

**RESOLVING ISSUES WITH CONFISCATED
PROPERTY IN CUBA, HAVANA CLUB RUM
AND OTHER PROPERTY**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

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FEBRUARY 11, 2016
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OFFICIAL HEARING RECORD

UNPRINTED MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by the Honorable Darrell E. Issa, a Representative in Congress from the State of California, and Chairman, Subcommittee on Courts, Intellectual Property, and the Internet. This material is available at the Subcommittee and can also be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104453>

**RESOLVING ISSUES WITH CONFISCATED
PROPERTY IN CUBA, HAVANA CLUB RUM
AND OTHER PROPERTY**

THURSDAY, FEBRUARY 11, 2016

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 5:06 p.m., in room 2141, Rayburn House Office Building, the Honorable Darrell E. Issa (Chairman of the Subcommittee) presiding.

Present: Representatives Issa, Goodlatte, Jordan, Poe, Chaffetz, Marino, DeSantis, Deutch, Bass, Richmond, and DelBene.

Staff Present: (Majority) Joe Keeley, Chief Counsel; Eric Bagwell, Clerk; and (Minority) Jason Everett, Minority Counsel.

Mr. ISSA. The Committee will come to order.

Today's hearing of the Subcommittee on Courts, Intellectual Property, and the Internet will be dealing with resolving issues with confiscated property in Cuba, which will include Havana Club rum and other property.

The Subcommittee Ranking Member may be able to join us but has a conflict of interest, as will others. If they do attend—if they are able to be here, we will take their openings statements at that point.

I would like to welcome everyone here today and ask unanimous consent that the Chair be authorized to declare recesses of the Subcommittee at any time.

Today we have two distinguished panels, and I would ask—I guess we'll swear them in, each panel.

The witnesses have opening statements which will be entered into the record in their entirety. And I would ask, please, that during your 5-minute period that you summarize and stay within the 5-minute period. As you know, the red lights, green lights, and yellow lights will indicate go, hurry up, and stop.

Before I introduce the witnesses, Committee rules require that all witnesses be sworn. So what I'd ask, that you please rise to take the oath and raise your right hands.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Please be seated.

Let the record reflect that all witnesses answered in the affirmative.

Our first panel of witnesses will be the Honorable Kurt Tong, Principal Deputy Assistant Secretary of the Bureau of Economic and Business Affairs, United States Department of State; and Ms. Mary Denison, Commissioner for Trademarks for the United States Patent and Trademark Office.

I'll now recognize myself for an opening statement.

Today's hearing is on the integrity of the patent and trademark system.

Over 50 years ago, the people of Cuba entered into an era of religious persecution, property seizures, and political oppression. Families who had worked for years to build a future for they and their families lost everything and were forced to flee the country or, worse than that, be imprisoned in Cuban jails.

In response to Cuba's alliance with the then-Soviet Union, its totalitarian dictatorship under communism, America began a trade embargo to deny Castro and his allies the benefits of free trade.

In 1999, American policy further prevented the recognition by the United States Government of trademarks seized by Cuba. A drafting error in section 211, or what has come to be known as a drafting error, made the legislation subject to a challenge by those who want to do nothing more than, in fact, trade with a dictator.

To fix the drafting error, I have become an original cosponsor of the No Stolen Trademarks Honored in America Act of 2015. The law simply would—the change in the law would simply take out references to a single country but, in fact, still cover the category that would include the wrongful taking of these trademarks.

In the case of the Havana Club example, a family business was seized at gunpoint with no compensation. Forced into exile, the family was unable to restart their business on their own and chose to partner with Bacardi, another company. The Ricard business of France chose to partner with the Communist regime in Cuba and purchase and agree to distribute under the name "Havana Club" throughout the rest of the world.

The United States—and, I must say, the United States alone—chose not to allow the sale and, thus, the profiteering by the Cuban Government based on their theft. And let us understand clearly that we are still dealing with a Cuban-made product in which the people of Cuba work for maybe \$20 a month to produce rum so the Cuban Government can sell it at a price that benefits their regime.

So the technicality that, in fact, we have a French Government-owned, partially owned, enterprise that will testify indirectly today that they bought it and of course they're simply entering into business is, in fact, inaccurate. In the case of the trademark in dispute, it was not a French company partially owned by the country of France but, in fact, the Cuban Government that applied for the trademark—the very Cuban Government that had seized it illegally.

With the passage of time, Cuban Americans also have sought to be repaid for stolen homes and businesses. On our second panel, we will have a former member of the claims board and a personal testimony of someone who is still trying to recoup that which was stolen from her family by this dictatorship.

I'll now recognize the Ranking Member for her opening statement.

Ms. BASS. Why, thank you, Mr. Chair.

I thank our witnesses for coming today.

And I will say—excuse me, let me take a minute here to wrestle with the microphone—I was pleased when the President announced that he was working to normalize relations with Cuba. This shift in policy is really long overdue for a country that is 90 miles away. And we've denied American businesses. This is an issue that has been big in California, frankly, because there's a lot of California businesses across many different categories that are willing and ready to be involved in this important market.

I want to take the opportunity here to say what I think is at stake here. There are hundreds of U.S. companies with thousands of trademarks that are registered in Cuba. So I'm worried that American businesses rely on the validity of the treaties that we sign to protect their interests abroad. The General Inter-American Convention for Trade Mark and Commercial Protection, the IAC, is such a treaty, and it's been signed by 10 countries, including the United States. And so I'm concerned that our actions will impact U.S. interests not only in Cuba but in eight other countries who could subsequently choose not to honor the IAC.

With regard to some of the issues that have come up—that I know will come up, like expanding section 211, I agree that we risk doing more harm than good. I'm worried that when an entity as reputable as the National Foreign Trade Council tells me that we're about to violate a treaty that protects U.S. businesses—especially when considering that Cuba has consistently honored the IAC in favor of U.S. companies.

So, for example, there's the Olin Corporation who sought to protect its famous rifle trademark, Winchester. And based on the IAC convention, Cuba ruled in favor of Olin over a non-U.S. company.

So I'm concerned that by looking at this issue, really, when it's already in the judicial branch, that we run the risk of looking like we're trying to improperly influence an ongoing case. So those are my concerns, and I am hoping that through the testimony of the panelists that they can clarify this.

Thank you. And I yield back.

Mr. ISSA. Thank you.

And we now go to our panel of witnesses.

Mr. Tong, you have an opening statement? The gentleman is recognized.

**TESTIMONY OF THE HONORABLE KURT TONG, PRINCIPAL
DEPUTY ASSISTANT SECRETARY, BUREAU OF ECONOMIC
AND BUSINESS AFFAIRS, U.S. DEPARTMENT OF STATE**

Mr. TONG. Well, thank you, Chairman Issa, and thank you, Members of the Committee. And good evening. I appreciate the op-

portunity to testify today on topics related to confiscated property in Cuba, Havana Club rum, and other property.

The protection of intellectual and real property rights is an important issue for American innovators, entrepreneurs, and businesses and deserves the close attention and vigorous efforts of multiple branches of the U.S. Government.

In my testimony today, I will first describe briefly the role of the Department of State and, in particular, my bureau, the Bureau of Economic and Business Affairs, with respect to intellectual property enforcement and protection and international claims and disputes. I'll also provide an overview of the recent claims discussions with the Cuban Government. And then, finally, I'll discuss the State Department's role in the Havana Club matter.

The Department of State's Economic Bureau uses economic diplomacy to advance the prosperity and security of all Americans by working hand-in-hand with other U.S. Government agencies and partners around the world to promote good economic policies as well as to negotiate and implement agreements that shape the rules of global commerce.

One of the Department's foremost priorities is the promotion of innovation in the United States and around the world. We do this, in part, by advocating for effective protection and enforcement of intellectual property rights. Specifically, the Department uses diplomatic outreach and programs and bilateral and multilateral negotiations to ensure the interests of American rights-holders as well as to highlight the critical role of intellectual property rights protections in supporting economic growth and stability.

We also devote substantial resources to supporting the development of a satisfactory climate for U.S. investment overseas, which includes assisting U.S. investors involved in investment disputes with foreign governments. In this regard, we work closely with the Department's Office of the Legal Adviser, which represents the United States and coordinates activities with respect to claims and international disputes.

In the case of Cuba, the Department is continuing to advocate for the resolution of all outstanding U.S. claims and disputes in our bilateral relations. We launched government-to-government claims talks in Havana on December 8th last year, and through these claims talks we are seeking compensation or some other form of appropriate redress from the Cuban Government for these longstanding U.S. claims.

The U.S. delegation at the talks provided an overview of the U.S. claims against the Government of Cuba. These include almost 6,000 claims of U.S. nationals related to confiscated property that were certified by the Foreign Claims Settlement Commission as well as claims related to unsatisfied U.S. court judgments against Cuba, in addition to the claims of the U.S. Government.

The meeting in Havana was the first step in what is expected to be a complex process, but the United States views the resolution of outstanding claims as a top priority.

With this in mind, I would like to finally address the specific case of Havana Club, which is quite a different sort of matter than the unresolved U.S. claims issues that I just mentioned.

As you may know, this case concerns a dispute between foreign actors—on one side, the Cuban state-owned enterprise, Cubaexport, which is in a joint venture with a French company, Pernod Ricard; and, on the other side, Bacardi and Company Limited, a company headquartered in Bermuda. These foreign companies are involved in pending Federal court proceedings in the United States with regard to their dispute over ownership of the Havana Club trademark in the United States.

The Department of State's role in the Havana Club matter was to respond to a request from Treasury's Office of Foreign Assets Control, or OFAC, for foreign policy guidance. To be clear, our role in the Havana Club matter was not to adjudicate the ownership of the disputed trademark rights, which is a matter still before our Federal courts, and the Department took no position on that issue in its foreign policy guidance.

To be a bit more specific, in November 2015, OFAC requested foreign policy guidance from the State Department with respect to an application from Cubaexport for a specific license authorizing all transactions with the U.S. Patent and Trademark Office related to Cubaexport's renewal and maintenance of the Havana Club trademark registration, including payment of necessary fees.

The Department evaluated this referral in light of a number of factors, including: the particular facts of the case; the recent shift in United States policy toward Cuba; United States foreign policy with respect to key allies in Europe; and the U.S. approach with respect to trademark rights associated with confiscated property. After weighing these factors, the Department recommended issuance of the requested specific license.

It is in the foreign policy interest of the United States that the relevant parties be able to reach a resolution in this longstanding dispute. As I mentioned, there are pending Federal court proceedings, and the denial of a license and the resulting expiration of the trademark registration may have rendered those proceedings moot, whereas granting the license will allow the parties to proceed toward adjudication of their respective legal claims in U.S. courts of law.

In closing, I wish to reaffirm that the Department of State will continue to advocate for the effective protection and enforcement of intellectual property rights around the world, including and especially in Cuba. This effort is squarely in line with our enduring objective of the emergence of a peaceful, prosperous, and democratic Cuba.

The Administration's approach to Cuba allows us to effectively engage with Cuba on seeking redress for U.S. claims, for protection of intellectual property rights, and a number of other matters in the national interest.

Thank you, Mr. Chairman, and I welcome your questions.

[The prepared statement of Mr. Tong follows:]

**Testimony of Kurt Tong
Principal Deputy Assistant Secretary,
Bureau of Economic and Business Affairs,
Before the House Judiciary Committee:
Subcommittee on Court, Intellectual Property, and Internet
February 11, 2015**

Good afternoon Chairman Issa, Ranking Member Nadler, and distinguished members of the subcommittee. Thank you for the opportunity to testify today on the topics of confiscated property in Cuba, Havana Club rum, and other property. The protection of intellectual and real property rights is an important issue for American innovators, entrepreneurs, and businesses and deserves the close attention and vigorous efforts of the U.S. government.

In my testimony today, I will overview the vital role of the Department of State and its Bureau of Economic and Business Affairs with respect to intellectual property enforcement and protection and international claims and disputes. I will provide an overview of the recent claims discussions with the Cuban government. Finally, I will discuss the Department of State's role in the Havana Club rum matter.

The Department and the Bureau of Economic and Business Affairs' Mission

The Department of State's overall mission is to shape and sustain a peaceful, prosperous, just, and democratic world and to foster conditions for stability and progress for the benefit of the American people and people everywhere. In support of this mission, the Bureau of Economic and Business Affairs (EB) uses economic diplomacy to advance the prosperity and security of all Americans, working hand-in-hand with other U.S. government agencies and partners around the world to negotiate and implement international agreements which shape the rules of global commerce. Specifically, EB gives the Secretary of State a global perspective on economic, financial, and development issues; leads efforts within State that expand trade, investment, transportation, and telecommunications links; shapes State's engagement in global economic discussions; crafts and implements U.S. sanctions; and promotes entrepreneurship overseas. The overall success of the U.S. economy and U.S. business is at the heart of our foreign policy.

One of the foremost priorities of the State Department and our bureau is the promotion of innovation in the United States and around the world and we actively

advocate for the effective protection and enforcement of intellectual property rights in all countries. Our bureau deploys economic and commercial diplomacy and utilizes bilateral and multilateral negotiations to ensure the interests of American rights holders and showcase the critical role of intellectual property rights protections in supporting economic growth and stability. Each year our bureau contributes to the congressionally-mandated Special 301 Report prepared by the Office of the U.S. Trade Representative on intellectual property rights, as well as to its Notorious Markets Report identifying physical and online markets worldwide that engage in and facilitate copyright piracy and trademark counterfeiting that harms U.S. businesses. We also prepare relevant sections of the State Department's annual Investment Climate Statement and contribute to U.S. negotiating policy for Free Trade Agreements and Trade and Investment Framework Agreement meetings.

The State Department is committed to supporting U.S. investors and business overseas, and this is a core function of our overseas posts. EB devotes resources to supporting the development of a satisfactory climate for U.S. investment overseas. The bureau engages in dialogues with foreign governments to promote open, transparent, and nondiscriminatory investment climates; provides U.S. companies with investment climate information; supports the negotiation of bilateral and regional investment agreements; and assists U.S. investors involved in investment disputes with foreign governments. In this regard, the bureau works closely with the State Department's Office of the Legal Adviser, which represents the United States and coordinates activities within and outside the United States with respect to all aspects of international claims and investment disputes. At the multilateral level, the State Department works to improve norms on investor treatment and the resolution of investment disputes through organizations such as the Organization for Economic Cooperation and Development (OECD), the UN Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL), and the International Center for the Settlement of Investment Disputes (ICSID).

U.S.-Cuba Claims Talks

The Department of State is continuing to advocate for the resolution of all outstanding U.S. claims and disputes in our bilateral relations with Cuba. On December 8, 2015, we launched government-to-government claims talks with Cuba in Havana. The purpose of these claims talks is to seek compensation or some other form of appropriate redress from the Cuban government for these longstanding U.S. claims. The United States delegation at the talks, which was led

by the Department of State's Principal Deputy Legal Adviser, provided an overview of the U.S. claims against the Government of Cuba. These include the almost 6,000 claims of U.S. nationals related to confiscated property that were certified by the Foreign Claims Settlement Commission (FCSC), as well as claims related to unsatisfied U.S. court judgments against Cuba, and claims of the U.S. government.

Re-establishment of diplomatic relations and the policy of engagement pursued by this Administration allows for more effective discussion of complex issues with the Cuban government and strengthens the ability to advocate on behalf of U.S. citizens. The meeting in Havana was the first step in what is expected to be a complex process which may take time, but the United States views the resolution of outstanding claims as a top priority.

The Havana Club Matter

Claims that were certified by the FCSC featured prominently in the bilateral claims talks with the Government of Cuba. To receive certified awards from the FCSC, claimants had to demonstrate, among other things, that they were U.S. nationals at the time of the taking of their property. Havana Club is a different kind of matter and was not able to be raised before the FCSC. It concerns a dispute between foreign actors: on one side, a Cuban-state owned enterprise, commonly known as Cubaexport, which is in a joint venture with a French company, Pernod Ricard S.A. (Pernod Ricard); and, on the other side, Bacardi & Company Limited, a company headquartered in Bermuda. The underlying property in their dispute over ownership of trademark rights in the United State was held by a non-U.S. national at the time of the taking.

