

U.S.-Cuba Trade and Economic Council, Inc.

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**One Important Meeting In NYC For President Diaz-Canel
Host One; Seek The Other
Offense Rather Than Defense
A Meeting For Thirty Representatives
Postage For Invitations US\$16.50
Trump Administration May Object
Government-To-Government Negotiations Still Possible- If Cuba Asks
Obama & Castro Bet On Clinton Victory; Diaz-Canel Paying For That Mistake**

It's time for the [H.E. Miguel] Diaz-Canel Administration embrace an offense rather than continue to attempt to fortify a defense defined by levels of acceptable pain rather than success. Focus upon solutions rather than maintaining issues.

That moment will be during the United Nations General Assembly (UNGA) in New York City in September 2019 for a first meeting with representatives of the thirty-largest United States certified claimants.

For perspective, the two largest certified claimants represent 24% of the total value- with the second largest managing one (soon two) hotels in the city of Havana; the thirty certified claimants represent 56% of the total value. There are 5,913 certified claimants. The total value of the certified claims is US\$1,902,202,284.95.

While at the United Nations, President Diaz-Canel should seek a meeting with The Honorable Donald Trump, President of the United States. As distasteful as the optics of such a meeting might be, absent settlement of the certified claims and changes to United States statutes, regulations and policies, the Republic of Cuba will continue to be globally constrained commercially, economically and politically; and a strategy of “*waiting-him-out*,” by relying upon a loss by President Trump on 3 November 2020 is government malpractice because whomever is victorious will not necessarily do what they said they wanted to do when they wanted to do it. There are always unknown disruptors- for example, health issues of diplomats and Venezuela.

The Meeting

As soon as possible, invitations (through the government's longtime legal counsel in New York City; postage US\$16.50) should be delivered to each of the thirty-largest certified claimants to meet with President Diaz-Canel at the Permanent Mission of the Republic of Cuba to the United Nations located on Lexington Avenue.

The purpose of the meeting would be to commence negotiations to settle the certified claims. Timelines would be agreed to, benchmarks for progress (or lack thereof) would be agreed to, and there would be transparency.

There exists a certified claims settlement proposal [LINK] presented in 2018 to the Trump Administration and the Diaz-Canel Administration. There are two certified claims [LINK] whose settlement would be least problematic.

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The moment such a negotiation is announced, the Republic of Cuba will gain from its supporters, allies, rivals and enemies.

Companies will create their interest, renew their interest or expand their interest towards the country. Rather than cringe when pondering the issues relating to engagement with the Republic of Cuba, there would be less concern and more relief. As a collective block, the European Union (EU) would be relieved.

With a settlement of the certified claims, commercial activity in the Republic of Cuba gains value; potential direct foreign investment projects become more viable.

Absent the issue of the certified claims, other components of United States statutes, regulations and policies would adjust as United States companies without the impediment of certified claims must have the required tools to make use of whatever value is obtained from a settlement.

If a resolution involves currency- the certified claimant must be able to obtain it, control it, move it. If resolution involves a security- the certified claimant must be able to obtain it, control it, sell it, or trade it. If the resolution involves an asset- the certified claimant must be able to obtain it, control it, operate it, invest in it, accept investors, sell shares.

There are individuals within the Republic of Cuba who don't object to compensating certified claimants but are adamant that the presence of United States companies is unwelcome. There are individuals who believe that no compensation is required; and United States companies are unwelcome.

The Trump Administration may object- by statement, by Tweet, by speech, by press conference and define the meeting as a sham; an effort by the Republic of Cuba to distract and buy time from additional lawsuits being filed and to create expanded distance between the validity of the certified claimants from the non-certified claimants.

The Trump Administration will maintain that its policies towards Venezuela are impacting the Republic of Cuba and its policies towards the Republic of Cuba are impacting the Republic of Cuba- so the Diaz-Canel Administration is desperate to make deal. Wait, certified claimants, the Trump Administration will argue- so an even better deal will be offered once the Maduro Administration in Caracas is replaced with the Guido Administration and Venezuela ends its discounted oil sales to the Republic of Cuba and removes Republic of Cuba nationals who work (primarily healthcare) on a contract basis in Venezuela- only then the Republic of Cuba will be truly desperate to make a deal. *The Trump Administration will argue that certified claims negotiations are government-to-government rather than certified claimant(s)-to-government.*

All the above arguments would be traditionally persuasive. But, the last argument is the weakest when it should be the strongest.

