationals' claims are probably the most significant category of takings in terms of value that occurred between 1959 and 1968 through a series of laws intended to transform Cuba's economic structure into that of a Socialist nation. The most important of these expropriation laws were: (1) the Agrarian Reform Laws of 1959 and 1963, which expropriated land holdings; (2) Law 890 of 1960, which expropriated a wide range of Cuban-owned industries and businesses; (3) the Urban Reform Law of October 1960, which ordained the forced sale to the state of all the rental residential property in private hands; and (4) Law No. 989 of 1961 which authorized the takings of "abandoned property." The final step in the takeover of private property in Cuba occurred in March of 1968 with the Revolutionary Offensive. These laws recognized the constitutional right of the owners to receive indemnification and in some limited occasions Cuban nationals received some type of compensation; but the majority of the complementary laws and implementation resolutions were never enacted. Today, hundreds of thousands of Cuban nationals (living in Cuba and abroad) have not received any type of compensation for the Cuban government expropriations after 1959.

The most difficult challenge of the Cuban and U.S. claims is dealing with expropriated residential properties. The mitigating factor here, however, is that there are probably few U.S. certified claimants involved, as the bulk of these properties were not income producing ones and thus were held by Cuban owners who were not U.S. citizens. A guiding principle in dealing with claims regarding residential properties should be that no one who has occupied a residential property for a number of years under claim of

good title should be dispossessed of his or her right of occupation. Good title is claimed under various laws passed by Cuba, among them the "old" Spanish civil code that was in effect in Cuba until 1988, including the claim of "usucapio" adverse possession by most if not all owners. Most if not all occupants of residential properties have title to their homes and as of late these are freely transferable to new owners.

The Helms-Burton Act excludes from the definition of property most residential real property, which was a necessary accommodation to avoid fears of dispossession or incurring liability by Cuban citizens simply by occupying a residence. Pursuant to the Helms-Burton Act, if there is restitution, it may be granted without adversely impacting innocent and third parties (excluding members of the Cuban Communist Party or a U.S. certified claim). Basically, an ordinary Cuban citizen living in a residence previously owned by a Cuban national may not face a risk of dispossession and/or personal liability under the Helms-Burton Act.⁷

It is clear that restitution of land is also a very complicated and emotional issue involving thousands of conflicting claims. Land, especially agricultural land, is a national security priority for the Cuban government and providing food to its people has been the main objective of the Cuban government since 1959. Thus, substitution-type restitution may be appropriate, for example, in cases where the confiscated property is farmland that has been conveyed to co-operatives or divided among small farmers. Rather than dispossessing the current occupants, Cuba may offer to convey to the U.S. claimants other comparable lands possessed by the Cuban State which are currently idle or where productivity is well below Cuban state planning targets and state ownership does not further social goals.

6. The U.S. government put this in question with regard to Cuba in 1991 when it sent a cable to diplomatic and consular posts from then Deputy Secretary of State Lawrence Eagleburger. The cable (dated October, 1991) is titled *Buyer Beware: Cuba May be Selling American Property* and states in pertinent part: "The United States Government strongly urges that your government take the necessary steps to encourage your nationals and business firms to avoid entering into contracts with the government of Cuba, or investing in the Cuban economy, where such actions would involve assets located in Cuba that may be legally encumbered by unresolved claims to such assets by American citizens. This will require careful verification on the part of such businesspeople and firms to ensure that the Cuban government has the unencumbered right to sell or otherwise dispose of the asset in question."

7. See 22 USC §6023(12).

Restitution, whether of the direct or substitution type, is likely to be an important ingredient in the mix of remedies available to Cuban claimants under a future Cuban claims settlement program. It will be inappropriate in many instances, and even where appropriate, its use should be tempered by the realization that restitution will often be a slow and difficult process, and one subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others. Therefore, restitution is the less likely remedy with the exception of paintings and other art pieces which are currently in museums and official buildings and could be readily returned to claimants.

Cuban Government Claims/Counter Claims

Cuba has a large counterclaim judgment against the United States of about \$122 billion USD for alleged damage and harm caused to the Cuban economy, and also to individual Cuban citizens, by over five decades of the U.S. trade and investment embargo. Cuba argues that the embargo has been an act of economic warfare for which a form of reparations is required. Havana's Provincial Court awarded Cuba \$121 billion for embargo damages in January of 2000 and \$181.1 billion for deaths and injuries in November of 1999, the years of the Cuban default judgments.⁸

According to Cuban authorities⁹, Cuban state enterprises continue being unable to freely export and import products and services to or from the United States, and Cuba cannot use the U.S. Dollar in its international financial transactions or hold accounts in

that currency in third country banks. However, U.S. law arguably requires resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted and foreign aid can resume.¹⁰

Losses alleged by Cuba are primarily associated with lost incomes from exports of goods and services, expenses caused by geographical relocation of trade, especially that which derives from immobilized inventories and adverse monetary-financial effects due to the exposure of the economic actors to exchange rate variations (the dollar cannot be used in any payments), and the increased cost of financing.

The Cuban government may have standing to sue the government of the United States in an international court and it may be able to obtain a favorable judgment against the United States for the deaths and injuries suffered by innocent Cuban citizens due to the CIA-sponsored terrorist attacks and other internationally-repudiated criminal acts in Cuban territory as well as the terrorist attacks against Cuban aircraft and other properties outside Cuba. This legal action may be a legitimate counterclaim against the defaulted judgments for the killing of U.S. citizens committed by the Cuban government. Other countries like Viet Nam and the Soviet Union have used the counterclaims route to settle claims and obtain favorable accords with the United States.