The Department of State responded to a request from the Treasury Department's Office of Foreign Assets Control (OFAC) for foreign policy guidance concerning Cubaexport's application for a specific license from OFAC. The Department of State's role in the Havana Club matter was not to adjudicate the ownership of the disputed trademark rights, and the Department took no position on that issue. Let me explain further:

In the interest of ensuring that its actions are consistent with the national security and foreign policy goals of the United States, OFAC regularly consults with the Department of State on foreign policy, referring to the Department for its review, among other matters, specific license applications in certain cases. This

consultation process occurs across the range of economic sanctions programs that OFAC implements.

In November 2015, OFAC requested foreign policy guidance from the Department of State with respect to an application from Cubaexport for a specific license authorizing all transactions with the U.S. Patent and Trademark Office (USPTO) related to Cubaexport's renewal and maintenance of the Havana Club trademark registration. The Department of State evaluated this referral in light of a number of factors, including the particular facts of the case, the landmark shift in the United States' policy toward bilateral relations with Cuba, United States foreign policy with respect to key allies in Europe, and the U.S. policy with regard to trademark rights associated with confiscated property. Based on its evaluation, the Department of State recommended that OFAC issue the requested license.

It is important to note that there are pending federal court proceedings in which Bacardi & Company Limited has filed suit against Cubaexport to contest the Havana Club trademark ownership in the United States. The denial of a license and the resulting expiration of the trademark registration may have rendered those proceedings moot, whereas granting the license will likely allow the parties to proceed toward adjudication of their respective legal claims to the trademark. Given the important and complex foreign policy considerations at issue in this matter, the Department of State considered allowing the relevant parties to be able to reach a resolution in this long-standing dispute to be in the foreign policy interest of the United States.

In closing, I wish to reaffirm that the Department of State will continue to advocate for the effective protection and enforcement of intellectual property rights around the world, including in Cuba. This effort is squarely in line with our enduring objective of the emergence of a peaceful, prosperous, and democratic Cuba. The Administration's approach to Cuba allows effective engagement with Cuba on U.S. claims, intellectual property rights, and a number of other matters in the U.S. national interest.

We appreciate your engagement on these important issues. I welcome your questions.

Mr. ISSA. Thank you.
Commissioner?

**TESTIMONY OF MARY BONEY DENISON, COMMISSIONER FOR
TRADEMARKS, U.S. PATENT AND TRADEMARK OFFICE**

Ms. DENISON. Chairman Issa and Members of the Committee—

Mr. ISSA. If you could pull it slightly closer. Your voice doesn't carry as well as the Secretary's.

Ms. DENISON. How's this? Is that better?

Mr. ISSA. Better.

Ms. DENISON. Thank you so much.

I appreciate the opportunity to describe the U.S. Patent and Trademark Office's role with respect to the renewal of the Havana Club trademark registration today.

The USPTO is charged with carrying out the trademark registration process consistent with the law so as to provide a stable marketplace for the sale of goods or services identified by the registered mark for the benefit of both consumers and owners.

The USPTO receives more than 300,000 applications for trademark registration each year and administers a trademark register of more than 2 million active registrations.

As a general matter, U.S. trademark law requires the submission of certain documents and the payment of appropriate fees to maintain and renew a trademark registration. The actions we took at the USPTO in this case were straightforward and consistent with the law.

In 1974, Cubaexport applied for registration of the Havana Club trademark at the USPTO. The USPTO approved the registration in 1976 and renewed it in 1996. The transactions were authorized under an existing general license pursuant to the Cuban Assets Control Regulations.

In October 1998, however, Congress included section 211 as part of the Omnibus Appropriations Act, which rendered that general license unavailable for transactions or payments for certain trademarks. As a result, when Cubaexport attempted to renew the Havana Club trademark registration in 2005, the Treasury Department's Office of Foreign Assets Control, known as OFAC, advised the USPTO and Cubaexport that a specific license would be required to authorize the payment of renewal fees. Cubaexport could not legally pay the required fees without an OFAC-specific license authorizing the transaction.

Cubaexport applied for a specific license from OFAC, and OFAC denied the application. Because the requirements of trademark law could not be met without an OFAC specific license authorizing the fee payment, the USPTO was unable to renew the registration.

Cubaexport then sought review of the USPTO's refusal by filing a petition with the USPTO, the same petition that we acted on in January. Because Cubaexport also sued OFAC over its decision not to issue Cubaexport a specific license authorizing the fee payment, the USPTO suspended action on the petition until that litigation was over. Cubaexport's challenges in Federal court were ultimately unsuccessful.

In November of 2015, Cubaexport submitted a new specific license application to OFAC, and OFAC issued the requested license

on January 11, 2016. On January 12, 2016, Cubaexport supplemented its USPTO petition to include an OFAC-specific license authorizing the 2005 payment of fees and all other transactions necessary to renew and maintain the Havana Club registration.

Because Cubaexport had satisfied the requirements of the Trademark Act, the USPTO took action to accept the now-authorized fee, to grant the petition, and to update the USPTO's records to reflect the renewed status of the Havana Club registration. This action does not, however, decide the Havana Club trademark dispute. The rights of all interested parties remain the same as they were before the action was taken.

That concludes my statement, Mr. Chairman, and I would be happy to answer any questions. Thank you very much.

[The prepared statement of Ms. Denison follows:]

STATEMENT OF
MARY BONEY DENISON
COMMISSIONER FOR TRADEMARKS
United States Patent and Trademark Office
BEFORE THE
**SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET
COMMITTEE ON THE JUDICIARY**
U.S. House of Representatives
Hearing on “Resolving Issues with Confiscated Property in Cuba,
Havana Club Rum and Other Property”
FEBRUARY 11, 2016

Chairman Issa, Ranking Member Nadler and Members of the Committee:

Thank you for this opportunity to describe the United States Patent and Trademark Office's (USPTO's) role with respect to the renewal of the Havana Club trademark registration.

The USPTO is charged with carrying out the trademark registration process consistent with the law so as to provide a stable marketplace for the sale of goods or services identified by the registered mark for the benefit of both consumers and owners. The USPTO receives more than 300,000 applications for trademark registration each year and administers a trademark register of more than 2 million active registrations.

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Omnibus Appropriations Act which rendered that general license unavailable for transactions or payments for certain trademarks.

As a result, when Cubaexport attempted to renew the Havana Club trademark registration in 2005, the Treasury Department's Office of Foreign Assets Control (OFAC) advised the USPTO and Cubaexport that a specific license would be required to authorize the payment of renewal fees.

Cubaexport could not legally pay the required fees without an OFAC specific license authorizing the transaction.

Cubaexport applied for a specific license from OFAC, and OFAC denied the application. Because the requirements of the trademark law could not be met without an OFAC specific license authorizing the fee payment, the USPTO was unable to renew the registration.

Cubaexport sought review of the USPTO's refusal by filing a petition with the USPTO, the same petition that we acted on in January. Because Cubaexport also sued OFAC over its decision not to issue Cubaexport a specific license authorizing the fee payment, the USPTO suspended action on the petition until that litigation was over. Cubaexport's challenges in federal court were unsuccessful.

In November of 2015, Cubaexport submitted a new specific license application to OFAC and OFAC issued the requested license on January 11, 2016.

On January 12, 2016, Cubaexport supplemented its petition to include an OFAC specific license authorizing the 2005 payment of fees and all other transactions necessary to renew and maintain the Havana Club registration.

Because Cubaexport had satisfied the requirements of the Trademark Act, the USPTO took action to accept the now-authorized fee payment, grant the petition, and update the USPTO's records to reflect the renewed status of the Havana Club registration. This action does not, however, decide the Havana Club trademark dispute. The rights of all interested parties remain the same as they were before this action was taken.

That concludes my statement Mr. Chairman, and I would be happy to answer any questions.

Mr. ISSA. Excellent.

I now ask unanimous consent that the entire list of the 6,000 certified recipients under the Foreign Claims Settlement Act be placed in the record.*

Additionally, I ask unanimous consent that the June 11, 1974, complete set of documents applying for the trademark by the country of Cuba entered by the law firm of Haseltine, Lake & Walters be placed in the record; the testimony of Ramon—and I apologize in advance for how I'm going to get this—Arechabala, that Ramon's testimony of 2004 be placed in the record; The Washington Post article of February 1, 2016, "Failure in Cuba," be placed in the record. It is an editorial; and lastly, Omy letter yesterday to the Secretary Kerry and Lew, along with attached signatures of a number of other Congressmen, be placed in the record.

Without objection, so ordered.

[The information referred to follows:]

***Note:** The material referred to is not printed in this hearing record but is on file with the Subcommittee. Also, see Issa submission at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104453>

TELEPHONE AREA CODE 212
647-0288

CITIZEN BOND 19
MAILING NEW YORK
TELEX 4-7488

ERIC H. WATERS
JOHN G. SCHWARTZ
J. HAROLD NISSEN
ERIC D. OFFNER

HASELTINE, LAKE & WATERS

PATENTS & TRADEMARKS
19 WEST 44TH STREET
NEW YORK, N. Y. 10036

ROBERT S. WATERS
1910-1986

HAROLD L. RODITI
CONSULTANT



June 11, 1974

OUR REF. NVA
YOUR REF. 5B
15B

Hon. Commissioner of Patents
Washington, D.C. 20231

SIR:

RE: UNITED STATES TRADEMARK/SERVICE MARK APPLICATION

APPLICANT : Empresa Cubana Exportadora De Alimentos Y
Productos Varios, trading as Cubalexport.

TRADEMARK : HAVANA CLUB Label (with claim to the colors
gold, white and black)

SERVICE MARK :

CLASS NO. 33

We are attaching herewith documents comprising an application
for registration of the above mark on the Principal Register
of the 1946 Act.

We would appreciate receiving the usual filing certificate at
your early convenience.

Respectfully submitted,

By

Enclosures:

1. Application documents;
2. Drawing of the mark;
3. Five (5) specimens of use;
4. Certified copy of Cuban Reg. No. 110153 with English translation
and
Enclosed Bulk Check No. 576; (this item \$35.00)

JUN 13 1974 -22

35 20-201-17



IN THE UNITED STATES PATENT OFFICE
APPLICATION FOR TRADEMARK OR SERVICEMARK REGISTRAT

23981 MA P-C

TRADEMARK : HAVANA CLUB Label (with claim to
the colors gold, white and black)
CLASS NO. : 33

- TO THE COMMISSIONER OF PATENTS
1. Empresa Cubana Exportadora De Alimentos Y Productos Varios,
Trading as Cubaexport
 2. a company organized under the laws of Cuba
 3. 55, 23 Street, Vedado,
 4. Havana, Cuba.

The above-identified applicant requests that the mark shown in the accompanying drawing be registered in the United States Patent Office on the Principal Register established by the Act of July 5, 1946 for rum

6. The mark was first used on or in connection with the goods ~~on~~ (a) _____
19____; was first used on the goods ~~in~~ commerce with or in the United States on (b)
_____ 19____, and is now in use in such commerce.

7. Application for registration of the said mark has been filed in _____ on the
_____ day of _____, 19____; No. _____
and a right of priority based on this application is claimed. Certified copy of such registration will be presented upon
issue.

8. The mark was registered in Cuba on the 12th
day of February 1974 No. 110055, and said registra-
tion is now in full force and effect. Certified copy of such registration is presented herewith.

9. Applicant has adopted and is using the mark by applying the mark to ~~the goods shown in the drawing~~
~~the goods shown in the drawing~~

and the drawing is based for the color gold.

AUTHORIZATION OF AGENT

Applicant hereby appoints ERIC H. WATERS, JOHN G. SCHWARTZ, J. HAROLD NISSEN or ERIC D. OFFNER, with offices at Haseltine, Lake & Waters, 19 West 44th Street, New York, New York 10036, United States of America, to prosecute this application to register, with full power of substitution or revocation, to transact all business in the Patent Office in connection therewith, and to receive the certificate of registration.

APPOINTMENT OF DOMESTIC REPRESENTATIVE

HASELTINE LAKE & WATERS, whose postal address is 19 West 44th Street, New York, New York 10036, United States of America, is hereby designated applicant's representative upon whom notices or process in proceedings affecting the mark may be served

06/14/74 HAVANA CLUB 1 201 35.0000
DECLARATION

10. The undersigned _____, declares: That he is the _____
of Empresa Cubana Exportadora De Alimentos Y Productos Varios
Trading as Cubaexport and
is authorized to execute this document on behalf of said company; he believes said company to be the owner of the mark sought to be registered; that to the best of his knowledge and belief no other person, firm, corporation or association has the right to use said mark in commerce, either in the identical form or in such near resemblance thereto as may be likely, when applied to the goods of such other person, to cause confusion, or to cause mistake, or to deceive; that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or document or any registration resulting therefrom.

11. Declared at Havana Cuba
(city) (country)
this 17th day of May, 1974

Empresa Cubana Exportadora De Alimentos
Y Productos Varios t/a CUBAEXPORT

SEAL

13. *[Signature]*

Haseltine, Lake & Waters, 19 West 44th Street, New York, N.Y. 10036, U.S.A.



REPUBLICA DE CUBA
COMISION NACIONAL DE COLABORACION ECONOMICA Y CIENTIFICO - TECNICA (C.N.C.E.C.T.)
OFICINA NACIONAL DE INVENIONES, INFORMACION TECNICA Y MARCAS (O.N.I.I.T.M.)

TTE. REY 405 HABANA 1
TELE. 61 1460 - 6-9242

ING. JOSE M. RODRIGUEZ RODRIGUEZ, Director General de la Oficina Nacional de Inveniones, Informacion Técnica y Marcas, de la Comision Nacional de Colaboracion Economica y Cientifico Tecnica, de la Republica de Cuba,

P E R T I N E N C I A

Se refiere a la vista al expediente número de invencion tipo del expediente número 100, del Registro General, apudado a foja 10 del mismo, el cual tiene de invencion número ciento diez del tratamiento cincuenta y tres, expedido con fecha doce de febrero de mil novecientos sesenta y cuatro, por un término de cinco años, a favor de la EMPRESA CUBANA DE FABRICACION DE ALUMINIOS Y PRODUCTOS VARIOS, (CUBALUMFOV), establecida en 25 No. 55, Vedado, La Habana, Cuba, que registra la Marca Desconocida 'HAYAL' OMBU', para distinguirlos, con representación de los colores oro, blanco y negro, en la forma y disposición que aparece en la etiqueta, en la clase 36 del Compendio Oficial, siendo el diseño exactamente igual al que se hizo en la presente, encontrándose actualmente en pleno vigor y efecto, -----



Y a petición de Sr. Don José M. Carrillo, Agente Oficial de la propiedad Industrial, se expide la presente, en vista de derechos, en la ciudad de La Habana, a los doce días del mes de marzo de mil novecientos sesenta y cuatro, -----

Rodríguez
Ing. José M. Rodríguez Rodríguez
Director General



Republic of Cuba
National Commission of Economic and Scientific Technical Collaboration
National Office of Inventions, Technical Information and Trademarks
Rey 405, Havana 1

ING. JOSE M. RODRIGUEZ PADILLA, Director General of the National Office of Inventions, Technical Information and Trademarks, of the National Commission of Economic and Scientific Technical Collaboration, of the Republic of Cuba,

CERTIFIES

that, having brought up File No. 212,372 of the General Register, there appears on page 12 thereof Certificate of Registration No. 110,353, issued under date of February 12, 1974, for a term of fifteen years, counted from the stated date, in favor of EMPRESA CUBANA EXPORTADORA DE ALIMENTOS Y PRODUCTOS VARIOS, (CUBAEXPORT), established at 23 No. 55, Vedado, La Habana, Cuba, which covers the Trademark "HAVANA CLUB", to distinguish:

Rum, with claim of the colors gold, white and black, in the form and arrangement which appears on the label, in class -36- of the Official Nomenclature, its design being exactly the same as is affixed hereon, and which is at present in full force, -

(see specimen attached to original)

And on request of Dr. Maria A. Carrillo, Official Agent of Industrial Property, the present document is issued, exempt of taxes, in the city of Havana, this 12th day of March, 1974.