In 2018 and then in 2019, leading to the decision by the Trump Administration to implement Title III of the Cuban Liberty and Solidarity Act of 1996, known as the "*Libertad Act*," officials of the Trump Administration (The White House, United States Department of State) never invited, individually or in groups, the largest certified claimants to a meeting or meetings- the two largest certified claimants (and their legal counsels) have confirmed this to be true- and they represent 24% of the total value of all 5,913 certified claims.

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Those most impacted by the Title III decision were specifically excluded from any input as to whether they would benefit or suffer from a decision to implement Title III.

Why didn't the Trump Administration, through the National Security Council (NSC), convene a one-day conference, a series of briefings, a teleconference, a webinar, with the largest certified claimants? Because the interests of the largest certified claimants were immaterial to the decision-making process.

If the goal of the Trump Administration was to negotiate a settlement, would not the process had included the United States Secretary of State sending a letter to the Minister of Foreign Affairs of the Republic of Cuba requesting (or demanding) that negotiations begin at the earliest date? And, if the Republic of Cuba refused, then there would be consequences? The Trump Administration implemented the consequences prior to extending an invitation.

As the Libertad Act permits private settlements, and the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury authorizes certified claimants to visit the Republic of Cuba for certified claims-related purposes, if the United States government hasn't an interest in solving the problem, then perhaps the private sector needs to intervene.

In 2018, a comprehensive proposal for a government-to-government certified claims negotiation was presented to the Trump Administration in Washington DC and to the Diaz-Canel Administration in Havana. Unfortunately, issues relating to Venezuela interceded and the proposal was waylaid. [LINK To Proposal].

NOTE: There should be no surprise if the Trump Administration again suspends the right-of-action under Title III. If there are not many lawsuits filed (estimates referenced by the United States Department of State were upwards of 200,000 for non-certified claimants), and the Trump Administration needs the assistance from the EU, Canada, Japan, and countries in The Americas for an issue (China, Iran, North Korea, Russia, Syria, Turkey, Venezuela), again suspending Title III would be a painless offering as existing lawsuits would be unaffected.

Thus far, there have been fourteen (14) lawsuits filed using Title III in United States District Courts; and there is one (1) related lawsuit filed in Spain using a law similar to provisions of Title III. Thus far, none of the lawsuits using Title III have been dismissed by the respective presiding judge.

The [Barack] Obama Administration and the [Raul] Castro Administration abjectly failed to use their uniquely created moments from 17 December 2014 through 20 January 2017 to negotiate a settlement for the certified claims. The failure was due in part to each government expecting a [Hillary] Clinton Administration- so they believed no urgency to work through the complicated issues. A debacle for the Castro Administration, and inherited by the Diaz-Canel Administration.

The Republic of Cuba wagered a better deal would be had not from the Obama Administration, but from a potential Clinton Administration. How could they have believed that? Perhaps, they will not make the same mistake in advance of 3 November 2020.

Cuba's Problems & EU Comments

An unnerving and continuing consensus amongst leadership within the global business community and government leadership: The country chooses to remain anachronistic, and its chronic shortage of foreign exchange reflects that adhesion to an unsustainable model. Foreign debt (commercial

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and sovereign) continues to increase. Revenues from exports have decreased. Costs for imports have increased. Not unusual for Republic of Cuba government-operated companies to seek payment terms of 720 days. Consumer retail prices reflect a mark-up from cost of 240% on average; true wholesale markets are nonexistent. Production of agricultural commodities remains inefficient. The manufacture and assembly of products is lackluster. The self-employed continue to be constrained. Statutes, regulations and policies remain fluid which impacts strategic planning. Trends for visitor arrivals and revenues have decreased- not only from the United States; and tourism (and other) infrastructure languishes from neglected maintenance and investment. Financial support from the [Nicolas] Maduro Administration in Venezuela continues to decrease (and extinguishing is not unlikely) and no other country or countries will individually or collectively replace it. Suspicions fueled by ideology and history and inefficiencies of process continue to restrain companies from engagement- exporting to, importing from, providing services for, and supporting delivery of direct foreign investment.