The best possible solution is to settle the Cuban counterclaim (legitimate or not) as part of a comprehensive financial assistance package similar to U.S. foreign aid, and reinsertion of Cuba in the World Bank, IMF and Inter-American Development Bank

8. "Claims brought by the people of Cuba for human and economic damages caused by terrorist acts and actions," Press Release of the Cuban Ministry of Foreign Affairs (MINREX), 2009. <http://anterior.cubaminrex.cu/English/Terrorism/Articulos/CubaDenounces/Claims.html>

9. Report by Cuba, On Resolution 69/5 of the United Nations General Assembly, entitled "Necessity of ending the economic, commercial and financial blockade imposed by the United States of America against Cuba." June 2015

10. Section 620(a) (2) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370 (a) (2) (1988) (amended 1994) prohibits U.S. assistance to Cuba until Cuba has taken "appropriate steps under international law standards to return to U.S. nationals, and to entities no less than 50% beneficially owned by U.S. citizens, or provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after 1959, by the government of Cuba." The Cuban Democracy Act (CDA) of 1992, 22 U.S.C. § 6001 et seq., sets very specific conditions for the lifting of the U.S. trade embargo against Cuba, yet it makes no reference to payment of compensation to U.S. citizens for the Cuban government's expropriation as a preconditioned to lifting the embargo and resuming economic assistance to Cuba. However, the Cuba Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C § 6021 et seq., would make assistance to Cuba contingent upon Cuba returning to U.S. citizens the expropriated properties, or providing full compensation for them to their owners.

for the accessibility of needed capital. For the Cubans, an open economy, rule of law, transparency and high standards of protection and guarantees for investors would be necessary. Entering into a U.S.-Cuba BIT would be the ultimate goal.

U.S. Default Judgments

Cuba was included in the U.S. list of states sponsoring terrorism (“rogue states”) from 1982 to 2015. In 1996 the U.S. Foreign Sovereign Immunities Act (FSIA) was amended with a new subsection (a)(7) of Section 1605 to allow a new category of suits against a foreign state by persons holding (1) U.S. nationality at the time of death or injury; (2) who seek money damages for those personal injuries or deaths; (3) “that [were] caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... made by an official, employee, or agent of such foreign state while acting within the scope of his office, employment or agency.” The first judgment under the new subsection resulted from Cuba’s deliberate shooting down in 1996 of two civilian planes operated by Brothers to the Rescue. The U.S. District Court awarded the plaintiffs a default judgment of \$187.6 million in compensatory and punitive damages.

The key question is how these U.S. citizens with later judgments will be able to collect from the Cuban government when there are no Cuban frozen assets left in the U.S. (They have been dispersed to pay a handful of early successful plaintiffs against Cuba.) Traditionally, outstanding claims between the U.S. and another country have been settled by a foreign claims settlement agreement similar to the one used to settle nationalization claims. In the present situation, however, there is a serious question whether a foreign claims settlement agreement is a reasonable approach in light of the large outstanding and likely future judgments against Cuba under the (a)(7) provision (in 2008 relabeled Section 1605A) and the limited assets now frozen by the U.S. government. Since the FSIA is federal law, the President (Execu-

tive) may need the approval of Congress to enter into a settlement for less than full compensation to avoid giving bona fide judgment holders a Fifth Amendment takings claim against the U.S. government. There is a possibility of using the fines and penalties assessed and collected enforcing the Cuban Assets Control Regulations (Embargo) against foreign banks and other large multinational corporations to compensate those judgment holders on a case-by-case settlement between them and the U.S. Department of Justice with the assistance of the U.S. Department of State.

Given the questions about the present implementation of the FSIA and how to reestablish a “normal” relationship with Cuba after being removed from the list of states sponsoring terrorism, it would seem appropriate to consider possible changes to section 1605A and the U.S. government role in these processes.

First, the U.S. government should intervene based on 28 USC Section 517¹¹ to seek dismissal of cases where the requirements of FSIA were not met. This is especially relevant in the cases against the Cuban government where the latter did not even respond to the lawsuits or raise its immunity. In many of those cases Florida courts did not even question the subject matter jurisdiction and still ruled in favor of the plaintiff in clear violation of the statute. If the U.S. government were to intervene, some of the default judgments may be vacated and declared void and current and future cases would be suspended on behalf of the national interest of the U.S.¹² If some of the judgments were vacated, the government of Cuba may reciprocate by withdrawing at least its counterclaims for personal death and injury against the government of the United States.

Second, these cases should be transferred to a foreign arbitration forum based on 28 USC Section 1605A(a)(2)(A)(iii). Cuba has ratified different international conventions regarding the settlement of dis-

11. 28 U.S.C. § 517.

12. As of November 29, 2015 lawsuits will no longer be available against Cuba as a result of its removal from the state sponsors of terrorism list. The question of outstanding judgments will however remain.

putes through arbitration. There is no doubt that the Cuban government would prefer the certainty of resolving disputes under acceptable and recognized alternative mechanisms over the risks of litigation in U.S. courts. Thus, the Cuban government would recognize and enforce a foreign arbitration award based on the applicable international conventions.

Third, any successful judgments may be limited to “actual” government accounts and not against accounts or assets owned by Cuban state enterprises. (The Cuban state enterprises would be protected in the U.S. against those claims under the U.S.-Cuba BIT proposed in this paper.) Fourth, the successful claimants and the U.S. government would negotiate a settlement and that settlement would be final without constituting a taking.

All of these claims/counterclaims/judgments will have to be resolved as part of a comprehensive and balanced negotiation. No shortage of creativity and innovation will be necessary to find the right mechanisms to move these issues off the table. Cuba is a poor developing country and U.S. and Cuban nationals’ claim holders will not receive the amounts that some of them had hoped for over many years, and Cuba will have to give up some cash or economic value to provide compensation and get in return the huge potential of investment and foreign assistance. This is a win-win strategy for Cuba and the U.S. as well as for the Cuban-American community.