(Signature)

Ing. Jose M. Rodriguez Padilla
DIRECTOR GENERAL

Testimony of

Mr. Ramon Arechabala

July 13, 2004

Mr. Chairman, good afternoon, my name is Ramón Arechabala. I am here today to testify in support of S. 2373. My life was changed forever on New Year's Day 1960 when the Castro government took over the rum business that my family founded in 1878. The revolutionary regime called it intervention. They promised us we would eventually be paid, but we never got a red cent. The simple truth is our property was stolen.

I am a Cuban American and U.S. citizen. My family moved to Cuba from Spain when I was a boy. My father went to work for our family company, Jose Arechabala, S.A. (JASA), in Cardenas, Cuba, which made fine rums sold under the ARECHABALA and HAVANA CLUB brands. We exported HAVANA CLUB rum that was made by JASA according to a secret family formula to the U.S. and elsewhere. JASA began selling HAVANA CLUB rum in the U.S. in the early 1930's. I believe that the HAVANA CLUB mark, at one time, was registered in the United States, Spain, Cuba and other countries. My cousin, Javier Arechabala, the company's lawyer, took care of those things. After the Bay of Pigs, Javier was thrown in jail on trumped up charges and did not get out for many years.

I worked as a sales manager at JASA after I got out of school. Special forces led by Calixto Lopez broke into JASA's offices and seized the company on December 31, 1959. Calixto pointed a machine gun at me and said from now on he was "Pepe." Pepe is my uncle who has since moved to Spain. He was JASA's President then. Calixto meant he was now the boss. All JASA's books and records were seized. My brother, Jose Miguel, who also worked at JASA, and I were searched when we left to make sure we did not sneak out any important papers. As soon as I could, I telephoned my uncle and other family members who were in the U.S. and Spain for the Christmas holidays to let them know what had happened and to tell them not to return to Cuba. I was afraid that if they returned, they would be tossed in jail.

The next day I went back to work. Lopez and his cronies knew nothing about making rum. He even gave away the oak barrels used to age the rum. For several months I stayed at JASA without pay, but Lopez didn't want me there. I had to leave.

The company's business was booming when Castro took it over. My uncle, who was responsible for selling HAVANA CLUB rum in the U.S., had gotten HAVANA CLUB on the shelves at the Stork Club and other famous restaurants in U.S. I later learned that in October 1960, the Cuban government issued Law No. 890, to try to legitimize the confiscations of the assets of JASA and dozens of other private companies. Law No. 890 promised that my family and I would be paid a fair price for the property that was taken but that promise was false. No one in my family was ever paid anything.

My family never gave up hope of getting our rum business back. The rule of law, we felt sure, would be restored to Cuba and with it, our stolen property. In the meantime, I worked at odd jobs in Cuba. But every time my business showed signs of getting off the ground, the government closed me down. My background made me unreliable, particularly after the Bay of Pigs. Eventually, I was thrown in jail by the Castro government after I organized a party for foreign embassy employees. My jailer then gave me a choice, leave Cuba or face the prospect of staying in jail indefinitely on some phony charge.

I left Cuba with my wife and infant son, Miguel. By then I had lost everything, including my home and Cuban bank account. The clothes on our backs were the only things we were allowed to take. The guards at the airport even took Miguel's diaper bag because it looked expensive. What the guards couldn't take was my knowledge of the secret formula for making HAVANA CLUB rum. My brother and I had committed this secret formula to memory when Lopez took over our company and I was determined to put it to good use.

My family and I first went to Madrid and then left for the United States. After a brief stay in Philadelphia with my brother we moved in 1967 to Miami where I still live. I kept trying to put enough money together to make HAVANA CLUB rum, but I was penniless when I arrived in the United States. I worked hard to build a car dealership, but when my franchise was canceled, I was forced into bankruptcy in 1974. Throughout this period, I kept looking for a partner for a joint venture to make HAVANA CLUB rum. In 1974, I flew to Nassau to meet with Orfilio Peláez of Bacardi, to discuss the possibility of Bacardi making HAVANA CLUB rum for us. When I toured Bacardi's distillery, I broke down in tears as it was the first time I had seen a rum distillery since I left JASA. I discussed this meeting with my brother, José Miguel, but we never heard back from Mr. Peláez. I later found out that after our meeting he had fallen ill and died.

Also in 1974, I discussed with a lawyer, whose name I have forgotten, whether JASA's U.S. registration of our HAVANA CLUB label could be renewed. Javier, my cousin and the company's lawyer, was still in a Cuban prison and I knew nothing about the corporate law. I was told I could not file a renewal statement under oath because we had no means of making HAVANA CLUB rum at the time.

While trying to get the family rum business going again, I worked as an auto repairman and in sales. In the late 1980's I set up a freight forwarding company. But I had to retire in 1997 after I suffered a major stroke. In 1993, a Miami newspaper article said that Pernod-Ricard was negotiating a joint venture with the Cuban government to make and sell HAVANA CLUB rum. I was furious. I wrote a letter to Mr. Patrick Ricard, the head of Pernod, to let him know my family owned JASA and the HAVANA CLUB mark. Pernod could never make real HAVANA CLUB rum without the family's secret recipe. Mr. Ricard did answer my letter, but he basically told me that he would not let the injustice done to my family interfere with the bargain Pernod was getting from Castro. However, Pernod was worried about us taking legal action. In 1993, a lawyer for Pernod, Emilio Cuatrecasas, approached the Arechabalas in Spain about buying the worldwide rights to the HAVANA CLUB mark. The family turned down Pernod's offer as it was ridiculously low.

Before hearing about Pernod's deal, I had met with Mr. Juan Prado of Bacardi to pick up on my earlier talks with Mr. Peláez. My discussions with Mr. Prado eventually led to an agreement in

principle in 1995 between the members of my family, who owned JASA, and Bacardi, giving Bacardi the right to make and sell HAVANA CLUB rum. As part of that deal, JASA assigned to Bacardi our rights to the HAVANA CLUB mark, the related goodwill of the business and other remaining JASA assets, including the family's secret HAVANA CLUB recipe. With our permission, Bacardi began selling HAVANA CLUB rum in the U.S. in mid-1995. A formal agreement was signed with Bacardi in 1997.

The Pernod-Cuban joint venture sued Bacardi in federal court in New York. I testified at the trial on February 3, 1999. I basically said then what I am telling you today. The court ruled in Bacardi's favor partly because of Section 211. Section 211 prohibits recognition in the U.S. of claims to own rights in a trademark or commercial name like HAVANA CLUB that had been confiscated by the Castro government unless the one claiming the trademark had gotten the consent of the original owner of that mark in the U.S. which in the case of HAVANA CLUB was the Arechabala family. In other words, rights to the U.S. trademark JASA owned cannot be transferred by Cuba, which confiscated JASA's Cuban assets, to the Cuban-Pernod joint venture or anyone else without JASA's consent as the original owner of the related U.S. trademark. This seems fair. I am told that paintings discovered in the U.S. that had been seized by the Nazis in World War II, are returned to their true owners. While the Castro regime has denied us our rights in Cuba, Section 211 has protected our U.S. trademark and shows that in the United States, at least, private property cannot be taken away at the whim of a foreign tyrant. This is why I am so proud to live in America.

Pernod says we abandoned the HAVANA CLUB trademark when we failed to file the renewal papers with the U.S. government. I am not a lawyer and I did not have the money to have a lawyer research the law for me. I was told that unless JASA was making and selling HAVANA CLUB rum in the U.S. the registration could not be renewed. I believed this and was not going to make a false statement to the U.S. government, which had given me and my family refuge. I do know, however, that Pernod was aware that the Arechabala distillery and the HAVANA CLUB trademark was seized at gun point. Pernod's attempt to buy the mark from us also shows Pernod knew that we never abandoned our trademarks and that we were trying to get our business back. Why else would Pernod have tried to buy our rights in 1993? What Pernod apparently concluded was that we did not have the means to fight them in court. Pernod is a huge company and I and my brother and cousins only made modest livings. But Bacardi, which also was victimized by Law No. 890, knew we were morally and legally the rightful owners of the HAVANA CLUB mark. Bacardi paid us fairly for our HAVANA CLUB rights and took up the court fight.

What happened to my family was wrong. We wanted to keep selling HAVANA CLUB rum but were prevented from doing this because of the confiscation of our distillery. Castro's wrong to me and my family continues today because the Cuban/Pernod venture continues to trade off HAVANA CLUB's reputation with a product that can never be the true HAVANA CLUB rum. Castro's government stole my assets, my family heritage, and much of my children's future. Section 211 prevents that wrong from spreading into the United States. Its protection should not be denied because of veiled threats made by Pernod on behalf of its partner, Cuba.

February 1, 2016

The Washington Post

AN INDEPENDENT NEWSPAPER

EDITORIALS

Failure in Cuba

Mr. Obama's opening is not leading to positive change.

CAN AN authoritarian regime convert to democracy by itself? The historical record isn't encouraging. In the absence of a popular uprising, it is rare for tyrants to voluntarily retire. The military junta of Burma has promised to relinquish some power to an elected government, but it has not yet delivered. China's party-state shows no inclination to try. Russia's strongman is reversing what incipient democracy existed.

This goes to the core of why President Obama's opening to Cuba seems to be failing to live up to its declared goals. When the end to a half-century of hostility was announced in December 2014, the proclaimed U.S. purpose was to "unleash the potential of 11 million Cubans," to "engage and empower the Cuban people," and to "empower the nascent Cuban private sector," among other things. The administration continued to offer this rationale for its latest moves. New regulations that took effect Jan. 27 from the Commerce and Treasury departments further lifted restrictions on financing

of exports to Cuba and relaxed limits on shipping products to the island. Most importantly, the rules will allow banks to finance exports to Cuba on credit, with the exception of agricultural commodities covered by the still-existing trade embargo, rather than requiring cash as before, or burdensome routing through third countries.

Yet there is scant evidence so far of a sea change in Cuba — perhaps because Mr. Obama continues to offer the Castro regime unilateral concessions requiring nothing in return. Since the United States has placed no human rights conditions on the opening, the Castro regime continues to systematically engage in arbitrary detention of dissidents and others who speak up for democracy. In fact, detentions have spiked in recent months. The state continues to monopolize radio, television and newspapers.

The administration has defined one of its goals as opening Cuba to the Internet, but the nation still suffers from some of the lowest connectivity rates in the world. The regime established a few dozen Wifi

spots but charges people \$2 an hour to use them; the average salary is \$20 a month. The state retains a chokehold on the economy, including tourism: the benefits of a 50 percent increase in U.S. visitors are being garnered by Raul Castro's son-in-law, the industry's boss. Meanwhile, Cuba's purchases of U.S. goods have fallen by more than 10 percent.

The hoped-for explosion in individual enterprise has not materialized either. On the contrary: The number of licensed self-employed workers has been dropping. If there are commercial deals as a result of the latest U.S. measures, it is Cuban state organizations that will benefit; only they are allowed to engage in foreign trade.

What's most evident over the past year is that the Castro brothers are effectively preventing real change and reform even as they reap the rewards of Mr. Obama's opening. The president's only response has been more unilateral concessions, along with talk of a visit to the island before he leaves office. Autocrats everywhere must be watching with envy the Castros' good fortune.

Congress of the United States
Washington, DC 20515

February 10, 2016

The Honorable John Kerry
Secretary
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

The Honorable Jacob J. Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Kerry and Secretary Lew:

It has come to our attention that the Office of Foreign Assets Control (OFAC) approved a license to allow Cubaexport, an entity wholly-owned by the Castro regime in Cuba, to renew an expired trademark registration for Havana Club rum. Cubaexport claims rights to the Havana Club registration through its confiscation, without compensation, of the Jose Arechabala Company (JASA). We are concerned about the implications of this decision for American intellectual property rights holders.

As you know, in 1997, OFAC revoked a prior license when Cubaexport attempted to transfer rights to the illegally obtained trademark to Pernod Ricard, its joint venture partner. Subsequently, OFAC denied a license to Cubaexport in 2006 when Cubaexport attempted to renew this illegally obtained trademark registration. Until this month, OFAC and the State Department have consistently followed long-standing U.S. and international policies and laws that protect rightful intellectual property owners from piracy. These policies also serve as a deterrent to those who seek to profit from uncompensated confiscations.

OFAC had previously based its decisions to deny or revoke the license to Cubaexport on the facts and conclusions that came out of years of litigation; primarily that Jose Arechabala, S.A. used the Havana Club name until the Cuban government expropriated its business in 1960 and that neither it, nor its successor, has ever consented to Cubaexport's or any of its partners' use of the Havana Club name. This most recent decision to grant a license to Cubaexport to renew an expired trademark places an illegally-obtained and expired trademark back in the hands of the regime that illegally confiscated it. Moreover, we are concerned that the effects of OFAC's granting such a license to the Cuban regime are not limited to Havana Club alone, and that this decision could undermine our national interests by diluting our nation's protections against the expropriation of American intellectual property by foreign governments.

We note that OFAC has also previously relied upon laws such as Section 211 in making its licensing decisions. The law states:

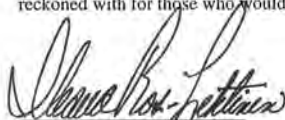
Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to Section 515.527 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona-fide successor-in-interest has expressly consented.

We believe that OFAC should not depart from precedent and should continue to apply Section 211 in rendering its licensing decisions. In accordance with Section 211, OFAC should determine: (a) whether the trademark that is the subject of the proposed renewal application is the same or similar to one that was used in connection with a business or assets that were confiscated, and (b) whether the renewal applicant has obtained the consent of the original owner of the stolen mark or the latter's bona fide successor-in-interest to register or renew that mark.

Further, we seek clarification as to why OFAC departed from precedent and declined to apply Section 211 to this most recent application for renewal of Cubaexport's license. In particular, we would appreciate it if you would shed light on how OFAC's approval of a license to allow Cubaexport to renew its expired trademark registration can be reconciled with Section 211, as well as with US policy norms that protect intellectual property rights holders against the effects of foreign confiscations.

Thank you for your attention to this important matter. We look forward to working with you to reinforce our nation's status as a champion for intellectual property rights holders, and a force to be reckoned with for those who would infringe upon their rights.

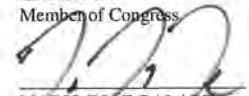
Sincerely,



ILEANA ROS-LEHTINEN
Member of Congress



ED ROYCE
Member of Congress



MARIO DIAZ-BALART
Member of Congress



CARLOS CURBELO
Member of Congress



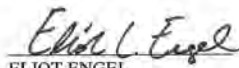
JEFF DUNCAN
Member of Congress



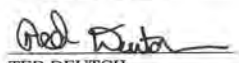
DARRELL ISSA
Member of Congress



DEBBIE WASSERMAN SCHULTZ
Member of Congress



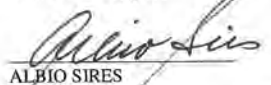
ELIOT ENGEL
Member of Congress



TED DEUTCH
Member of Congress



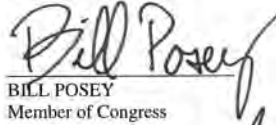
ALCEE L. HASTINGS
Member of Congress

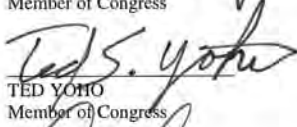


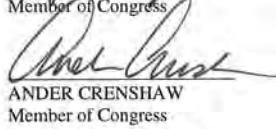
ALBIO SIRES
Member of Congress



LOIS FRANKEL
Member of Congress


BILL POSEY
Member of Congress

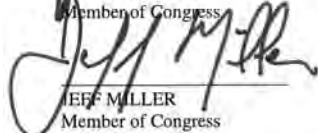

TED YOHIO
Member of Congress

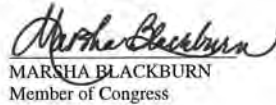

ANDER CRENSHAW
Member of Congress


GUS BILIRAKIS
Member of Congress

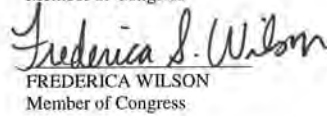

RON DESANTIS
Member of Congress


PETER ROSKAM
Member of Congress

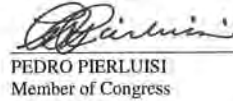

JEFF MILLER
Member of Congress

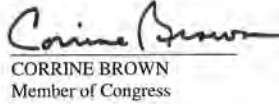

MARSHA BLACKBURN
Member of Congress


ALAN GRAYSON
Member of Congress


FREDERICA WILSON
Member of Congress


PATRICK MURPHY
Member of Congress


PEDRO PIERLUISI
Member of Congress


CORRINE BROWN
Member of Congress

Mr. ISSA. And I'd like to make sure the record indicates that the Ranking Member is not here as a result of a conflict of schedule—the interest being the schedule, not a conflict of interest.