As one company executive wrote years ago, the Republic of Cuba functions as it does primarily because others have paid for the country to remain an anachronism- a sort of *Yesterday Land* within an amusement park of decay. When visitors ponder- "*How did they do it?*" the context is "*How did they let it get this way and why don't they do something about it?*"

The twenty-eight (28) member EU has in limited instances expressed publicly its frustrations with the Republic of Cuba, but during a 31 May 2019 forum sponsored by the Ministry of Foreign Affairs (MINREX) of the Republic of Cuba, Ambassador Alberto Navarro, Head of Delegation, was quoted:

"Beyond looking at the past and criticizing the Helms-Burton law, there is also an opportunity here to improve the security of investments, to facilitate trade and investment and there the European Union will be with you," and "[I]n these difficult times, seek the opportunity to improve the investment climate and to facilitate trade and investment," and "[T]here are sufficient arguments for Cuba to understand that the countries with the greatest trade opening are the most prosperous in the world." And, "I have not seen any country emerge from underdevelopment through development aid and international solidarity (...) The countries that prosper are thanks to trade liberalization and foreign investment (...). unique, an opportunity." Settling the certified claims are a means to bring forth to reality the potential discussed by Ambassador Navarro.

Cuba Confirms Claims Obligation

The government of the Republic has confirmed its obligation to compensate the certified claimants. From a December 2015 report by the Brookings Institution: *"Importantly, Law 851 of July 6, 1960, which authorized the nationalization of the properties of U.S. nationals (in retaliation for the refusal of U.S.-owned refineries to refine crude oil from the Soviet Union) provided for compensation payments. These payments were to be arranged by means of 30-year bonds with two percent interest, to be financed from sugar sales to the United States, which the United States was already cutting as punishment for previous Cuban actions. However disingenuous the payment scheme, the law nevertheless acknowledged the compensation obligation. Similarly, the Agrarian Reform Law of May 17, 1959 provided for compensation via 20-year bonds with interest."*

"Interested in attracting foreign investors, the Cuban government recognizes that unresolved U.S. property claims, and associated U.S. legislation, raise a significant barrier to new capital inflows. For many non-U.S. multinationals, the Cuban market is too small to risk potential confrontations with the U.S. government or with U.S. claimants. As with U.S. sanctions more generally, the

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unresolved property claims, even when they do not forestall deals entirely, do raise the costs of doing business in Cuba, and hence prejudice Cuban economic development.... In so far as Cuba wishes to restore normal commercial relations with the very large market immediately to its north, the outstanding property claims remain a significant barrier, legally, politically, and commercially.”

Important for the Republic of Cuba to directly compensate certified claimants. Third parties invited by the Republic of Cuba to make use of expropriated properties should not be compensating the certified claimants. The resolution must be bilateral; a straight line rather than a triangle.

What the Republic of Cuba must not do is seek further to merge their financial issues with the United States government with compensating the certified claimants. The government of the Republic of Cuba reported in June 2019 that damages “*in 2018 exceeded \$134 billion at current prices and ‘the figure of \$933 billion dollars, taking into account the depreciation of the dollar against the value of gold in the international market.’”* In August 2019, the government of the Republic of Cuba reported that the damages were valued at US\$138.843 billion at current prices. The certified claims have nothing to do with damages; and efforts at linkage will remain unsuccessful and harmful. In September 2019, the government of the Republic of Cuba reported that “*the accumulated damages resulting from almost six decades of the blockade have reached US\$138,843,400,000.00, and that taking into account the depreciation of the dollar against the value of gold on the international market, that amount reaches US\$922,630,000,000.00.”*

Libertad Act

The Trump Administration has made operational Title III and further implemented Title IV of the Cuban Liberty and Democratic Solidarity Act of 1996 (known as “*Libertad Act*”).

Title III authorizes lawsuits in United States District Courts against companies and individuals who are using a certified claim or non-certified claim where the owner of the certified claim or non-certified claim has not received compensation from the Republic of Cuba or from a third-party who is using (“trafficking”) the asset.