Principles and Guidelines in the Government-to-Government Settlement Process

Continuous nationality of the claimants: Pursuant to the Public International Law Principle of Continuity of the Nationality of the Claimant,¹³ the claimant must have been a national of the United States at the time of property expropriation to be considered for diplomatic protection under the Cuba Claims Act of 1964. Moreover the claimant must have main-

tained U.S. nationality until the claim is settled by the U.S. government. In order for a State to exercise diplomatic protection for a person, he/she must possess its nationality at the time of commission of the international wrongful act and remain a national of that State at least until that State takes up his/her claim (*Dies A Quo—Dies Ad Quem* principle).

In the U.S., pursuant to FCSC’s practice and interpretation, the nationality of a corporation is determined by the controlling or majority ownership of the corporation. Thus, the nationality of the controlling or majority shareholders determines the nationality of the corporation for diplomatic protection purposes. That is why the acquisition of the shares of any U.S. company or subsidiary that holds U.S. certified claims require a prior approval by the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) and OFAC would not approve any acquisition of shares of U.S. certified claimants by foreigners because the U.S. certified claimant would become a foreign-owned entity regardless of the place of incorporation and any prior certification and recognition of compensation rights under the espousal doctrine. As such, the U.S. certified claimant may be automatically disqualified from receiving any compensation if there is a U.S.-Cuba government-to-government settlement agreement.

Anti-speculation Clause—Cuban Claims Act, FCSC Notice of 2008¹⁴: Pursuant to the Cuban Claims Act of 1964, the amount determined to be due on any claim of an assignee who acquires the same by purchase shall not exceed (or, in case of any such acquisition subsequent to the date of the determination, shall not be deemed to have exceeded) the amount of the actual consideration paid by such assignee, or in case of successive assignments of a claim by any assignee.

13. See Brownlie’s *Principles of Public International Law*, 8th Edition, by James Crawford. Oxford, United Kingdom: Oxford University Press, 2012.

14. See U.S. Department of Justice, Federal Claims Settlement Commission Notice of March 5, 2008.

Mauricio Tamargo, ex-Commissioner of the FCSC, clarified the contents and purpose of the FCSC Notice in an interview with *The Tampa Tribune* on 06/17/2008. According to Mr. Tamargo, it is not illegal to sell or purchase these claims. But he emphasized that federal law prohibits anyone who purchases a Cuban claim from receiving more in settlement money than they paid the original owner. This is what federal officials call an “anti-speculation” measure.

Unlicensed Transactions—OFAC Notice of 2008¹⁵: The U.S. Department of the Treasury may consider licensing the transfer of U.S. certified claims through a sale under certain circumstances, provided that any transactions are limited to persons subject to U.S. jurisdiction. As indicated above, OFAC requires full disclosure of the parties involved in a transfer, the purpose of the transaction and the actual consideration paid for the U.S. certified claims.

Valuation (US - \$1.9 billion v. Cuba - \$800 million): What Is the “actual” value of the claims? To hold that a claimant has property rights does not establish the actual value of the claims. Today, the claimant is no longer the owner of the Cuban properties. Instead the claimant owns a claim for compensation against Cuba. The value of the claims depends upon the likelihood of finding a forum that will adjudicate the claim, overcoming all relevant defenses and obtaining satisfaction from the debtor’s available assets. Moreover, the expense of prosecuting such a claim and obtaining satisfaction would have to be taken into account. The value determined by the FCSC was made entirely on an ex parte basis (non-adversarial basis), which Cuba did not have an opportunity to contest. Therefore, Cuba does not recognize the value placed on the claims by FCSC. However, Cuba recognizes the rights of the claimant to receive some form of compensation.

Tax Deductions—Subrogated Rights: In 1962, the IRS issued a formal ruling stating that, “the taking of property without compensation is confiscation”¹⁶ and Congress specifically addressed Cuban confiscation losses in the Revenue Act of 1964. This law provided that any loss of tangible property by Cuban confiscation was to be treated as a casualty loss. The amendment treated both business and purely personal confiscations of tangible property as casualty losses. The legislation allowed for the losses to be deducted from the income earned, capital or ordinary, by the taxpayer affected by the confiscations. The losses provided a limited benefit to those affected by reducing income taxes for periods subsequent to the property takings (in the carryover period). Numerous Cuban exiles that became U.S. taxpayers (not necessarily naturalized citizens) and subsequently lost their properties to confiscation measures were able to use these deductions. In 1971 the tax code was amended regarding losses sustained in taxable years ending after December 31, 1958. A special exception allowed Cuban losses to be carried over for 20 years so that the numerous immigrant taxpayers—whose income levels were insufficient to benefit from the exceptions—could use more of the losses. The key issue here is if there is a monetary compensation, then the successive assignees would be limited to receive what they paid for the claim after deducting the tax deductions from the monetary compensation, or nothing because the tax deductions would offset the final monetary compensation. It is also worth noting that the tax deductions are not considered compensation; therefore, the U.S. government is not subrogated on behalf of the claimant and became the actual claimant as some have argued in the past.

U.S.-Cuba Lump Settlement Agreement On U.S. Certified Claims

The President of the United States has the power to settle claims against foreign governments for the un-

15. See U.S. Department of the Treasury, Notice of July 29, 2008 Regarding the Transfer of Claims Against Cuba Certified by the Foreign Claims Settlement Commission.