And, with that, I'd ask unanimous consent that all Members' opening statements be placed in the record.

But, Mr. Chairman, would you like to ask a round of questions?

Okay. In that case, I will go first and ask my list of questions.

And, Commissioner, I probably only have one question—a couple of questions for you, fairly briefly. But one of them is—you didn't mention 2012. That was when all the cases were resolved. And the Commission could have vacated all the documents, correct?

In other words, 2012, when the cases were decided, in the ordinary course, this application would have been gone, the trademark would have been available under common law and registration law. Isn't that true?

You said you had held up—suspended this case while other cases were pending. But those cases were resolved, what, 2 years ago?

Ms. DENISON. There was litigation that was pending—

Mr. ISSA. Just, when did the last piece of litigation end, to your knowledge?

Ms. DENISON. In 2012.

Mr. ISSA. Thank you. So litigation ended in 2012. Your excuse for holding up and keeping this in limbo so that the Administration could act ended in 2012. Isn't that true? You had no valid reason to leave this file open as it was, did you?

Ms. DENISON. Mr. Chairman, let me explain a little bit about the petition process.

Mr. ISSA. No, ma'am. I appreciate the petition process, but I only have 5 minutes.

On what basis—there was a conflict known. There was a competing company that had purchased the rights from the family, was sharing the profits in those sales with the family. And they, in fact, also had valid applications, and they had been selling the product in common law since 1994.

So, in 2012, on what basis did you keep this open so that could you could retroactively go back to 2005?

Ms. DENISON. Well, first of all, there is no set timeframe for us to issue a decision on a petition.

Mr. ISSA. Okay.

Ms. DENISON. We receive thousands of petitions every year, and some of them are acted on very—

Mr. ISSA. Well, I know you acted on this one in 3 days.

Ms. DENISON. And some of them are acted on in a matter of years.

Mr. ISSA. Okay. So let me just make one thing clear for the record. From 2012, any statement that you were waiting on a court case to end ended. And from 2012 until 2015, the case simply sat open, waiting for OFAC or somebody else to do something, because there was no—your basis for suspending had ended. Isn't that true?

Ms. DENISON. Actually, after the litigation ended, there was an extended period where there was back-and-forth between our office and OFAC before we could have acted. And—

Mr. ISSA. Yeah, but that wasn't the question, Commissioner. The question was—you said in your testimony that you held this in suspense because of a case. Now, that case went to the U.S. Supreme Court. Ultimately, they, by not granting cert, affirmed the lower court case, and it was over. The Supreme Court had spoken and essentially allowed the lower court. So there were no court issues left.

So the fact that you were going back and forth with OFAC, all of that is a political question and answer, so to speak, to do what the current Administration—and, Mr. Secretary, I think you said it very well. You were trying to reach out to deal with Cuba, the relationship. So this became a tool, I would gather, in that negotiation. Isn't that correct, Mr. Secretary, that this was on the table as part of negotiations?

Mr. TONG. The issue of Havana Club, to my knowledge, was not discussed in our conversations with Cuba regarding the normalization of diplomatic relations.

Mr. ISSA. Okay. So it was never on the table, you're saying, as far as you know.

Mr. TONG. As far as I know.

Mr. ISSA. Okay.

Commissioner, would you provide us with written communications and memos related to correspondence with other agencies outside the Patent and Trademark Office for purposes of the decision process related to the delay until 2015?

Ms. DENISON. Yes, I can. I'm not sure there is any.

Mr. ISSA. So it was just oral conversations, just chatter?

Ms. DENISON. To my knowledge, there is no written communication.

Mr. ISSA. Okay. Well, if you would check, I would appreciate it.

Mr. Secretary, I've got a question for you. You said in your statement that your goal, the Administration's goal, of course, is to restore people, to strengthen personal property and the like.

I'm going to use a little bit of demonstration. Here's two tangible bottles. This one is Cuban-made; it's empty. This one is American-made; it's full—or half-full, not by my consumption. These are tangible products.

This one is made in Puerto Rico, where there are about 1,400 workers, American workers, earning \$40,000 or so a year. This is made in Cuba by people making about \$20 a month. Now, under your decision, people making \$20 a month are going to be shipping this to the U.S. and people in Puerto Rico making \$40,000 a year are going to be laid off.

If I take it to its logical conclusion, I could hold up bottles of Bacardi, which the Cubans have the exact same claim on, that they seized it, it was theirs, and they asserted around the world that it was there. Would you have the \$100 million that the Puerto Rican Government gets from Bacardi tax revenues every year and the 1,000-plus jobs eliminated by giving Bacardi back to Cuba as a question of renewing our policies? Is that on the table? And is there any real difference, from a foreign policy, of whether or not you give away one family's rights or another's?

Mr. TONG. Thank you, Mr. Chairman.

My understanding is that the economic impact of the patent or the trademark registration has not yet played out, that the ownership of the Havana Club trademark continues to be a matter before U.S. Federal courts and that that matter will be settled in U.S. Federal courts.

Mr. ISSA. Well, you know, the man who it was taken from has died. So I'm not sure that there will ever be justice in that economic impact. And the son is working for a company and not able to produce the product his family had produced since the thirties.

But my time has expired. I have to be sensitive to all here. The gentlelady from California, Ms. Bass, is recognized.

Ms. BASS. Thank you, Mr. Chair.

I wanted to know if either witness could talk a little bit more about section 211 and the impact of that.

You know, as I'm reading some of the material here, the Cuban Government has threatened to violate the trademark rights of U.S. companies because we haven't repealed section 211. And I guess there's some consideration about expanding it.

So I'm wondering if you can talk a little bit more about that and, also, within the context of that, discussing the possible implications for U.S. business interests in the eight other countries who are part of the IAC. So I know, in some instances, it's viewed that we might be violating the international treaty or it will weaken our ability to protect U.S. intellectual property interests in the eight other countries.

So perhaps you could comment about 211 and explain.

Either one. Whichever.

Mr. TONG. I guess I can start, and my colleague may want to amplify.

Section 211 is a statute which is under—the interpretation of which comes to OFAC. So I can't speak on their behalf with regard to that interpretation. But my understanding is that a specific license can be granted regardless of the existence of section 211.

With regard to the broader diplomatic elements of intellectual property rights protection, this is something that we obviously work on very, very hard with a lot of countries. And we're looking forward to the opportunity, as I said earlier, to pursuing the protection of intellectual property rights in a vigorous fashion in Cuba now that we have a better opportunity to pursue those protections.

The question of section 211 has come up in the World Trade Organization, and the United States was, if you will, taken to dispute by—dispute settlement by the European Union some years ago with respect to section 211. And that was a longstanding point of disagreement between the United States and the European Union.

Since the granting of the specific license and then the trademark to Havana Club, there has been a noticeable lessening of the European Union's level of interest in that issue. So, in a sense, we have made some progress in the overall strategy of intellectual property rights protection and cooperation with Europe as a result of this one specific case.

Ms. BASS. Should it be repealed, that section?

Mr. TONG. I don't have an Administration position to convey to you on that matter.

Ms. BASS. Do you know of any instances in which Cuba has failed to honor its obligations under the IAC in relation to U.S. companies?

Mr. TONG. I'm going to have to get back to you on that because that's a rather specific question and I'm not researched on it.

Ms. BASS. Do you have any concern over the thousands of trademarks that are registered in Cuba from U.S. companies?

Mr. TONG. Absolutely. My understanding is that there's somewhere in the range of 5,000 U.S. trademarks that are active in Cuba. And the protection of those trademarks is of great interest to the United States, and we need to pursue it vigorously.

Ms. BASS. So one of the questions is, if we move toward closer and better relations with Cuba, are we in a better position to protect those trademarks than if we were to roll back the direction that the Administration is pursuing now?

Mr. TONG. In the Administration's estimation, yes, we are in a better position to pursue this entire topic of intellectual property rights protection with Cuba based upon our recent approach. In fact, we've gotten some positive feedback from the Cuban Government with regard to their openness toward having detailed and specific conversations about intellectual property rights protection.

Ms. BASS. Thank you.

Would you like to add anything, Ms. Denison?

Ms. DENISON. I think he did a great job.

Ms. BASS. Okay. I yield back my time.

Mr. ISSA. The gentlelady yields back.

The Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing. I submit my opening statement for the record. And I'm happy to yield to you so you can continue your excellent line of questioning.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

At the core of the House Judiciary Committee priorities are the fundamental constitutional rights guaranteed to Americans such as freedom of speech, freedom of the press, freedom of religion, and freedom from having the government confiscate your property without compensation. Although the United States was initially one of only a few countries with such explicit guarantees for its citizens, more countries began to recognize such basic rights for their citizens as well. Decades after Soviet aggression created an Iron Curtain across Europe, Eastern Europeans rose up to reclaim their rights from governments that had long oppressed them.

Cuba's version of the Iron Curtain arrived in the 1960s, bringing property seizures of churches, homes, and businesses while locking up and even executing those who objected. Many were forced into exile in America. Some of the property seizures were for properties and assets that were owned in whole or in part by Americans including homes, businesses, and financial investments. No one—American, Cuban, or otherwise—was compensated for the seizures of their property.

In 1964, Congress directed the International Claims Commission, now known as the Foreign Claims Settlement Commission at the Department of Justice, to undertake a process to enable American citizens and businesses to submit evidence to prove their property seizure claims. Almost 6,000 claims submitted by Americans were certified with an estimated value in 1970's dollars of close to \$2 billion dollars. No money has ever been paid by Cuba to settle these or other claims.

Although these claims are grounded in numbers and paperwork, they reflect personal and direct losses to individuals and their families whether they were:

- Businesses whose shipments of merchandise were never paid for

- Family homes of those forced into exile in America
- Family businesses such as the Arechabalas
- Retirees who were counting on their investments in Cuban businesses to provide for their income

Reflecting the direct personal impact upon families, one of our witnesses here today is from a family that was forced into exile, leaving everything they had worked for behind in order to live in exile in Florida.

The Administration has long been interested in restoring diplomatic relations with Cuba, believing that reopening relations would lead to greater freedoms for Cubans. However, its tactics have been nothing short of bizarre. Just one year ago tomorrow, Congresswoman Ileana Ros-Lehtinen and I sent a letter to the Bureau of Prisons demanding answers to the Administration's efforts in facilitating the artificial insemination of the wife of a convicted Cuban spy, Gerardo Hernandez, even though he was convicted on 13 counts, including conspiracy to commit murder. The answer from the Bureau of Prisons was less than illuminating. Only a few months ago, Gerardo Hernandez's sentence was commuted by President Obama after which he returned home to a triumphant meeting with Fidel Castro where he was unrepentant for his crimes.

Since the reopening of U.S.-Cuban diplomatic relations last summer, it appears little has changed for Cubans not favored by the regime. In September, members of a dissident group known as the Ladies in White were arrested as they traveled to see the Pope to advocate for human rights. In December, they were arrested again as they protested in support of basic human rights on the day known as United Nations Human Rights day.

This Administration has failed to aggressively seek compensation for property seized by Castro's regime and failed to stop the persecution of Cubans advocating for basic human rights. Meanwhile it has assisted a convicted Cuban spy to artificially inseminate his wife from a U.S. prison, something no other federal prisoner has been allowed to do.

Today's hearing will help shed light on the Administration's response, or lack thereof, to the confiscation of property, including trademarks, by the Castro regime. I look forward to the witnesses' testimony.

Mr. ISSA. Well, I'm going to continue somewhat, but I'm going to change a little bit.

Commissioner, H.R. 1627, you've seen the legislation that proposes changes to 211, correct? And it does eliminate any specific reference to Cuba. And it makes 211 essentially an impediment to those who would steal somebody's property and then try to—in another country and then gain use of it here.

Do you have any questions or doubts about its validity under WTO?

Ms. DENISON. I'm sorry, could you—

Mr. ISSA. H.R. 1627, you can implement it if it's passed by the Congress, right? The Trademark Office hasn't issued any objections or anything that would cause us to think you have a problem—

Ms. DENISON. I understand there are a number of proposals pending, and there is no Administration position on any of them, to my knowledge.

Mr. ISSA. Well, that's why you're a Commissioner. Have you read it, and do you have any problem with it?

Ms. DENISON. I am not authorized to state a position without the Administration position being—

Mr. ISSA. I'll remember that when we talk about the independence of commissions.

Mr. Secretary, since they've sent you here, you mentioned that you were concerned about 211. You mentioned that essentially giv-

ing this trademark back to Cuba ameliorated friction between us and our French partners and so on.

Where does the family get compensation for your benefit? You got the benefit. You've improved relationships. The original owners got screwed, right? Are you planning to make them whole in return for the benefit you got?

Mr. TONG. Well, my understanding is that the trademark—

Mr. ISSA. You traded real property that belonged to somebody.

Mr. TONG. Thank you, Mr. Chairman.

The trademark in question is being litigated in U.S. courts as of this date.

Mr. ISSA. Okay.

Well, let me go through a question. Commissioner, I hope you can answer this without going back. And I'm not sure you can. But, in 1974, the Cuban Government applied for a trademark, and it was granted. There was an embargo at that time. They could not legally give you \$35. Where did they get permission to give you the \$35?

And I understand that some law firm submitted it and somebody in Luxembourg did it. But the mark went to Cuba; therefore, it was clearly Cuban money.

On what basis did you grant them the trademark, to your knowledge? What was your legal authority to take that \$35 then?

Ms. DENISON. Thank you for the question.

When Cubaexport applied for the trademark application in 1974, they were allowed to proceed under the general license provision of the Cuban Asset Control Regulations. So there was no problem accepting money.

Mr. ISSA. You had no problem accepting their \$35.

Ms. DENISON. That is correct.

Mr. ISSA. Okay. Well, we'll check into that. That's not what we're told.

Additionally, instead of an intent to use, they filed based on having a trademark in Cuba. They simply submitted an attached trademark from Cuba and said, "This is our application for the same," correct?

Ms. DENISON. Yes.

Mr. ISSA. Okay.

Now, interesting thing about trademarks, if anybody other than Cuba applied for a trademark, let's say Darrell Issa, and then went more than a decade of not selling one single drop, one single bottle, would their trademark still be valid and enforceable?

Ms. DENISON. It might be if they could show—there's a section of the statute that is called excusable non-use. And, in certain situations, use is not required. So, for example, if there's an embargo—

Mr. ISSA. Well, let me go through that, because embargo was exactly what was in place. At the time of the application, there was an embargo. So they filed saying they were going to do something that they couldn't do legally and can't do today. Isn't that true?

Ms. DENISON. No, that's not correct.

Mr. ISSA. Can they ship to the United States today, madam?

Ms. DENISON. No, they cannot, but—

Mr. ISSA. Could they ship to the United States in 1974?

Ms. DENISON. No.

Mr. ISSA. Has there been any period of time between 1974 and today in which they could ship to the United States?

Ms. DENISON. No.

Mr. ISSA. Do you ordinarily accept and provide trademarks excluding others when, in fact, they're not entering commerce?

Ms. DENISON. We have to honor our treaty obligations. And this was filed under a treaty obligation—

Mr. ISSA. Okay.

Now, the family—

Ms. DENISON [continuing]. Known as section 44(e).