Title IV restricts entry into the United States by individuals who have connectivity to unresolved certified claims or non-certified claims. Since 1996, the United States Department of State has on occasion issued letters requesting information from companies as to their activities in the Republic of Cuba and has informed companies that they could receive letters. The total number of letters issued since 1996 is reportedly less than twelve (12). One Canada-based company is currently subject to this provision based upon a certified claim. There is limited legal recourse for appealing a Title IV determination. The United States Department of State refuses to divulge how many letters have been sent and/or to whom the letters have been sent.

Suspension History

Title III had been suspended every six months since the Libertad Act was enacted in 1996- by President William J. Clinton, President George W. Bush, President Barack H. Obama and President Donald J. Trump.

On 4 March 2019, The Honorable Mike Pompeo, United States Secretary of State, reported that there would be a suspension for thirty (30) days.

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On 3 April 2019, Secretary Pompeo reported a further suspension for fourteen (14) days through 1 May 2019.

On 17 April 2019, the Trump Administration reported that it would no longer suspend Title III.

On 2 May 2019 certified claimants and non-certified claimants were permitted to file lawsuits in United States courts.

Certified Claims Background

There are 8,821 claims of which **5,913** awards valued at **US\$1,902,202,284.95** were certified by the USFCSC and have not been resolved for nearing sixty years (some assets were officially confiscated in the 1960's, some in the 1970's and some in the 1990's. The USFCSC permitted simple interest (not compound interest) of 6% per annum (approximately US\$114,132,137.10); with the approximate current value of the 5,913 certified claims **US\$8,521,866,236.75**.

The first asset to be expropriated by the Republic of Cuba was an oil refinery in 1960 owned by White Plains, New York-based **Texaco, Inc.**, now a subsidiary of San Ramon, California-based Chevron Corporation (USFCSC: CU-1331/CU-1332/CU-1333 valued at **US\$56,196,422.73**).

The largest certified claim (*Cuban Electric Company*) valued at US\$267,568,413.62 is controlled by Boca Raton, Florida-based **Office Depot, Inc.** The second-largest certified claim (*International Telephone and Telegraph Co, ITT as Trustee, Starwood Hotels & Resorts Worldwide, Inc.*) valued at US\$181,808,794.14 is controlled by Bethesda, Maryland-based **Marriott International**; the certified claim also includes land adjacent to the Jose Marti International Airport in Havana, Republic of Cuba. The smallest certified claim is by *Sara W. Fishman* in the amount of US\$1.00 with reference to the Cuban-Venezuelan Oil Voting Trust.

The two (2) largest certified claims total US\$449,377,207.76, representing 24% of the total value of the certified claims. Thirty (30) certified claimants hold 56% of the total value of the certified claims. This concentration of value creates an efficient pathway towards a settlement.

Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 requires that an asset had a value of US\$50,000.00 when expropriated by the Republic of Cuba without compensation to the original owner. Of the 5,913 certified claims, 913, or 15%, are valued at US\$50,000.00 or more. Adjusted for inflation, US\$50,000.00 (3.70% per annum) in 1960 has a 2019 value of approximately US\$427,267.01. The USFCSC authorized 6% per annum, meaning the 2019 value of US\$50,000.00 is approximately US\$1,649,384.54.

The ITT Corporation Agreement

In July 1997, then-New York City, New York-based ITT Corporation and then-Amsterdam, the Netherlands-based STET International Netherlands N.V. signed an agreement whereby STET International Netherlands N.V. would pay approximately US\$25 million to ITT Corporation for a ten-year right (after which the agreement could be renewed and was renewed) to use assets (telephone facilities and telephone equipment) within the Republic of Cuba upon which ITT Corporation has a certified claim valued at approximately US\$130.8 million. *ETECSA*, which is now wholly-owned by the government of the Republic of Cuba, was a joint venture controlled by the Ministry of Information and Communications of the Republic of Cuba within which Amsterdam, the Netherlands-based Telecom Italia International N.V. (formerly Stet International Netherlands N.V.), a subsidiary of Rome, Italy-based Telecom Italia S.p.A. was a shareholder.

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Telecom Italia S.p.A., was at one time a subsidiary of Ivrea, Italy-based Olivetti S.p.A. The second-largest certified claim (*International Telephone and Telegraph Co, ITT as Trustee, Starwood Hotels & Resorts Worldwide, Inc.*) valued at US\$181,808,794.14 is controlled by Bethesda, Maryland-based Marriott International.