16. “Tax Relief Given on U.S. Property Seized by Cuba,” *Wall Street Journal*, Nov. 7, 1962, at 2. See Rev. Rul. 197, 1962-2 CUM. BULL. 66. See also “Taxation of Cuban Confiscated Assets After Property Claims Settlements: Issues for Taxpayers and the U.S. Government” by Timothy Ashby and Tania Mastrapa. *Cuba in Transition—Volume 15*, ASCE. 2005

compensated taking of property belonging to U.S. citizens.¹⁷ The U.S. Department of State, under authority delegated by the President, acts on behalf of U.S. claimants in the negotiation of their claims with an expropriating foreign country. Under the “doctrine of espousal,” the negotiations conducted by the Department of State are binding on the claimants, and the monetary settlement that is reached constitutes the claimants’ sole remedy unless provision is made for other remedies such as restitution of the expropriated property as was the case in the U.S. claims settlement with East Germany.

The role of the FCSC, an agency of the Department of Justice, is to determine the validity and valuation of claims of U.S. nationals for loss of property in foreign countries. The 5,913 claims approved and certified by the Commission in relation to Cuba were sent to the U.S. Secretary of State for use in future negotiations with the government of that country.

It is expected that the U.S. State Department will negotiate a settlement with the Cuban government concerning compensation for property seized from U.S. nationals by the Cuban Revolutionary Government. This procedure will involve the Office of the Legal Advisor, International Claims and Investment Disputes (L/CID), which is authorized to arrange government-to-government settlements on behalf of all claimants by invoking the diplomatic practice of “espousal.” “Espousal” describes the mechanism whereby one government adopts or “espouses” and settles the claims of its nationals against another government in a sovereign-to-sovereign negotiation.

The U.S. government during the Cold War period has rarely negotiated a settlement that truly met the requirement under international law for prompt, adequate and effective compensation for expropriation by a foreign government.¹⁸ However, in the two most

recent sovereign-to-sovereign claims negotiations undertaken by the U.S., claimants with claims against Vietnam received the full value of their certified claims along with a nearly 6% interest component dating back to the time of the loss. In the case of the settlement of claims certified against the old German Democratic Republic (“DDR”), claimants received the full value of their losses along with 3% interest. In addition, claimants could elect to recover their properties in the former East Germany. Meanwhile Cuba has not paid more than a small fraction of the claims to other countries including Canada, England and Spain. Currently, Cuba has no realistic means of paying meaningful compensation to settle U.S. claims unless the negotiated amount is a mere pittance to achieve an accord and satisfaction under international law.

Thus, a traditional settlement involving the payment of money, even if payment is spread out over a period of time, would place Cuba in a difficult financial situation. Such a settlement could also have adverse political repercussions. Therefore, it is recommended to settle all the U.S. certified claims (mainly the individual claims) for a one-time payment compensation of a new and agreed value of such claims. The corporate claims shall be reviewed on case by case basis to determine eligibility taking into account the before mentioned principles of the continuous nationality of the claimants; the anti-speculation clause; and the nullity (voidance) of any unlicensed transfers of U.S. certified claims and stocks in companies holding the U.S. certified claims.

Recommended Initial Steps to Identify the Legitimate Holders of U.S. Certified Corporate Claims

Legitimate claimants are either U.S. certified claimants (U.S. corporations) or successors-in-interest of

17. See *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) and *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005) discussed in the Report on the Resolution of Outstanding Property Claims Between Cuba & the United States by Creighton University School of Law. October 2007, pages 158–160.

18. See Burns H. Weston, et al., *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995* (The Procedural Aspects of Int’l Law Monograph Series Vol. 23 1999); Matías F. Travieso-Díaz, “Alternative Recommendations for Dealing with Confiscated Property in Post-Castro Cuba,” in *Expropriated Properties in a Post-Castro Cuba: Two Views*, Cuba Transition Project, (2003). See also *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms* by Timothy Ashby. University of Miami, 2009.

those corporations and individuals holding shares (stocks) or any legal document asserting their rights in the U.S. certified claimants. By applying the continuous nationality principle of the U.S. certified claims, the State Department would be able to identify some U.S. certified claimants that may be excluded from a government-to-government settlement due to the fact that the U.S. government would not espouse a claim of a foreign entity unless the ownership transfer from a U.S. certified corporation to a foreign entity was previously approved by OFAC and the State Department. The State Department would be also able to identify some speculators who acquired individual claims and/or stocks in companies holding the certified claims at a discounted value or without consideration for speculation purposes. By applying the anti-speculation clause in the Cuban Claims Act of 1964, those identified speculators would not get the negotiated value of the certified claim or their pro-rata share of any settlement based on their ownership interest in the U.S. certified claimant. Instead, the speculators would receive a reduced compensation based on the actual amount paid for the stock of the U.S. certified claimants, if any. Furthermore, those individuals and corporations involved in those unauthorized transactions (transfers of claims) may be also subject to fines and penalties for violating the Cuban Assets Control Regulations. (See 31 CFR 515.203.)

The U.S. Department of State shall conduct the following due diligence:

- Request the FCSC to provide the updated list of the fifty (50) largest corporate certified claimants that represent around 80% of the total FCSC's Cuban program certified amount;
- Notify the fifty largest claimants and successors to present within a short-period of time (no longer than 90 days): current corporate registration and good standing from any State of incorporation; certified list of shareholders; certified and notarized copies of probates, executed wills, judicial decisions; purchase and assignment agree-

ments and/or any lawful transfer of the claims or stocks in companies holding the certified claims; OFAC licenses authorizing the acquisition of the U.S. certified claimants and stocks in those certified claimants; and IRS's certifications of tax deductions granted to the U.S. certified claimants from 1960 to 1980.