Mr. ISSA. Right. The family, through Bacardi, has tried to renew their activity and, in fact, has an application pending. And the only thing working against them is that, when they had no money, extenuating circumstances, they were unable to file their renewal, and they were poor and destitute because all of their assets had been seized.

Isn't there a provision in the law that would have allowed the family to be able to renew their trademark in 1974, 1975, 1976 and, in fact, say that these circumstances prevented it, and that circumstances was, in fact, the confiscation of our assets and so on? Isn't it within the power of the Trademark Office? You could have made a decision to renew their trademark too, Couldn't you?

Ms. DENISON. Are you referring to the trademarks previously owned by the Arechabala family?

Mr. ISSA. Yes.

Ms. DENISON. They could have claimed excusable non-use.

Mr. ISSA. So, my last quick point. In 1974, the trademark was not codified, right?

Ms. DENISON. In 1974, the Arechabala family did not have any registrations on the U.S. Register. Is that your question?

Mr. ISSA. No. In 1974, they entered into what had been a latent—never mind. You know what? I'll wait for additional time. I don't want to take from other Members. The gentlelady from Washington has been patiently waiting.

Ms. DELBENE. Thank you, Mr. Chair.

And thanks to both of you for being with us today.

Commissioner Denison, in your testimony, you note that the PTO's decision to accept the authorized fee payment and the most recent Havana Club petition in no way decides the Havana Club trademark dispute. So I wondered if you could elaborate on why this is and comment on the distinct roles that the PTO and the courts have in resolving such a dispute.

Ms. DENISON. Thank you very much. And, by the way, we appreciate your participation in the Trademark Caucus.

Ms. DELBENE. Thank you.

Ms. DENISON. So when the Trademark Office is presented with documents for renewal, we look at the documents; we do not examine ownership at that point in time because of treaty obligations that we have which restrict our ability to examine ownership in the post-registration renewal period. And we only look at the ownership if, in fact, there is someone who sends the documents in does not match the name in our records. So we don't have resources to

investigate the ownership, and people are required to declare under penalty of perjury that they own it.

So what happens is, if there is a dispute, people file cancellations. And so, in fact, that is what has happened here. Bacardi has filed a cancellation proceeding, and that is now in Federal court. So we are not the ultimate arbiter of ownership. That is where we hope the ownership dispute will be resolved, in the Federal court case that is now pending between Bacardi and Cubaexport.

When you get a registration, you just get a presumption of ownership. And then, when it's challenged in court, that can be rebutted.

Ms. DELBENE. Thank you.

Secretary Tong, in your view, has the Administration's decision in any way dictated an outcome in the trademark dispute?

Mr. TONG. Thank you for your question.

No. In our view, this trademark dispute will be settled in Federal court.

Ms. DELBENE. And in terms of any intervention that Congress might do, what are your concerns about that at this point in time? If either of you have concerns.

Mr. TONG. Well, I'm not sure I have any particular concerns to express beyond the fact that—to once again express the really strong determination of the Administration to make the protection of intellectual property rights and the pursuit of the legitimate claims of U.S. nationals who have had their property confiscated by Cuba—our, you know, very vigorous pursuit of both of those initiatives going forward. And we believe that, you know, recent circumstances and events have strengthened our capability to do so.

Ms. DELBENE. Commissioner, do you have any additional comments on that either?

Ms. DENISON. No.

Ms. DELBENE. Okay.

Thank you both for your time.

And I yield back, Mr. Chairman.

Mr. ISSA. Would the gentlelady yield just to a clarifying question you had?

Ms. DELBENE. Yes, I yield.

Mr. ISSA. Thank you.

When you said U.S. nationals, would those include people only at the time of the seizure in 1960, or would it include all of the Americans who exist today who fled afterwards and whose assets were seized while they were still Cuban nationals?

Mr. TONG. Yeah, thank you for that question. I think it's an important point of clarification.

Our claims talks that began last December are pursuing three areas. The first and most important is the claims of some 6,000 U.S. nationals, the total value of approaching \$2 billion, a very significant amount. The second is claims of the U.S. Government. And the third—I'm afraid I've forgotten right now, but I'm sure it's also very important.

But the—

Mr. ISSA. It could be Cuban nationals who are now Americans.

Mr. TONG. But the Foreign Claims Settlement Commission, Mr. Chairman—I think this is an important point—has, under statute,

only been able to accept the petitions of people who were U.S. nationals at the time of the property being taken.

Mr. ISSA. So the Bacardi family and all the other families involved who fled Cuba after a dictatorship seized their assets are not covered by anything you're doing today is what you're saying.

Mr. TONG. Under the current laws and statutes that we have to work with, the Foreign Claims Settlement Commission is——

Mr. ISSA. No, no. I apologize. I'm on the gentlelady's time. But the question was are you pursuing on their behalf, not something about the claims. You certainly have the right to bring up a whole host of families, including, to be honest, the Bacardi family, who can't sell Bacardi rum in Cuba, not just Havana Club and their family.

So the question—I just want to make sure the gentlelady's question, which you answered, was answered, that, if I understand correctly, no, you are not dealing with those who came to America escaping persecution. We have, you know, a person on the next panel that fits that description. That's why I asked.

Mr. TONG. So I will take your question and concern back to the State Department. I think it's—my understanding is that, again, we are pursuing, first and foremost and at this point exclusively, the property of the people who were U.S. nationals at the time of confiscation.

Mr. ISSA. Thank you.

Mr. Marino?

Mr. MARINO. Thank you, Chairman.

The question I'm going to ask I would like each of you to respond to, if you would, please.

Has anyone from the Administration, the Obama administration, whether it's the White House, whether it's State, anyone that you work for, anyone you work with, has anyone said to you that this issue cannot be part of or get in the way of the reinstating of diplomatic ties between the U.S. and Cuba?

Secretary?

Ms. DENISON. No.

Mr. MARINO. Or Commissioner. Go ahead.

Ms. DENISON. Sorry I answered first.

Mr. MARINO. That's all right.

Ms. DENISON. The answer's no.

Mr. MARINO. No?

Mr. Secretary?

Mr. TONG. Again, to my knowledge, in the course of the conversations that the U.S. Government had with the Cuban Government about the resumption of diplomatic relations, as far as I'm aware, the matter of Havana Club did not come up.

Mr. MARINO. Do you know if there were any communications with anyone else in the White House pursuing this matter within any other department or agency in the U.S. Government?

Mr. TONG. Again, to my knowledge, there was no quid pro quo, and this was not a question of negotiation, that the Havana Club matter is a matter of U.S. regulatory action and then now, after that regulatory action, now it's a matter before the U.S. courts.

Mr. MARINO. Commissioner?

Ms. DENISON. I'm sorry, could you repeat the question?

Mr. MARINO. Do you know of any communication, if there exists, between the White House and any other department or agency concerning the issue with this patent?

Ms. DENISON. Yes. There were communications from the White House to the USPTO staff at some point regarding what the procedure was for the petition.

Mr. MARINO. And do you know where that communication went and what was the intent behind it?

Ms. DENISON. I don't know what you mean by where it went or—

Mr. MARINO. Well, the White House communicates to staff at USPTO, right?

Ms. DENISON. Yes.

Mr. MARINO. What was their request, or what were their instructions?

Ms. DENISON. To the best of my knowledge, there were no instructions. It was an inquiry, and we provided information.

Mr. TONG. Mr. Marino, can I provide a clarification?

Mr. MARINO. Please.

Mr. TONG. I don't want to leave you with the impression that the Cuban Government has never raised the Havana Club issue with us, because they have raised it with us.

Mr. MARINO. I'm sure.

Mr. TONG. But it was—and that won't surprise any of us. But it was not, to my knowledge, a matter of negotiation or of any quid pro quo in the discussions with Cuba.

Mr. MARINO. Now, Mr. Secretary, you said that State is seeking claims. For whom is State seeking claims, specifically?

Mr. TONG. We're seeking compensation from the Cuban Government.

Mr. MARINO. For whom?

Mr. TONG. On behalf of 6,000-odd U.S. nationals who were U.S. nationals at the time that their property was confiscated.

Mr. MARINO. And how is that going?

Mr. TONG. Well, it just got started, and obviously it's going to be a complex process. I know we were, at the initial meeting, able to lay out the full scope of our claims and the rationale behind them and have that initial discussion. But we're asking for compensation, so it will be a—I don't want to handicap the process for you, sir.

Mr. MARINO. When you say you're asking for it, is there going to be some restrictions concerning Cuba if they do not agree to compensate these people? Is there going to be any retaliation from the U.S. Government that you know of?

Mr. TONG. I don't want to comment on the negotiations per se, and perhaps we can follow up and have a—the people that are directly involved in those negotiations could have a conversation with your staff—

Mr. MARINO. Okay.

Mr. TONG [continuing]. To explain more about the course and the strategy of those negotiations.

Mr. MARINO. Now, a question for the two of you I have, in 34 seconds: Do you think either State or USPTO or you personally have the responsibility of raising the issue with the Administration pur-

suant to the Administration's move to begin diplomatic ties again with Cuba and raise the issue with the White House over this issue concerning the patent?

Ms. DENISON. I did not think I had any obligation to raise it with the White House, no.

Mr. MARINO. You knew of the existing complications in this case? People claiming to have ownership and then—

Ms. DENISON. I am aware that there are a number of people claiming ownership in the Havana Club mark. We have pending applications not just from Bacardi. There is also—and I apologize if I mispronounce it—the Arechabala family. There is a pending application from them. There was a pending application filed last year by somebody named Mr. Solar. I think he abandoned recently. But, anyway, there are multiple parties claiming ownership.

Mr. MARINO. All right.

My time has expired. Thank you.

Mr. ISSA. Just to follow up very—just one thing. You did mention to the gentleman from Pennsylvania communications with the White House. But then, earlier, you said there was no document. Is this all oral communication?

Ms. DENISON. Yes.

Mr. ISSA. Okay.

Ms. DENISON. To the best of my knowledge.

Mr. ISSA. Okay. Can you be provide us memos and any other information that may exist related to the—you know, in your business, everyone does a memo for the record. Could we have any of that that exists so we could understand the context?

Ms. DENISON. Yes, Mr. Chairman, if it exists.

Mr. ISSA. Thank you.

We now go to the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you.

And I thank the witnesses for their presence here today.

Commissioner Denison, I want to go over some issues related to the excusable non-use doctrine, some of which you may have already covered, and then build upon that to the extent time permits.

Just so that I'm clear, to obtain and maintain a trademark registration, the mark owner has to show use. Is that correct?

Ms. DENISON. In order to get a registration to begin with, most people have to show use in commerce. There are certain exceptions, though, to honor our treaty obligations. And so, in those cases, those people would not have to show use in commerce to obtain a registration.

However, everyone has to show use in commerce, as a general rule, between the fifth and sixth year of the registration date. The exception is if you can prove excusable non-use, which is provided for in the statute. And we did talk about it a bit earlier.

Mr. JEFFRIES. Now, let me ask about that. In the case of excusable non-use, am I correct that it's a temporary doctrine in its application?

Ms. DENISON. There's no restriction on it in the statute.

Mr. JEFFRIES. Okay. Now, under U.S. trademark law, non-use of a trademark for 3 consecutive years, as I understand it, creates a rebuttable presumption of non-use. Is that right?

Ms. DENISON. That's a different concept. That is rebuttable presumption of abandonment.

Mr. JEFFRIES. Right. But that relates to non-use, correct?

Ms. DENISON. It does. It's sort of a complicated legal interpretation, though.

Mr. JEFFRIES. Okay. And it's 3 years, which is what creates the rebuttable presumption, true?

Ms. DENISON. Yes.

Mr. JEFFRIES. Okay.

Now, how does that legal concept work in the context of a trademark that's been registered since 1976 but has never actually been used in the context of U.S. commerce?

Ms. DENISON. Well, the excusable non-use part of the statute—I'm going to have to ask my legal team for an opinion on this, but I think that the excusable non-use can trump any claim of abandonment.

Mr. JEFFRIES. Okay. I'd be interested—

Ms. DENISON. I can get back to you on that, though. I'd like to consult.

Mr. JEFFRIES [continuing]. In some clarification.

Ms. DENISON. That's a complicated legal question you asked me.

Mr. JEFFRIES. Okay. No, thank you. Well, I should thank my staff for that complicated legal question, actually.

Let me—

Mr. ISSA. It was a good one.

Mr. JEFFRIES. Let me explore a different concept. Now, it's my understanding that there's a principle under law which I guess technically is referred to as geographically deceptively misdescriptive goods. Is that correct? It's kind of an awkward phrase, but that's the concept, correct?

Ms. DENISON. Yes, there is such a concept.

Mr. JEFFRIES. Now, in terms of that concept, could you just elaborate on—I believe there are four factors connected to that principle in the statute, one of which—I think the one that grabs my attention is—or the two that grab my attention are: one, the primary significance of the mark is geographic; and, two, purchasers would likely believe that the goods or services originated in the place named in the mark.

Is that correct, in terms of two of the factors, two of the four factors connected to this principle?

Ms. DENISON. That sounds right. I don't have the statute in front of me, but that sounds generally correct.

Mr. JEFFRIES. I'd be interested, you know, sort of, in your opinion, as it relates to the Havana Club mark—and this was an issue that some of us explored when we were in Europe as the Judiciary Committee related to the concept of champagne in France and understanding what's the difference between champagne and sparkling wine.

In the context of the Havana Club mark, is it your understanding—I believe it's correct—that the Havana Club rum was actually made in either Puerto Rico or the Bahamas. Is that right?

Ms. DENISON. Excuse me. Whose Havana Club are you—

Mr. JEFFRIES. The Bacardi rum.

Ms. DENISON. My understanding is it is not made in Cuba.

Mr. JEFFRIES. Correct, that it was made in Puerto Rico or the Bahamas. And—

Ms. DENISON. I honestly don't know where it's made. I think it may have been made in Puerto Rico, but I did not know it was made in the Bahamas.

Mr. JEFFRIES. Okay. Right. We might be able to clarify that if time permits with the second panel. But what I'd be interested in—

Mr. ISSA. The gentleman, for the record, it says "San Juan, Puerto Rico" on the bottle.

Mr. JEFFRIES. Okay.

Mr. ISSA. The bottle's open if you want to inspect.

Mr. JEFFRIES. It's tempting.

And so my time has expired, but if the Chair would permit, I'd be interested in your thoughts on the—your views as it relates to this particular concept of geographic deception as it relates to a Havana-related mark put onto the market by Bacardi with the rum actually being made in San Juan, Puerto Rico.

Ms. DENISON. Thank you for your question.

I believe that when we were examining the Bacardi application many years ago that that was raised as an issue in the Bacardi application, the fact that it could possibly be geographically misdescriptive, deceptively misdescriptive, if the rum was not, in fact, being made in Havana.

Mr. JEFFRIES. And, as far as you know, that's an open legal question?

Ms. DENISON. Well, the application is still pending.

Mr. JEFFRIES. Okay. Thank you.

Thank you, Mr. Chair.

Mr. ISSA. Thank you.

We now go to the gentleman from Texas, Mr. Poe, for his round of questioning.

Mr. POE. Thank you, Mr. Chairman. I think you cut my mike off. Maybe you did that on purpose.

Mr. ISSA. Well, mine is working, but I really didn't touch yours. See if maybe the—try the next one down. We haven't done anything.

Ron, does your work?

Mr. DESANTIS. Yep.

Mr. ISSA. It's just you, Ted.

Mr. POE. I'm sure it is. It always is.

This issue—as maybe some of you know, I used to be a judge. And the more I hear about this specific case, the more I'm glad that I tried criminal cases, you know, bank robberies, kidnappings, murder cases.

Be that as it may, let me see if I can look at this from a big-picture situation. Cubaexport is the Cuban Government. Is that correct?

Ms. DENISON. Yes.

Mr. POE. And it's really the military portion of the Cuban Government that runs a company. And if you want to export something out of Cuba, you work through Cubaexport, which is a government military-run corporation that sometimes partners with other people

throughout the world, like the French in this particular case, to sell a product abroad. Is that a fair statement?

Ms. DENISON. I'm not prepared to opine on Cubaexport.

Mr. POE. Well, this whole thing is about Cubaexport. You don't know anything about Cubaexport?