TITLE III--SEC. 302. LIABILITY FOR TRAFFICKING IN CONFISCATED PROPERTY CLAIMED BY UNITED STATES NATIONALS.

(a) Civil Remedy.-- (1) Liability for trafficking.--(A) Except as otherwise provided in this section, any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages in an amount equal to the sum of-- (i) the amount which is the greater of-- (I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest; (II) the amount determined under section 303(a)(2), plus interest; or (III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and (ii) court costs and reasonable attorneys fees. (B) Interest under subparagraph (A)(i) shall be at the rate set forth in section 1961 of title 28, United States Code, computed by the court from the date of confiscation of the property involved to the date on which the action is brought under this subsection.

(2) Presumption in favor of the certified claims.--There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

(3) Increased liability.-- (A) Any person that traffics in confiscated property for which liability is incurred under paragraph (1) shall, if a United States national owns a claim with respect to that property which was certified by the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949, be liable for damages computed in accordance with subparagraph (C).

(B) If the claimant in an action under this subsection (other than a United States national to whom subparagraph (A) applies) provides, after the end of the 3-month period described in paragraph (1) notice to-- (i) a person against whom the action is to be initiated, or (ii) a person who is to be joined as a defendant in the action, at least 30 days before initiating the action or joining such person as a defendant, as the case may be, and that person, after the end of the 30- day period beginning on the date the notice is provided, traffics in the confiscated property that is the subject of the action, then that person shall be liable to that claimant for damages computed in accordance with subparagraph (C).

(C) Damages for which a person is liable under subparagraph (A) or subparagraph (B) are money damages in an amount equal to the sum of-- (i) the amount determined under paragraph (1)(A)(ii), and (ii) 3 times the amount determined applicable under paragraph (1)(A)(i). (D) Notice to a person under subparagraph (B)-- (i) shall be in writing; (ii) shall be posted by certified mail or personally delivered to the person; and (iii) shall contain-- (I) a statement of intention to commence the action under this section or to join the person as a defendant (as the case may be), together with the reasons therefor; (II) a demand that the unlawful trafficking in the claimants property cease immediately; and (III) a copy of the summary statement published under paragraph (8). (4)

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Applicability.--(A) Except as otherwise provided in this paragraph, actions may be brought under paragraph (1) with respect to property confiscated before, on, or after the date of the enactment of this Act.

(B) In the case of property confiscated before the date of the enactment of this Act, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before such date of enactment. (C) In the case of property confiscated on or after the date of the enactment of this Act, a United States national who, after the property is confiscated, acquires ownership of a claim to the property by assignment for value, may not bring an action on the claim under this section.

(5) Treatment of certain actions.--(A) In the case of a United States national who was eligible to file a claim with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 but did not so file the claim, that United States national may not bring an action on that claim under this section. (B) In the case of any action brought under this section by a United States national whose underlying claim in the action was timely filed with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 but was denied by the Commission, the court shall accept the findings of the Commission on the claim as conclusive in the action under this section.

(C) A United States national, other than a United States national bringing an action under this section on a claim certified under title V of the International Claims Settlement Act of 1949, may not bring an action on a claim under this section before the end of the 2-year period beginning on the date of the enactment of this Act.

(D) An interest in property for which a United States national has a claim certified under title V of the International Claims Settlement Act of 1949 may not be the subject of a claim in an action under this section by any other person. Any person bringing an action under this section whose claim has not been so certified shall have the burden of establishing for the court that the interest in property that is the subject of the claim is not the subject of a claim so certified. (6) Inapplicability of act of state doctrine.--No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under paragraph (1).

(7) Licenses not required.--(A) Notwithstanding any other provision of law, an action under this section may be brought and may be settled, and a judgment rendered in such action may be enforced, without obtaining any license or other permission from any agency of the United States, except that this paragraph shall not apply to the execution of a judgment against, or the settlement of actions involving, property blocked under the authorities of section 5(b) of the Trading with the Enemy Act that were being exercised on July 1, 1977, as a result of a national emergency declared by the President before such date, and are being exercised on the date of the enactment of this Act.

Additional Analysis

Troika To Negotiate Settlement Of Certified Claims Against Cuba? Kushner, Greenblatt & Feinberg

<https://www.cubatrade.org/blog/2018/11/18/lojx6s6oe5epgonh6mub855d5ak143?rq=G20>