Once the U.S. State Department concludes this prescreening stage, it would be able to produce a current list of legitimate claimants and a revised and updated certified amount to be used in the negotiation and adjudication processes. The prescreening stage may also allow the U.S. State Department to explore additional available remedies for some of the claimants outside a government-to-government negotiation and lump sum settlement agreement mechanism.

Cuban Nationals Claims Against the Cuban Government

Resolution of the Cuban nationals' expropriation claims against the Cuban government is a political as well as a legal issue. The Cuban State has effectively transferred the majority of the expropriated properties (commercial and residential) to current owners in Cuba; however, the State has still the legal obligation to comply with both the Cuban 1940 Constitution and the Cuban Fundamental Law of 1959¹⁹ which provides in the last paragraph of its article 24 that "failure to comply with these requirements shall give rise to the right by the person whose property has been expropriated to the protection of the courts and, if appropriate, to have the property returned to him." Under this article, it is clear that transfer of property back to the owners is neither automatic nor constitutionally required. Indeed, under the procedure established by art. 24, the owner of an expropriated property who wished to contest the validity of the taking had to sue the government and, if successful, could obtain relief from the court in the form of damages or if justice so required restitution of the property. Thus, unless and until a court ruled that restitution should take place, title to the property remained with the state.²⁰

19. Ley Fundamental of February 7, 1959, published in Gaceta Oficial.

20. See Matías F. Travieso-Díaz, *The Laws and Legal System of a Free-Market Cuba*, p. 84.

Therefore, resolution of the expropriation claims may be resolved according to the following principles and methods:

1. All the current holders of a “good” title in residential properties are the “legitimate” owners of the residences in Cuba today. Current Cuban law permits and guarantees the ownership of a residential and a rural or vacation home. Therefore, there will be no restitution of residential properties if the residential or vacation properties are currently “owned” by individuals. Thus, the “prior” owners of the residences may be entitled to compensation based on the assessment value of the property at the time of expropriation or confiscation (abandonment);
2. Restitution of commercial properties may be considered only: (a) if the commercial property (land, whether agricultural, coastline or urban, mill, factory, apartment building, marinas/ports, mines, and so on) is not contributing to the economy (or would make a larger contribution to the economy if fully or partially privatized) and the property has been identified as a foreign investment target in the Cuban portfolio of investments; and (b) the Cuban government declares by Resolution that the restitution of the property is for reasons of public utility, social interest and the best economic interest of the country. The transfer or the restitution of the commercial property implies a commitment by the prior owner to invest in the property and to make it productive again. The amount of the investment and the settlement would be negotiated between the State’s designated agency and the prior owner;
3. The procedures for resolving the claims will follow a short and straightforward approach based on the assessment value of those properties at the time of expropriation and the compensation would be in line with the Cuban laws (agrarian, urban and expropriation laws of the 1960s).²¹ All the Cuban claimants, heirs and assignees will

have one year to properly document their titles to certify their property rights before an independent Cuban State Agency (the Agency) with jurisdiction over determining the validity of claims of title to expropriated and confiscated property and over the dispensing of remedies. The Agency would have the ultimate decision to certify or not the claims based on Cuban property laws and the determination of the final compensation amount (the certified compensation value);

4. The compensation will not be paid in cash due to Cuba’s current financial situation. The certified compensation value would be converted in a fiscal incentive voucher (loss certificate voucher) that would be carried forward for up to 10 years and that would be used to reduce any tax liability the holder of the voucher has in Cuba or for a future investment project in Cuba. Therefore, the voucher would be transferable to third parties including Cuban nationals, foreign investors and other Cuban entities.

POTENTIAL U.S.-CUBA BILATERAL INVESTMENT TREATY

Pursuant to international law, a treaty and an international agreement are synonymous terms for all binding agreements and under the U.S. legal system, international agreements can be entered into by means of a treaty or an executive agreement. The U.S. Constitution allocates primary responsibility for entering into such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Secondly, Congress may authorize congressional-executive agreements. Thirdly, many treaties and executive agreements are not self-executing, meaning that implementing legislation is required to provide U.S. bodies with the domestic legal authority necessary to

21. Francisco E. García Henríquez, Yarelis Martínez Lorenzo, Jhosvany Martínez Barreiro, *Compendio de Disposiciones Legales sobre Nacionalización y Confiscación*, Ministerio de Justicia, La Habana, Cuba, 2004.

enforce and comply with an international agreement's provisions.

There are three potential ways for the U.S. government to enter into an International Agreement with Cuba to Settle the Claims (the "Agreement"):

- Sole Executive Agreements, in which an agreement is made pursuant to the President's constitutional authority without further congressional authorization. The U.S. President has the power to enter into the Agreement without the need to ask Congress or Senate for ratification; however, this Executive Agreement may be challenged in court.
- Article II Treaty: Pursuant to the U.S. Constitution, the President shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.
- Congressional-executive agreements: Unlike in the case of treaties, where only the Senate plays a role in approving the Agreement, both houses of Congress are involved in the authorizing process for congressional-executive agreements. Congressional authorization of such agreements takes the form of a statute which must pass both houses of Congress. Historically, congressional-executive agreements have been made for bilateral trade investments such as NAFTA and GATT. Any U.S. President who chooses to seek legislative approval of a treaty risks delay, textual modification and even a defeat. Despite these shortcomings, legislative consent will make the terms of the agreement more protected and honored.

Recommended steps in the negotiation and implementation of the Agreement under U.S. President's constitutional executive authority:

1. Secretary of State authorizes negotiation with Cuban counterparts;
2. U.S. and Cuban negotiators meet;
3. Secretary of State recommends negotiated terms to the President;
4. U.S. President approves and authorizes the signature of the Agreement;
5. The Agreement becomes binding under international law;²²and
6. The U.S. President transmits the Agreement to Congress for informational purposes within 60 days after entry into force.