Neither one of you know anything about Cubaexport?

This isn't a gotcha question. I'm just trying to lay the foundation of who the people are we're talking about in this case.

Mr. TONG. Yeah. Thank you, sir.

Cubaexport is a state-owned corporation. So it is owned and managed by the Cuban Government.

Mr. POE. Cuban Government, primarily the military.

So what happened? When the revolution happened, the Cuban Government swoops in and steals property from Cuban nationals and foreign nationals, foreign corporations, and nationalizes the property, makes it theirs. Then they set up another corporation, called Cubaexport, to run these companies like Bacardi and sell stuff abroad. They partnered with the French in this particular case.

And this dispute is whether or not the United States, the trademark, and they should still be allowed to sell or not sell and whether Bacardi and Puerto Rico can sell or not sell. I mean, is that a generally rough statement of what's going on in this particular case?

Mr. TONG. I mean——

Mr. POE. Or not?

Mr. TONG. The case is certainly a matter—the trademark dispute is definitely one between—and you'll be hearing from them in your next panel, I believe—Cubaexport, which is a state-owned Cuban corporation, and Bacardi, which is not.

Mr. POE. Okay.

And so we're in a position where Congress is considering under legislation to weigh in on this particular case, and we make a verdict, we'll make a verdict based upon the legislation filed by the Chairman, or we let it play out in the judicial system, in the courts, the Federal courts, where this particular case is now.

I mean, is that right? The case is in Federal court?

Mr. TONG. The case certainly is in Federal court.

And, sir, if I can make one observation on that, as someone who is charged with the promotion of intellectual property rights overseas, it's a matter of pride in explaining the strength of the United States intellectual property rights system that we do have a court system that operates well and considers the merits of each case in a proper fashion.

Mr. POE. All right.

Mr. TONG. And I must say that I'm confident that our court system will provide the most high-quality judgment in this case compared to those of any other country.

Mr. POE. And I generally have the belief and feeling that if something is in the court system the court system ought to settle the issue, and Congress should really stay out of it, as a general rule. I'm not talking about this particular case.

But we are dealing with the Cuban Government now and trying to open it up and be more—let's see—have a better relationship

with Cuba nationally. And my concern is similar to one that Mr. Marino, who used to be a Federal prosecutor, said. We're dealing with Cuba, and my belief is we do a lousy job when it comes to dealing with someone that's an adversary. The Iranian deal is a perfect example, in my opinion. I think that was a bad deal for the United States.

Now we're dealing with Cuba. Are we dealing with them through strength or through weakness in our political dealings with Cuba?

Of the 6,000 claims—you know, the Cubans, they don't take back convicted criminals that are ordered deported back to their country. They don't take them back. You know, China doesn't take them back either. And it's very difficult to deal with the Cuban Government on a level playing field.

So are we giving up our strength in dealing with Cuba diplomatically over these claims, over this case, over the other cases that include Americans, that don't include Americans, that include Cubans, in your opinion? Or are we fighting for, you know, what we want to be fair in the outcome of our relationship with Cuba and what they have done in the past to steal everybody's property?

Mr. TONG. I think you've raised an important matter here, sir. And, yes, the U.S. Government is pursuing the claims of U.S. nationals against the Cuban Government with great vigor and, we believe, in an intelligent fashion, which is by creating an environment where we can actually engage with the Cuban Government and seek resolution of those claims across the table, presenting our case clearly and scientifically to the Cuban side.

And I must say that, in the estimation of the Administration, the fact that we have faith in the fairness of our own court system to adjudicate this trademark dispute actually adds to our legitimacy and strength in pursuing that conversation with Cuba. We don't agree with Cuba on everything, by any means, but a demonstration of confidence in our democratic system adds to our strength in pursuing these claims.

Mr. POE. I would agree with your comment about our judicial system. It is the absolute best in the world.

But I yield back to the Chairman.

Mr. ISSA. Mr. Poe, where would you put the Cuban judicial system in that hierarchy of best to worst?

Mr. POE. Well, first of all, it's a misnomer. It's not a Cuban judicial system; it's just a system. So it's not much of a justice system, but it's just a system.

Mr. ISSA. Thank you.

And, with that, we go to the gentleman from Florida, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Tong, you were talking about trying to create conditions to get results here, but the President's policy change was announced, I believe, in December of 2014. So, since that point, how many certified claims have been paid by the Cuban Government to U.S. citizens?

Mr. TONG. None yet, sir.

Mr. DESANTIS. That's what I thought.

And when you have discussed the issue—I think in your testimony you said that they have been provided an overview of nearly

6,000 certified claims—how did the Cuban Government officials respond to that?

Mr. TONG. I was not a participant to those negotiations, so I don't think—

Mr. DESANTIS. Do you know if any commitments were made?

Mr. TONG. They listened to the presentation of the U.S. claims, and we're beginning a complex process of pursuing them with great vigor.

Mr. DESANTIS. So that's a way to say "no," I think, that there were no commitments made, correct?

Mr. TONG. We're still just getting started in this conversation.

Mr. DESANTIS. Well, I get that. I just think that when you're dealing with a regime of this nature, from their perspective, they've received all these concessions, I mean, a lot of cash they're going to end up getting, and they really haven't done anything for us. And I think that they're just gonna keep doing this and try to pocket concessions. So I think that this has been a mistake in approach.

Now, let me ask you this, Commissioner. As a general matter, seized trademarks, should those be registered to those who seized them or to their rightful owners?

Ms. DENISON. The situation with Havana Club is that we registered it because they were permitted to pay under the—

Mr. DESANTIS. I understand. But I'm just saying, as a general matter, when you have a trademark that's seized, is it better that the person who seized it is recognized or is it better that the person who originated it is recognized? Will it be better policy?

Ms. DENISON. It's not my job to opine on the law that you have put into place. Congress has put into place section 211. So if there were another situation and another special license were issued, I would be in a situation where I had to take the money.

Mr. DESANTIS. Well, I'm glad you mentioned 211. What type of legal analysis, if any, did the Patent and Trademark Office undertake before departing from the precedent, the longstanding precedent, following the language of 211 with respect to this issue?

Ms. DENISON. I think it's important for you to understand that section 211 is administered by OFAC. And so, once we received the specific license—we were not involved with the OFAC decision to issue a specific license. But once we received the specific license, the law had been complied with, and we didn't have an option, we had to issue the renewal.

Mr. DESANTIS. So you did not do any separate legal analysis for that reason. Is that what you're saying?

Ms. DENISON. Correct.

Mr. DESANTIS. Okay.

Well, Mr. Chairman, I appreciate you calling this hearing. I think it's something that's very frustrating to see, you know, the Cuban Government seizing all this property. This has been going on for decades. And it seems like they're going to get away with a lot of this stuff, and, you know, I think that's a real tragedy. But I know we have the next panel coming up, and so I will yield back.

Mr. ISSA. Will the gentleman yield for just 1 second?

Mr. DESANTIS. For 1 second.

Mr. ISSA. Mr. Secretary, did you do a legal analysis? They asked the Commissioner, but since you folks—you and OFAC—was there

a legal analysis done by State, who effectively made this happen while tying the hands of the PTO? Ms. Denison has made it clear she had no choice. You had a choice. What was your legal analysis for it?

Mr. TONG. We also followed the guidance of OFAC in the interpretation of—

Mr. ISSA. So I need to get OFAC here to find out if they did a legal analysis?

Mr. TONG. Yes, sir.

Mr. ISSA. Okay. Well, I guess that's what the empty chair is for. Thank you, Mr. DeSantis.

We now go to Mr. Deutch, another gentleman from Florida.

Mr. DEUTCH. Thank you, Mr. Chairman.

I apologize. I had another meeting. But I'd just like to walk through a couple of points.

Secretary Tong, as the Administration moves toward normalization, there's been broad recognition, widely discussed, that confiscated and disputed property claims have to be resolved, and I absolutely agree with that.

What I am confused about is, how was it that we decided before any of the many claims, many claims that are out there that have been the focus of much discussion, before any of those claims are resolved, that we would toss aside this heavily disputed trademark? Why was Havana Club marked first on the list?

Mr. TONG. Our handling of the Havana Club registration—the State Department's role, to be very specific, was to provide foreign policy guidance to OFAC in its decision about whether to grant a specific license that provided Cubaexport the ability to pay a fee, which would allow them to register a trademark.

Mr. DEUTCH. Right.

Mr. TONG. It—

Mr. DEUTCH. And you had said—I'm sorry. But you had said earlier, or you said in your testimony that—specifically, you'd said that State's role was not to adjudicate the ownership of the disputed trademark rights and the Department took no position on that issue.

Mr. TONG. Correct.

Mr. DEUTCH. But how is it that granting of an OFAC license is not taking a position on the issue?

And here's the question. Here's why I rushed back here as quickly as I could. Shouldn't we clearly bar the recognition of any sort if the mark was used—if the mark that's used was used in connection with a confiscated business and the original owner hasn't consented? And aren't we just legitimizing the confiscation and then telling the original owners to take their objections to court?

And I hope that it's not going to be a broader reversal of what has been U.S. policy, to not recognize any interest in confiscated property. And I also hope that it's not a foreshadowing of the process that might be used in future Cuban confiscated property claims resolution.

Mr. TONG. So there was a lot in what you said.

Mr. DEUTCH. There was. I realize that.

Mr. TONG. Our action, the State Department action, again, was to issue foreign policy guidance that then informed the decision to

allow a trademark registration. That trademark registration is now a matter of dispute in U.S. Federal court.

So the U.S. administration action, in particular the State Department action, in this regard, as I said, was not to adjudicate this claim, but, rather, it creates a situation where it will be adjudicated—

Mr. DEUTCH. Right, but—

Mr. TONG. If I could—

Mr. DEUTCH. No, but I just want to follow up on that point. But that gets to the question I asked. Isn't that just essentially legitimizing the confiscation and then telling the original owners just simply take your case to court?

Mr. TONG. Well, in the question of broader claims of U.S. nationals against the Cuban Government, I've stated several times this evening that we are pursuing those with great vigor and, we believe, with an astute strategy, sitting down directly with the Cuban Government to address these claims of 6,000 people, worth close to \$2 billion. And we will pursue those claims with great energy and vigor and determination.

That is a separate matter in a different channel and an entirely different matter than the question of a trademark registration for a disputed trademark.

Mr. DEUTCH. But how is the—ultimately, we're talking about these claims, and, in all cases, we're talking about the confiscation of property, right? So, I mean, in those cases where we're talking about the confiscation of property, why is it different in this case with the confiscation of a trademark versus the others?

Mr. TONG. One of the differences in this case—and there are several in terms of the type of matter to be decided, again, not by the State Department. But one of the difference is that, in this case, the property which was confiscated that this trademark is associated with was that held by a U.S. national at the time of confiscation. So, under the law that we're operating under, it doesn't become a matter for us to be pursuing through the claims discussions. So that is one of the differences.

I just would encourage Members of Congress to consider the broader game here, which is the pursuit of the claims of U.S. nationals, worth in the billions of dollars, against a government that will not necessarily go easily into recognizing these claims. So we are going to go after those with great energy, and we should.

Mr. DEUTCH. I do—and my time is up, but I do—I appreciate the suggestion and your urging that I consider those. I consider those very seriously. That's why I am concerned about the possible precedential value—the possible precedent that's being set in the way this claim was handled, almost with the appearance that this one will cast aside to perhaps give us some greater leverage as we discuss these others. That's my concern.

But I yield back, Mr. Chairman.

Mr. ISSA. Thank you.

And I'll be brief, because I know we have a second panel.

One, isn't the \$2 billion the original value? Isn't it \$7 billion or \$8 billion? Isn't there interest—

Mr. TONG. On the—

Mr. ISSA. You may not be claiming it, but the value of money over a lifetime plus.

Mr. TONG. I'm not certain of the facts of that to answer—

Mr. ISSA. Well, aren't the 6,000 claims—

Mr. TONG [continuing]. Question. We'll get back to you on that.

Mr. ISSA. The 6,000 claims were about \$2 billion at the time that they were certified. So we're going to assume that they're a multiple of that at some point.

But let me just—I have to, to be honest, call you out on something that I'm—I'm concerned, the way you said it. You said "the broader game."

Now, this country welcomed tens of thousands of Cuban refugees to our shores. Those tens of thousands of Cuban refugees, including those who spent time in prisons and fled, those who died—some of them died on the boats, and some made it here. Those Americans, you've said repeatedly, are not part of your calculation. Isn't that true?

And, please, don't tell me about international law. I just want the straight answer.

Those tens of thousands of Cubans who fled to our shores, who we granted asylum and citizenship from a totalitarian dictatorship that oppressed them, that had no rule of law, they are not part of the current negotiations that you are trying to work with the Cubans. And yet you used the word "broader game."

Isn't that the broader game? Isn't the broader game justice for the tens of thousands here and the hundreds of thousands still in Cuba, that they get their rights? Isn't that the broader game for America?

Mr. TONG. Well, Mr. Chairman, as I've stated previously, the Foreign Claims Settlement Commission has recognized the claims of people who were U.S. nationals at the time of confiscation, and we're pursuing those claims vigorously through the negotiations.

Mr. ISSA. Well, doesn't your responsibility, your position, Secretary, include taking steps to eliminate trafficking in stolen U.S. property?

Mr. TONG. Yes, sir.

Mr. ISSA. So U.S. property is sitting there, perhaps a home that—a U.S. citizen in 1960, and certainly homes and businesses of U.S. citizens today. That's where rum is being produced. It's where Coca-Cola copy is being produced. It's where cigars are being produced.

So anything that we allow to come, including Havana Club rum, very, very possibly is coming from assets seized illegally, held by Americans. And your responsibility is to see that that doesn't get trafficked, isn't it?

Mr. TONG. Our responsibility is to uphold and implement U.S. law on all these matters.

Mr. ISSA. So, again, I'll go to the Commissioner.

And, please, this is within your jurisdiction. And I would ask that you use the level of career professionalism and not tell me that somebody I haven't yet brought before this Committee is the person to ask.

We talked earlier, and the round of questioning was rather interesting. The first question: There's abandonment, and then there's

an inability to ship the goods, to in fact use your trademark, correct? Okay.

The original trademark holder, who's one of the still applicants, that family, their assets—and they're American citizens today—their assets were seized in Cuba. Their product, if their assets were lawfully returned to them, could be made in Cuba and shipped from Cuba, couldn't it?

Well, I won't ask you to hypothecate that.

Ms. DENISON. I can't.

Mr. ISSA. Right. But the fact is they have a factory, or had a factory, in Cuba. If they didn't have to flee as refugees recognized by us, for asylum recognized by us, after a totalitarian dictatorship jailed them unlawfully, oppressed them, if they hadn't fled here, they could still be there. If they could be there, then they could ship from Cuba.

So in the question about Havana Club and origin, once Cuba returns to rule of law, once it returns to where the family can regain what was taken by it in no different matter than the Nazis took things—this government nationalized. They took assets. They gave no compensation. So the fact is Havana Club has a factory in Cuba, except it belongs to someone who is an American citizen.

So is there, within your recognition, a circumstance in which—as long as a military junta holds on to the asset that makes the alcohol, that family is unable to secure the money for their trademark or to ship from their native country of Cuba because their factory is being held by a military dictatorship. Isn't that every bit as valid a reason for the family not to be able to ship product and, thus, reclaim their trademark?

You know, the Cubans say we can't ship—the Cuban Government says we can't ship because we have an embargo. But this family can't ship because the Cuban Government took their factory, their distillery, and still holds it today.

Ms. DENISON. I believe I stated earlier that they could have preserved their registrations by claiming excusable non-use back in the fifties.

Mr. ISSA. But you have the right to waive any limit to go back and find those circumstances. You don't have—you mentioned you didn't have time limits. If the family came to you today and said, we want to reclaim it because we have been unable to ship from our country of Cuba, from our factory, because a dictatorship has taken it and seized it, you have the ability to grant that today. There's no time limit on that, is there?

Ms. DENISON. I don't have the ability to do that today because there is a blocking registration.