Recommended steps in the negotiation and implementation of the Agreement and BIT as a Treaty in the U.S.:

1. Secretary of State authorizes negotiation and consults with Senate Foreign Affairs Committee;
2. U.S. and Cuban negotiators meet. U.S. negotiators/representatives may need Senate Foreign Affairs Committee confirmation;
3. Negotiators agree on terms and upon authorization of the Secretary of State, U.S. representative signs a treaty;
4. U.S. President submits treaty to Senate;
5. Senate Foreign Affairs Committee considers treaty and reports it favorably to Senate with a proposed resolution of ratification with or without conditions;
6. Senate considers treaty and approves resolution of ratification with or without conditions by two-thirds majority;

22. The U.S. assumes international obligations most frequently when it makes agreements with other States that are intended to be legally binding upon the parties involved. The U.S. signed the Vienna Convention on the Law of Treaties on April 24, 1970, but the U.S. Senate has not given its advice and consent to the treaty. Therefore, the U.S. is not a party to the Treaty. Nonetheless, the U.S. considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also, e.g., *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003); *Galo-Garcia v. I.N.S.*, 86 F.3d 916 (9th Cir. 1996) ("where a controlling executive or legislative act... exist[s], customary international law is inapplicable"); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir.1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 479 U.S. 889 (1986). But see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the Alien Tort Statute, 28 U.S.C. §1350, recognized an individual cause of action for certain egregious violations of the law of nations).

7. U.S. President negotiates with the Cuban representatives the Senate's conditions and if there is an agreement, the U.S. President exchanges instruments of ratification with Cuban authorities;
8. Treaty enters into force in accordance with its terms, becoming binding under international law; and
9. U.S. President proclaims entry into force, serving notice for domestic purposes.

U.S.-Cuba BIT Core Benefits

The conclusion of a bilateral investment treaty between the U.S. and Cuba (U.S.-Cuba BIT) would add additional protection to future U.S. private investment, would help developing market-oriented policies, and promote trade relations between the countries and the area.

U.S. BITs provide American investors with six core benefits:

1. Require that investors and their "covered investments" (that is, investments of a national or company of one BIT party in the territory of the other party) be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country. The BIT generally affords the better of national treatment or most-favored-nation treatment for the full life-cycle of investment - from establishment or acquisition, through management, operation, and expansion, to disposition;
2. establish clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place;
3. provide for the transferability of investment-related funds into and out of a host country without delay and using a market rate of exchange;
4. restrict the imposition of performance requirements, such as local content targets or export quotas, as a condition for the establishment, ac-

quisition, expansion, management, conduct, or operation of an investment;

5. give covered investors the right to engage the top managerial personnel of their choice, regardless of nationality;
6. give investors from each party the right to submit an investment dispute with the government of the other party to international arbitration. There is no requirement to use that country's domestic courts.

Cuban Foreign Investment Law And Cuban Bilateral Investment Treaties

Articles 3–10 of the Cuban Foreign Investment Act (Law 118/2014) establish guaranties to foreign investors. They mostly refer to the validity of the Authorization²³ for the whole period of time granted thereto, albeit the foreign investor's assets may be expropriated for reasons of public utility or social interest, as declared by the Council of Ministers, contingent on indemnification based on the agreed commercial value of the said assets.

Guaranties Under Cuban Law:

- Subject to authorization, the investors may sell or transfer the stocks and shares derived from any form of contract;
- The foreign investors may transfer abroad the net profits or dividends derived from their investments, as well as the proceeds resulting from the liquidation or sale of shares, in convertible currency, free from taxes, withholdings or deductions; and
- Foreign temporary residents who render services to a joint venture, the parties to an international economic association contract or a totally foreign capital company are entitled to transfer abroad 66% of their earned income.

Pursuant to Law 118/2014, any conflict which may arise in the relations between partners of a joint venture, or between foreign and national investors who are party to an international economic association contract, or between partners in a totally foreign cap-

23. Any foreign investment must be approved and an "Authorization" issued, depending on its content and extent, by the Council of State, the Council of Ministers, or another authority appointed by the latter.

ital company established in the form of a nominal share corporation, shall be resolved in accordance with the provisions laid down in the corporate documents. The same rule shall apply when conflicts arise between one or more partners and the joint venture or the full foreign ownership company to which they belong. Cuban Courts shall have jurisdiction over disputes arising from the following:

1. Inactivity on the part of the top management of any form of foreign investment envisaged in the legislation or situations conducive to the dissolution or termination/liquidation of the investment.
2. Relations between the partners to a joint venture or a totally foreign capital company or between national and foreign investors who are party to an international economic association contract who have been authorized to carry out activities involving the use of natural resources and public utilities and the execution of public works.
3. Any dispute regarding the implementation of economic contracts which may arise within the context of the various forms of foreign investment envisaged in the legislation or between the said forms and Cuban legal entities or individuals.

There is no doubt that a U.S.-Cuba BIT would provide additional protection to U.S. investors in Cuba by providing dispute settlement procedures within the host state under internationally-recognized Alternative Dispute Resolutions (“ADR”) principles. For disputes between investors and the host state, the BIT would give the investor the choice of whether to submit the dispute to domestic or international arbitration, as it is stipulated in the majority of the Cuban BITs. As such, Cuban BITs provide access to international dispute-resolution mechanisms in lieu of risky litigation in Cuban ordinary courts. Finally, the

signing of a BIT signals recognition of the practice of international arbitration in Cuba.

Cuban BITs follow the international arbitration doctrine with regard to Standard of Treatment; Expropriation and Compensation; Repatriation of Profits; and Dispute Resolution Mechanism²⁴s.

Standard of Treatment: Includes national standard of treatment, fair and equitable standard and most-favored-nation-treatment. National treatment requires that foreign investors be treated the same as nationals in similar circumstances; however, this principle is often excluded from Cuban BITs. Cuban officials argue that there are some exceptions to this principle based on public health, moral, interior order, national security and strategic development and social policies. In reality, foreign investors receive more favorable treatment than Cuban nationals with respect to property rights.²⁵ Cuban BITs refer to fair and equitable treatment by each contracting party with respect to investments made by investors of the other contracting party in its territory. According to the BITs, each contracting party shall guarantee that no discriminatory or unjustified measures be taken against the procurement, maintenance, utilization, transformation, termination or liquidation of the investments made in its territory by investors of the other contracting party. Cuban BITs also guarantee the most-favored-nation-treatment principle with some exceptions: (1) any existing or future customs union or similar international agreement to which either of the contracting parties is or may become a party; and (2) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Expropriation and Compensation: Cuban BITs provide full protection and safety of the foreign in-

24. The author reviewed the BITs between Cuba and several countries, including Vietnam, the United Kingdom, Trinidad & Tobago, Spain, China, and Venezuela.

25. According to Law No. 118, a foreign investor is a natural or juridical person with foreign domicile and capital. Law No. 118, article 16, permits investment in Cuban real estate and other property rights over real estate by joint ventures, international economic associations and foreign companies. Cuban nationals do not enjoy the same rights with respect to real estate investments. The BIT between UK and Cuba recognizes national treatment, but is only applicable to nationals under the national foreign investment legislation and moreover only applicable to the specific BIT agreement.

vestments and returns in its territory and guarantee that investments and returns shall not be directly or indirectly nationalized, expropriated or subjected to measures having similar effects unless such measures are made for public benefit, national or public interest, with proper compensation in a non-discriminatory²⁶ manner pursuant to the law in force. Such compensation shall be made in freely convertible currency. However, the amount and time of compensation vary in Cuban BITs. For instance, some BITs mention that the amount of compensation would be the effective market value, the genuine market value, the actual market value, or just the equivalent value of the expropriated investment at the time of the expropriation is proclaimed. Some BITs elaborate on how to estimate the basis of the valuation, but there is no uniformity in the calculation formulae. The time of payment also varies in the Cuban BITs; some agreements declare that compensation would be made without unjustifiable delay, promptly or immediately, without defining any of the terms. There are BITs that allow the addition of a commercial interest rate to the amount of the compensation from the expropriation date until the date of payment. The BITs indicate different forums to resolve disputes related to expropriation and compensation, including judicial authority, arbitration and international courts. In the case of the Spain-Cuba BIT, the expropriated party or its assignees have the right to reacquire the expropriated property if, following the expropriation, the property acquired for that purpose has not been fully or partially utilized as intended.

Repatriation of Profits: Cuban BITs guarantee the free transfer of the investors' returns and other payments resulting from their investments upon the payment of all taxes and charges stipulated under its laws, including, although not exclusively, of the following: (a) return on investment; (b) compensation for expropriation, damages or losses due to war, state of emergency or other similar circumstances; (c) the amount resulting from the total or partial sale or liquidation of an investment. The payments shall be ef-

fectured at the exchange rates prevailing on the date of the transfer pursuant to the exchange regulations in force. Cuba is currently facing a severe economic and financial crisis and foreign investors do not have the resources to mitigate a potential devaluation of the Cuban Convertible Peso (CUC) or just to hedge against that currency exchange risk.

Subrogation Clause: A contracting party (State) may assume the rights of an investor if the party, or an agency of the state, has made one or more payments to an investor to compensate for a non-commercial risk.

Dispute Resolution Mechanisms: Cuban BITs make significant progress in the area of the resolution of the disputes arising from the foreign investment by specifying arbitration in a neutral forum as the method of resolution of investor-state disputes outside the Cuba's judicial system.

Investor-Host State Dispute: Involves a Contracting Party (Host State) and a national company or company of the other Contracting Party (Investor), concerning an obligation of the former under a BIT in relation to an investment of the latter. In this regard, Cuban BITs provide that disputes between the parties regarding the interpretation and implementation of the treaty (agreement) should be resolved, to the extent possible, through diplomatic means. If after the period determined in each particular BIT from the date when one of the contracting party has notified in writing the other, the dispute shall, upon request of either contracting party, be submitted to an ad hoc arbitral panel following the rules set out in the agreement.

Cuban State Corporations and State Responsibility

Pursuant to Law 118/2014, a Cuban national (national investor) may be either a Cuban state enterprise or a Cuban domestic company or a Cuban Cooperative (Cuban juridical persons) domiciled in the national territory of Cuba which participates as a

26. Discriminatory actions by a State against the nationals of a foreign country are a violation of international law. *Banco Nacional de Cuba v. Sabbatino*, U.S. Supreme Court, 376 U.S. 398 (1964).

shareholder in a joint venture, or is a party to an international economic association agreement.

- As per Cuban legislation, a Cuban state enterprise is a state enterprise created by a government agency (Cuban Ministry) after receiving approval by the Ministry of Economy and Planning and/or the Ministry of Foreign Trade. State enterprises are independent legal entities created according to the Constitution of 1976, as amended in 1992, and complementary legislation that regulates their formation and operations. State enterprises are registered in the Registry of State Enterprises and Budgeted Entities.
- A Cuban domestic company (100% Cuban capital company) is a non-governmental commercial company with nominative shares. The company follows capitalist techniques and operates entirely in the free-currency market. This company could be owned by a Cuban Ministry or a Cuban state enterprise.
- A Cuban cooperative is clearly defined as a “non-state enterprise” that operates in a “non-state managed sector”. Pursuant to U.S. regulations Cuban independent enterprises are not owned, operated or managed by a Cuban state enterprise.