Mr. ISSA. Oh. Oh, that's right, because you were ordered by the State Department to grant a registration to the Cuban Government that seized their asset.

Ms. DENISON. I was not—

Mr. ISSA. The same State Department that's not going to protect the rights of those refugees and asyumees and their families, the tens and thousands of Cuban Americans who fled Cuba or were imprisoned and then got out of Cuba on a boat. They won't protect them. And you've granted a trademark to the Cuban Government

that did that, and that's going to block it today? Is that your testimony?

Ms. DENISON. I was not ordered by the State Department to do anything.

Mr. ISSA. Well, you provided the legal information necessary to compel you to give it. Because you said you had no choice once OFAC delivered that.

Ms. DENISON. The Department of Treasury—

Mr. ISSA. I'm sorry, Treasury.

Ms. DENISON [continuing]. Is where OFAC is.

Mr. ISSA. Treasury.

Ms. DENISON. Yes. So once the OFAC—

Mr. ISSA. I apologize for saying OFAC. Treasury. Thank you.

Ms. DENISON. Once—

Mr. ISSA. The problem is we have State here telling us that this is the bigger game that we need to understand.

Ms. DENISON. I understand that. I'm just a very small part of it, and I got a license from OFAC, and so then I followed the law.

Mr. ISSA. Right. You had no choice but to provide a trademark to a dictatorship that seized their assets and that now blocks the original owners, who had it seized from them, and whose children and grandchildren are fairly destitute today comparatively because, of course, they don't have the assets to make their distilled spirits.

Ms. DENISON. Is there a question?

Mr. ISSA. Well, "yes" would be fine.

Ms. DENISON. I had no choice but to renew registration number 1031651.

Mr. ISSA. Well, thank you.

I think, although the record is not complete, it is certainly complete as to what the broader game is by the State Department and the fact that you had no choice but to grant an injustice by renewing to a dictatorship that seized some of these assets their trademark, which will now, I predict, be used in Federal court for the presumption in favor of Cuba.

And that is what you have done here today, or have done. You have changed the presumption in the court. I will tell you, your testimony, Mr. Tong, that you don't think it's going to change the presumption, I don't think you're right. I think it will change the presumption. It shouldn't. And certainly I hope Congress passes a resolution hoping that the courts will recognize that your actions should in no way change the presumption of who has the actual right and who has had the right to that trademark since the 1930's.

Ms. DENISON. Mr. Chairman, the presumption has been in place since 1976. So we have maintained the status quo.

Mr. ISSA. I hear you. But no one was shipping any product; today, this product is being sold in at least 19 states. And notwithstanding the renewal—there's certainly 19 states' worth of common law rights, rights that in the ordinary course would not be stopped. And I would presume that the Cuban Government will seek to stop Bacardi in court. They will try to stop the sale of this even while they cannot sell the product.

We'll see how it works out. The one thing I know is the lawyers will get rich, the Administration will move on, and the thousands

and thousands of Americans whose parents and grandparents fled Cuba will feel undercut if you're only looking at 6,000 people who may have lost a stock or a bond but were Americans sitting here. And I hope this Administration will reconsider the broader game and understand that the broader game includes all Americans, not just those who were Americans in 1960.

If you have any closing comments, I certainly want to hear them.

And, with that, this panel is dismissed, and we'll take a 5-minute recess while we set up the next panel.

Ms. DENISON. Thank you.

[Recess.]

Mr. ISSA. I want to welcome all of you back.

And I take pleasure in introducing our second distinguished panel of witnesses. Once again, the witnesses' written statements will be entered into the record in their entirety.

And I would ask that you summarize your testimony in 5 minutes or less. To help us stay within the time, you see the lights. You know how the lights work. I will say no more.

Before I introduce the witnesses, pursuant to the Committee's rule, I would ask you all to please rise to take the oath and raise your right hand.

Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

Please be seated.

Let the record indicate that all witnesses answered in the affirmative.

Our second panel of witnesses today includes Mr. Rick Wilson, senior vice president at Bacardi-Martini, Incorporated; Mr. William Reinsch, president of the National Foreign Trade Council; Mr. Mauricio Tamargo, attorney at law of Tamargo LLP and former chairman of the Foreign Claims Settlement Commission, which certainly was talked about by the previous panel; and Ms. Escasena, a Cuban property claimant from Miami, Florida.

And, just for the record, are you one of the 6,000 that is in that stack that was referenced earlier?

Ms. ESCASENA. No, I'm not.

Mr. ISSA. Okay. So you are a claimant but not certified. You lost property but are not recognized. I just want to make that for the record.

And, with that, I will go down the list, starting with Mr. Wilson.

**TESTIMONY OF RICK WILSON, SENIOR VICE PRESIDENT,
BACARDI-MARTINI, INC.**

Mr. WILSON. Thank you, Mr. Chairman, Committee Members. Good afternoon—or good evening, I guess. My name is Rick Wilson, and I'm senior vice president of external affairs for Bacardi.

I'm here today to testify about the recent decisions of OFAC and the PTO, which issued a license and a trademark registration for the illegally obtained and now-expired Havana Club mark 10 years after the statutory deadline. These decisions are unprecedented and shocking because they undo decades of U.S. law and policy by sanctioning Cuba's efforts to capitalize on and traffic in stolen assets.

This dispute has a long history, and I will not go through all the facts, and I ask the Committee to look at my written comments.

I do have to say a few words a little bit about history. You know, the Bacardi and the Arechabala families were both very similar companies. They originated in Cuba in the mid-1800's. We both created rums and operated in a similar fashion until 1960, when armed forces of the Cuban Government, under the leadership of Fidel Castro, forcibly seized the company's assets in Cuba without compensation, throwing family members in jail or forcing them to flee the country.

And I just have an example. And we have the original, by the way, in our office. This is actually the front page of the newspaper that talks about the confiscations. And on the last page, actually, is the list, which have been circled, of the Arechabala company and the Bacardi company, in case there's any doubts.

Unlike the Arechabala family, the Bacardi had assets outside of Cuba and successfully stopped Cuba from selling rum under the Bacardi name around the world. We had to fight them in a number of places. Unfortunately, the Arechabalas did not have those assets outside of Cuba and were unable to continue their business.

After losing the fight for the Bacardi brand, the Cuban Government, they lied in wait. And in 1976, you heard earlier, after the family's U.S. trademark registration understandably lapsed, Cuba fraudulently registered the mark for itself.

Years later, then it sought an OFAC license, by the way, to transfer that illegally obtained registration to that joint-venture company you heard about earlier half-owned by Pernod Ricard, a French liquor company that today is the second-largest spirit company in the world. OFAC, back then, properly denied that request.

However, the Cuban Government would be faced in 2006 with another need to renew its illegally obtained registration. But, this time, a very important law had been passed by Congress, called section 211, which specifically requires confiscators and their successors to seek a specific license to obtain or renew a trademark registration for Cuban confiscated trademarks.

Cuba applied for such special license, and OFAC refused to grant it back then, stating, and I quote, "We have received guidance from the State Department informing us that it would be inconsistent with U.S. policy to issue a specific license authorizing transactions related to the renewal of the Havana Club trademark." And indeed it was, and indeed it still should be.

As a result of OFAC denying this license application, the PTO denied the trademark renewal, stating that the registration will be canceled expired. Again, this, as was stated earlier, 2012, all the litigation regarding that ended.

The Cuban Government sued the U.S. Government during this timeframe, and OFAC specifically defended its decision to deny the license application all the way to the Supreme Court, which declined to hear the case.

That should have been the end to the matter. However, in unprecedented fashion and for unknown reasons, the PTO refused to remove the canceled mark from its register for years. And, recently, on January 11, 2016, OFAC unbelievably reversed course and

granted Cuba a license which purports to authorize payment of this long-overdue filing fee from 2006.

So, within 24 hours of learning about this decision, a speed which is likely unmatched in the chronicles of administrative law, the PTO granted Cuba's 2006 petition to renew its trademark. Granting a specific license to renew Cuba's invalid registration allows the Cuban Government to illegally maintain its claim of title to United States property which is acquired through the forcible confiscation of the Arechabalas' assets and forced exile of its founders. Indeed, intellectual property law is undermined, not strengthened, when states recognize rights in confiscated marks.

Whether the Cuban embargo is strengthened or weakened, it will always be important to ensure that the United States does not become a party to Cuba's illegal confiscation of private property. Recognizing Cuba's ownership of the U.S. Havana Club registration, as OFAC and PTO have now done, will only serve to legitimize Cuba's thievery.

What occurred was a forcible confiscation at gunpoint. For decades, the U.S. has prevented Cuba and its business partners from profiting off of the United States Havana Club registration. It should continue to do so.

Well-settled U.S. law and policy, as reaffirmed by section 211, ensures that the U.S. will always protect the creators and owners of intellectual property, like us, and not reward those rogue states, like Cuba, which use force of arms to steal such property and enrich itself at the expense of its citizens. The sudden and unexplained decision of OFAC and the PTO to permit Cuba's renewal of the Havana Club mark flies in the face of these legal and policy principles, and this action should be retroactively revoked.

Thank you very much.

[The prepared statement of Mr. Wilson follows:]

STATEMENT OF RICK WILSON
House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
February 11, 2016

Executive Summary

Recently, the Office of Foreign Assets Control and the Patent and Trademark Office suddenly and without explanation reversed decades of U.S. policy and permitted Cuba to renew its registration in the HAVANA CLUB mark for rum despite the fact that Cuba confiscated the Havana Club rum business from its original owner by gunpoint in 1960 without compensation. This decision by the Administration is unprecedented as it will upend well-settled U.S. law and policy, and Congressional intent, which protects the owners of intellectual property ("IP") from having their IP and other assets confiscated by foreign governments without compensation by, among other things, preventing recognition of such governments' claims in United States trademark registrations.

Introduction

Mr. Chairman, good afternoon, my name is Rick Wilson. I am the Senior Vice President, External Affairs and Corporate Responsibility for Bacardi-Martini, Inc. I am here today to testify about the recent decision of the Department of Treasury, Office of Foreign Assets Control ("OFAC"), to issue a license to a Cuban-owned company, Cubaexport, authorizing it to renew its HAVANA CLUB trademark registration, and the recent decision of the Patent and Trademark Office ("PTO") to approve that renewal 10 years after the statutory deadline. These decisions are unprecedented and shocking because they undo decades of United States law and policy by approving Cuba's efforts to capitalize on, and traffic in, stolen assets.

History of Jose Arechabala, S.A. and Havana Club

Jose Arechabala S.A. ("JASA") was a Cuban corporation founded in 1878 and owned privately by members of the Arechabala family. JASA produced "Havana Club" rum and owned the trademark HAVANA CLUB for use with its rum, which it exported to the United States beginning in 1934. In 1960 armed forces of the Cuban government, under the leadership of Fidel Castro, forcibly seized all of JASA's assets without compensation, throwing family members in jail or forcing them to flee the country with only the shirts on their backs. Mr. Ramon Arechabala, who was present in Cuba when Cuban armed forces took his family's properties previously testified in front of the Senate Judiciary Committee in 2004 about these horrific events. He has since passed away. His son, Miguel Arechabala, cannot be here today but will be submitting a statement for the record, if permitted. There is no dispute that Cuba confiscated the Havana Club rum business - this fact has been affirmed by every Court to address the issue over the years including the Second, Third, and D.C. appellate courts.

After forcing the Arechabala family into exile and stealing all of their assets, the Cuban government waited - and in 1976, after JASA's U.S. trademark registration lapsed, Cuba stepped in and registered the mark for itself. At that time, Cuba did not need an OFAC license to obtain a

trademark registration. Understandably, while trying to rebuild their lives in exile and with no money or other resources, the Arechabala family was unable to renew its HAVANA CLUB registration in the United States. While Cubaexport could not sell rum in the U.S. due to the embargo, it started selling HAVANA CLUB rum in Communist-bloc countries.

While JASA did not have the resources to fight Cuba, Bacardi did. In 1995, it purchased JASA's rights to the trademark and applied for its own OFAC license to effectuate the transfer of the Havana Club trademark from JASA to Bacardi. On or about December 1996, OFAC granted that license in part because "no benefit will accrue to Cuba or a Cuban national based on Bacardi's acquisition of the assets and rights of JASA." In the 1990s, Bacardi continued selling HAVANA CLUB rum in the United States, and still does today.

Cuban Government Lies and OFAC Actions/Denials

Cuba's first misrepresentation occurred when it applied to register the HAVANA CLUB mark in 1976. It failed to inform the PTO that JASA was the true owner of the mark and that Cuba had forcibly confiscated JASA's assets without compensation. Then, in the mid-1990's, in a knowingly illegal and unauthorized transaction, Cuba purported to transfer its ownership in the HAVANA CLUB mark, and all of its stolen rum business assets, to Havana Club Holdings S.A. ("HCH"), a joint venture company half-owned by Pernod Ricard, a French liquor company. OFAC initially authorized this transaction based on a fraudulent license application which claimed that the "assignments were part of a reorganization of the Cuban rum and liquors industry and each of the assignors and assignees are nationals of Cuba." The application failed to mention that HCH was half owned by non-Cubans and that the purpose of the assignment was to engage in a global commercial enterprise that would financially benefit the same Cuban regime that expropriated JASA's assets. Upon learning of the deceit a few years later, OFAC retroactively rescinded the license and the transfer of the trademark registration was therefore voided *ab initio*. OFAC's reason for rescinding the license was clear – to prevent Cuba from profiting off of stolen property by selling ownership rights in an illegally obtained U.S. trademark registration.

Having failed to obtain OFAC approval to transfer this registration to the Pernod Ricard/Cuban government joint venture, the Cuban government was faced again in 2006 with needing to renew its illegally obtained registration. It applied for a special license and OFAC refused to grant such license stating: "We have received guidance from the State Department informing us that it would be inconsistent with U.S. policy to issue a specific license authorizing transactions related to the renewal of the HAVANA CLUB trademark." And indeed it was.

But there should be no mistake, although the U.S. registration is now purportedly placed in the hands of Cuba, the stolen rum business is still in the hands of the joint venture and is being exploited around the world by Pernod. Indeed, Pernod's general counsel recently was quoted in the press, stating that "*we* are obviously very pleased that *we* could renew the Havana Club registration." These comments suggest that Pernod and the Cuban government have continued to participate in a joint economic venture despite OFAC's 1997 denial of the assignment of the U.S. registration. On that basis, it is very possible Cubaexport has, or will soon again, seek an additional license from OFAC to effectuate the transfer that was denied two decades ago, hoping to finally achieve the unjust transfer of the HAVANA CLUB registration to a joint venture that

effectively would reward the Cuban government with money for its confiscation when it has failed to compensate the original owners.

The CACR, Section 211, and Fundamental Principles of U.S. Law

The Cuban Assets Control Regulations (“CACR”), which implement the trade embargo against Cuba, *prohibit all transactions* involving property, including trademarks, in which Cuba, or any national thereof, has any interest of any nature whatsoever, direct or indirect, except as specifically authorized by the Secretary of the Treasury. The CACR provided a general license for trademark registration and renewal by Cuban nationals. However, this allowed a loophole for the Cuban government to register and renew trademark registrations for marks created or owned by private businesses in Cuba which were confiscated by the Castro government. As this Committee no doubt is aware, Congress took action to close this loophole by passing Section 211 of the Omnibus Appropriations Act of 1998 which ensures that the general license in the CACR cannot be used by foreign states, like Cuba, to register marks associated with businesses that were confiscated without compensation. Section 211 has been critical to the efforts of the Arechabala’s, Bacardi – and other companies – to ensure that Cuba does not profit off of stolen property, especially through U.S. trademark registrations and renewals. Section 211 rescinds the general license for trademark registration and renewal of marks that were used in connection with a confiscated business and prohibits courts from recognizing Cuba’s rights in confiscated property.

The purpose of Section 211 is simple: to deny giving effect to Cuba’s claims to illegally confiscated property in the United States. As the District Court for the Southern District of New York explained in interpreting Section 211(b), “Congress made clear its intention to repeal rights in marks and trade names ... where those marks and trade names” were used in connection with a confiscated business. *Havana Club Holding, S.A. et al. v. Galleon, S.A. et al.*, 62 F. Supp. 2d 1085 (S.D.N.Y. 1999).