Cuban state-owned enterprises are the principal agents through which the Cuban government engages in international trade. The functioning of state entities ensures that the sectors in which they operate remain monopolies. Since Cuban foreign investment legislation mandates the creation of joint ventures, it becomes inevitable that the entry of foreign investment occurs in association with these state entities.

According to the International Law Commission of the United Nations (ILC’s articles and commentaries), the general law of state responsibility provides in

two situations for the possibility of attributing to a state the acts committed by its corporate nationals in violation of international law giving rise to international responsibility: first, where a state empowers a corporation to exercise elements of public authority; and second, where a corporation acts on the instructions of or under the direction or control of a state. In addition, where the state through aiding and assisting corporate activity is complicit in the commission of an internationally wrongful act committed by another state or by the corporation itself, then the state will be internationally responsible. In all of these cases, such acts will be attributable to the state even where they are committed outside the territory of that state.

There is a considerable question, however, whether a Cuban entity entering into a joint venture with a foreign investor will be deemed to be an extension of the Cuban state such that a dispute between the foreign investor and its Cuban partner becomes a dispute between a foreign investor and the State such as to trigger the dispute resolution provisions of the BIT.²⁷

It is evident that the Cuban government has considerable control over foreign investment which arises from its sovereignty. Foreign investment takes place within the state, and it is the prerogative of the state to control it as it pleases. But, this is not a fact that sits easily with the notion of foreign investment because the home states of foreign investors, as well as foreign investors themselves, are considerable bases of power and have an interest in ensuring the protection of foreign investment. Many BITs make significant progress in the area of the resolution of the disputes arising from the foreign investment by specifying arbitration in a neutral forum as the method of resolution of the dispute.²⁸

27. Jorge Pérez-López and Matías Travieso-Díaz, “The Contribution of BITs to Cuba’s Foreign Investment Program,” *Cuba in Transition—Volume 10 ASCE* (2000), page 469. According to the authors, in the United States there is a presumption of separate juridical status by a state instrumentality from the State itself; this presumption can be overcome under two circumstances: when the corporate entity is so extensively controlled by the State that a relationship of principal and agent is created, and when to recognize the separation would work fraud or injustice or defeat overriding public policies. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629–30 (1983); *Alejandro v. Telefónica Larga Distancia de Puerto Rico*, 183 F. 3d 277, 1284–95 (11th Cir. 1999). The party claiming that the instrumentality is not entitled to separate recognition bears the burden of proving so. See *Alejandro*, supra; 905 F.2d 438, 447 (D.C. Cir., 1990).

In the absence of an agreement to the contrary, an investment dispute between a state and a foreign investor would normally have to be settled by the host state's courts. From the investor's perspective, this is not an attractive solution. Rightly or wrongly, the investors will fear a lack of impartiality from the courts of the state against whom it wishes to pursue a claim. On the other hand, an agreement on forum selection for investment disputes in a state other than the host state is unlikely to be accepted by the latter and it is supported by the rules of state immunity. In addition to sovereign immunity, other judicial doctrines are likely to stand in the way of lawsuits in domestic courts. The act-of-state doctrine enjoins courts from examining the legality of official acts of foreign states in their own territory, as it was referred in the *Sabbatino* case in which the U.S. Supreme Court ruled that it would not examine the validity of a taking of property by a foreign government in its territory even if its illegality under international law is alleged.²⁹ Further obstacles to lawsuits against host states in domestic courts of other states would be related to doctrines of non-justifiability, political questions, and lack of a close connection to the local legal system.³⁰

It is mainly for these reasons that alternative methods have been created for the settlement of disputes between states and foreign investors. Arbitration, in a neutral forum, has been the most successful method of securing a legal avenue for the foreign investor. Where a BIT backs the foreign investor up by creating an obligation on the host state to submit to any arbitral proceeding brought against it by the foreign

investor, a major step could be said to have taken forwards investment protection.³¹

CONCLUSION AND RECOMMENDATIONS

The settlement of the U.S. certified claims against the government of Cuba shall not be completed without the lifting of the trade and investment restrictions against U.S. investors in Cuba. Otherwise, non-U.S. investors will have the green light (free and clear title) to investment in any property in Cuba while the U.S. investors will be missing the last opportunity in the Western Hemisphere. Thus, investment restrictions by the U.S. against its own nationals need to be revamped or even lifted and the entering into a U.S.-Cuba BIT will establish the foundation of future U.S. investments in the Island creating transparency, rule of law and a 21st century economy in Cuba guided by mutually recognized and accepted international standards and principles.

Cuba's participation in the international arbitration arena will help create impartial forums to handle domestic and international commercial claims during the transition to a modern economy. Cuba should also join the International Centre for Settlement of Investment Disputes (ICSID) together with its reinsertion to the World Bank and the International Monetary Fund. Furthermore, an independent roster of arbitrators and mediators, including international arbitrators, will play an important role in the acceptance and recognition of Cuban arbitration and mediation mechanism as impartial forums to resolve disputes in a transition-era Cuba.

28. Wolfgang Peters, *Dispute Settlement Arrangements in Investment Treaties*, 1991.

29. However, Congress reacted to this position by the passage of the Hickenlooper's Amendment to the Foreign Assistance Act of 1964 which suspends the application of the act of state doctrine unless the Executive notifies the Judiciary that such adjudication would be detrimental to the U.S. foreign policy. The presumption is, therefore, reversed and the burden is placed upon the Executive to object to the adjudication on the merits.

30. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*. Oxford University Press, 2008, page 215

31. M. Sornarajah, *The International Law on Foreign Investment*. Cambridge University Press, 2007, page 250.