The United States itself has explained the purpose of Section 211 in a submission to the World Trade Organization (“WTO”): “[I]t is a fundamental principle of U.S. law ... that a State need not, and will not, give extraterritorial effects to foreign confiscations, including with respect to trademarks. Section 211 was enacted to reaffirm this principle in respect of trademarks, trade names and commercial names used in connection with businesses confiscated by Cuba, and to reaffirm and clarify the rights of the legitimate owners of such marks and names.” *See* First Submission of the United States to the WTO, ¶ 13 (December 21, 2000). Section 211 voids any registration of a confiscated trademark by the confiscating entity because “the trademark application is invalid since the owner of the mark did not apply for registration.” *Id.* at ¶ 19.

Thus, as stated above, when the HAVANA CLUB registration came up for renewal in 2006, Cuba could no longer rely on the general license in the CACR. Instead, it had to ask OFAC to approve a specific license authorizing the payment of the renewal fee. OFAC rightfully denied the application.

Even before Section 211 and the CACR, it has been a fundamental principle of U.S. law that a State need not, and will not, give extraterritorial effects to foreign confiscations, including with respect to trademarks. Courts in the United States have steadfastly held that foreign

confiscations will not be given effect because such confiscations are “shocking to our sense of justice.” See First Submission of the United States to the WTO, ¶ 9. Time and again, the United States has stood up to protect the victims of uncompensated expropriation – like JASA. And Congress codified that principal of law in Section 211.

As a result of OFAC’s decision to properly deny the license in 2006, the PTO denied the renewal, stating that the registration “will be cancelled/expired.” OFAC successfully defended its decision in a lawsuit filed by Cubaexport all the way to the Supreme Court which denied cert. See *Empresa Cubana Exportadora De Alimentos y Productos Varios v. United States Department of Treasury, et al.*, 516 F. Supp. 2d 43 (D.D.C. 2007); 606 F. Supp. 2d 59 (D.D.C. 2009); and 638 F.3d 794 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2377 (2012). In that action, Adam Szubin, the Director of OFAC at the time, testified that it was OFAC’s determination that “the HAVANA CLUB trademark constituted a ‘mark ... that is the same as or substantially similar to a mark ... that was used in connection with a business or assets that were confiscated,’” that Bacardi was the successor-in-interest to the rights in that mark, and that neither Bacardi nor JASA ever consented to Cubaexport’s registration of the mark.

Recent Actions of OFAC, State and PTO

That should have been the end of the matter. However, for unknown reasons, the PTO refused to remove the cancelled mark from its register for years. And recently, on January 11, 2016, OFAC inexplicably reversed course and granted Cuba a license which purports to authorize payment of the long-overdue filing fee from 2006. Within 24 hours of learning about this decision – a speed which is likely unmatched in the chronicles of administrative law – the PTO granted Cubaexport’s 2006 petition to renew its trademark.

Granting a specific license to renew Cubaexport’s invalid HAVANA CLUB registration violates the purposes and principles of the embargo of Cuba, which were codified by Congress. It allows the Cuban government to illegally maintain its claim of title to United States property, which it acquired through the forcible confiscation of JASA’s assets and the forced exile of its founders, the Arechabala family. As the Court of Appeals for the Second Circuit has held: “Congress clearly expressed its intent to prohibit transfers of property, including intellectual property, confiscated by the Cuban government by enacting the LIBERTAD Act.” *Havana Club Holdings, S.A. et al. v. Galleon S.A., et al.*, 203 F.3d 116, 125 (2d Cir. 2000). Indeed, while Bacardi is a strong supporter of the reciprocal recognition of foreign trademarks, international intellectual property law is undermined – not strengthened – when states recognize rights in confiscated marks. The law should protect the original owners of intellectual property, such as JASA and its successor in interest Bacardi, from the forced confiscation of their property by armed militias, as happened in Cuba.

Moreover, Congress is specifically opposed to the Castro regime “‘offering foreign investors [like Pernod] the opportunity to purchase an equity interest in, manage, or enter into joint ventures’ involving confiscated property in order to obtain ‘badly needed financial benefit, including hard currency, oil, and productive investment and expertise.’” *Id.* “Congress intended to create a chilling effect that will deny the current Cuban regime venture capital, discourage third-country nationals from seeking to profit from illegally confiscated property, and help preserve such property until such time as the rightful owners can successfully assert their claim.”

Id. “In other words, Congress sought to discourage business arrangements like Cubaexport’s joint venture with Pernod...” *Id.*

OFAC’s decision to authorize Cubaexport’s renewal of the stolen HAVANA CLUB mark, however, *encourages* exactly the type of joint venture that Congress plainly intended to discourage and makes it easier for Cuba and its business partner Pernod to traffic in JASA’s stolen property.

Finally, I would like to note that there are no valid foreign policy reasons for authorizing Cuba to renew its registration in a confiscated mark nearly a decade after that mark was cancelled and expired. The Administration cannot lift the embargo or repeal Section 211 without Congressional action. While the Administration has announced certain changes in the United States’ relationship with Cuba, the Administration has stated that those changes are intended to “support the ability of the Cuban people to gain greater control over their own lives and determine their country’s future” by increasing diplomatic relations, improving travel between our countries, authorizing sales of certain lower-priced goods to the Cuban people, increasing access to the internet, and generally assisting the Cuban people in gaining greater economic independence from the state. None of these changes remotely suggest that the United States will set aside well-established law and ignore the Congressional mandate of Section 211 in order to recognize Cuba’s ownership in stolen property!

Conclusion

To the contrary, permitting Cubaexport and its non-Cuban business partner Pernod to claim rights in a United States trademark registration associated with a business that was illegally confiscated without compensation will not help the Cuban people “gain greater control over their own lives” or “gain greater economic independence from the state” – it will, rather, enrich and empower the Cuban state to the detriment of the true owners of confiscated property who, like the Arechabala family, were forced out of their country at gunpoint. Whether the Cuban embargo is strengthened or weakened, it will always be important to ensure that the United States does not become a party to Cuba’s illegal confiscation of private property. Recognizing Cuba’s ownership of the U.S. HAVANA CLUB registration – as OFAC and the PTO have now done – will only serve to legitimize Cuba’s thievery.

The Cuban government seized JASA, a viable business with a well-known mark, and, without any interruption in the business, began making and selling rum under the HAVANA CLUB brand. What occurred was a forcible confiscation at gunpoint. Pernod, knowing all of this sordid history, chose to invest with Cuba in this stolen brand. For decades, the United States has prevented Cuba and its business partners from profiting off of the United States HAVANA CLUB registration – it should continue to do so. Well-settled United States law and policy, as reaffirmed by Section 211, ensures that the United States will always protect the creators and owners of intellectual property, like JASA and Bacardi, and not reward those rogue states, like Cuba, which use force of arms to steal such property and enrich itself at the expense of its citizens. The sudden and unexplained decision of OFAC and the PTO to permit Cuba’s renewal of the HAVANA CLUB mark flies in the face of these legal and policy principles.

I thank the Committee for holding this hearing to address this important topic.

Mr. ISSA. Thank you.
Mr. Reinsch.

**TESTIMONY OF WILLIAM A. REINSCH, PRESIDENT,
NATIONAL FOREIGN TRADE COUNCIL**

Mr. REINSCH. Thank you very much, Mr. Chairman.

My name is Bill Reinsch. I'm the president of the National Foreign Trade Council, which represents 200 American companies engaged in global commerce.

The NFTC strongly supports the Obama administration's efforts to place relations between the United States and Cuba on a more normal footing. Resolving satisfactorily the legitimate claims of U.S. citizens who had their property in Cuba confiscated by the Castro government is essential to creating the conditions in which a normal relationship with Cuba can thrive and endure. Constructing new impediments and perpetuating those that already exist will only complicate this process and make it more difficult to secure the recompense that U.S. property holders have sought for decades.

Tonight, I want to focus my testimony on an important intellectual property issue that, if not resolved correctly, will adversely affect our country's standing in international organizations, our ability to lead the global effort to protect intellectual property rights, and our efforts to protect the property of U.S. citizens and companies doing business in Cuba in the years ahead. And that is section 211.

As the Committee is aware from its hearing on this subject in March 2010, where I also had the honor of appearing, section 211 was found in 2002 to be in violation of U.S. WTO obligations. Some 14 years later, the United States remains in noncompliance. Section 211 also has put the United States in violation of its obligations under the General Inter-American Convention for Trade Mark and Commercial Protection.

On behalf of the NFTC, I want to express our support for repeal of section 211, which is contained in—a provision for which is contained in a number of different bills, which I enumerate in my statement.

I also want to express my opposition, I'm sorry to say, Mr. Chairman, to your bill, H.R. 1627, which purports to address this problem in a different way but, in fact, would only exacerbate it.

Repeal of section 211 would remedy the U.S. breach of its WTO obligations and the Inter-American Convention—and my written statement provides details about that—while it would also remove any pretext for the Cuban Government to remove protection of trademarks currently registered in Cuba by U.S. companies.

At present, there are more than 5,000 U.S. trademarks registered in Cuba by over 400 U.S. companies. Many of these companies look forward to the opportunity to sell their products in Cuba, and they will want to know with certainty that their trademarks will be protected by Cuba as they build their plans to develop that market.

Repeal of section 211 also would restore the traditional U.S. leadership role on intellectual property issues which has been compromised by our failure to comply with the WTO ruling. This has

provided over the past decade a convenient excuse for other WTO member countries, such as China and India, to ignore U.S. calls to improve their IP laws.

Repeal of section 211 would confirm the U.S. commitment to providing high standards of IP protection, including our commitment not to assign trademarks based on political criteria. It would also reaffirm that resolving trademark disputes are properly the responsibility of the Patent and Trademark Office and the courts based on the merits and not on political considerations.

Section 211 has no benefits for the U.S. business community and is far more likely to cause significant damage. If it's maintained in law, it could provide, as I said, a pretext for Cuba to withdraw protection for U.S. trademarks currently registered in Cuba by American companies. It could also become one more roadblock to the efforts of the United States to reach agreement with the Cuban Government on a satisfactory resolution of the outstanding claims that will be the topic of the next two witnesses.

H.R. 1627, another proposal short of full repeal, we believe, will make things worse. For the benefit of a single company, the proponents of section 211 and H.R. 1627, in effect, are asking the Congress, one, to make it more difficult for U.S. companies to enforce their trademarks and tradenames in U.S. courts against claims of ownership; two, to keep U.S. companies exposed to the risk of retaliation abroad and the type of injury that they suffered in South Africa in a comparable situation; and, three, to continue putting U.S. law at cross-purposes with longstanding principles of U.S. trademark law and important IP and trade policy objectives of the U.S. business community and the U.S. Government. And my written statement has further details on those points, as well.

H.R. 1627 would seek to apply section 211 to both U.S. nationals and foreign trademark holders. However, such an amendment has significant drawbacks when compared with repeal, the main one being that it would not address any of the inconsistencies of 211 with the Inter-American Convention. In addition to the risk to U.S. companies abroad, such a partial approach would also lead to increased litigation and legal uncertainty at home.

In sum, section 211, even if amended by H.R. 1627, would continue to benefit only a single company and provide no benefits for U.S. business. Instead, it would make it more difficult for U.S. companies to enforce their trademarks and tradenames in U.S. courts against counterfeiters and infringers and keep U.S. companies exposed to the risk of legal uncertainty and retaliation abroad. For NAFTA members, this is a bad bargain that harms both U.S. business and U.S. national interests.

Instead, we urge Congress to repeal section 211 in its entirety. Repeal is the only action that will provide full compliance with all current U.S. trade obligations and deny other governments any rationale for suspending their treaty obligations or retaliating against the trademark and tradename rights of U.S. businesses. This is all the more important as the United States moves to reestablish a normalized relationship with Cuba. Repeal of section 211, we believe, is an essential element of establishing that relationship.

Finally, Mr. Chairman, I want to reiterate what Secretary Tong and Ms. Denison said, and that is to note that repeal would not

take sides in the underlying dispute over the Havana Club trademark and it would not settle that question. Rather, it would return that dispute to the Patent and Trademark Office and the courts, where we believe it belongs. Experience shows that the courts are more than capable of reaching a just and equitable resolution of that dispute based on the merits.

Thank you for the opportunity.

[The prepared statement of Mr. Reinsch follows:]

Testimony of William A. Reinsch,
President of the National Foreign Trade Council
Before the House Committee on the Judiciary
Subcommittee on the Courts, Intellectual Property and the Internet
February 11, 2016

Thank you, Mr. Chairman. My name is William Reinsch, and I am President of the National Foreign Trade Council, which represents 200 American companies engaged in global commerce. The NFTC strongly supports the Obama Administration's efforts to place relations between the United States and Cuba on a more normal footing. Resolving satisfactorily the legitimate claims of U.S. citizens who had their property in Cuba confiscated by the Castro government is essential to creating the conditions in which a normal relationship with Cuba can thrive and endure. Constructing new impediments and perpetuating those that already exist will only complicate this process and make it more difficult to secure the recompense that U.S. property holders have sought for decades.

With these concerns in mind, I would like to focus my testimony today on an important intellectual property issue that, if not resolved correctly, will adversely affect our country's standing in international organizations, our ability to lead the global effort to protect intellectual property rights, and our efforts to protect the property of U.S. citizens and companies doing business in Cuba in the years ahead. That is Section 211 of the FY 1999 Department of Commerce and Related Agencies Appropriations Act.

As the Committee is aware from its hearing on this subject in March 2010, Section 211 was found in 2002 to be in violation of U.S. WTO obligations. Some 14 years later, the United States remains in non-compliance. Section 211 also has put the United States in violation of its obligations under the General Inter-American Convention for Trademarks and Commercial Protection¹

On behalf of NFTC, I wish to express our support for repeal of Section 211. Repeal provisions are contained in a number of bills, including H.R. 403 and 635, both introduced by Congressman Rangel, as well as H.R. 735 by Mr. Serrano, and H.R. 274 by Mr. Rush. I also want to express

¹ Feb. 20, 1929, 46 Stat. 2907, 2930-34.

NFTC's opposition to H.R. 1627, which purports to address this problem in a different way, but in fact would only exacerbate it.

Repeal of Section 211 would remedy the U.S. breach of its WTO obligations and the Inter-American Convention, while also removing any pretext for the Cuban government to remove protection of trademarks currently registered in Cuba by U.S. companies. At present, there are more than 5000 U.S. trademarks registered in Cuba by over 400 U.S. companies. Many of these companies look forward to the opportunity to sell their products in Cuba, and they will want to know with certainty that their trademarks will be protected by Cuba as they build their plans to develop that market.

Repeal of Section 211 also would restore the traditional U.S. leadership role on intellectual property issues which has been compromised by our failure to comply with the WTO ruling. This has provided over the past decade a convenient excuse for other WTO member countries, such as China and India, to ignore U.S. calls to improve their intellectual property laws. Repeal of Section 211 would confirm the U.S. commitment to providing high standards of intellectual property protection, including our commitment not to assign trademarks based on political criteria. Finally, it would reaffirm that resolving trademark disputes are properly the responsibility of the Patent and Trademark Office and the courts, based on the merits and not on political considerations.

Section 211 was not considered by this Committee or any other committee in either house of Congress before it was slipped into the 1998 Omnibus Appropriations Act in conference. It was enacted solely to help one of the litigants in a particular dispute before the U.S. courts by preempting the court from rendering judgment on the merits of the litigants' respective claims.

Section 211 has no benefits for the U.S. business community and is far more likely to cause significant damage. If Section 211 is maintained in law, it could provide a pretext for Cuba to withdraw protection for U.S. trademarks currently registered in Cuba by American companies. It could also become one more roadblock to the efforts to the United States to reach agreement with the Cuban government on a satisfactory resolution of the outstanding claims of U.S. citizens whose properties in Cuba were confiscated by the Castro regime more than 50 years ago.

The only effective remedy for the problems presented by Section 211 is to repeal it. H.R. 1627, or other proposals short of full repeal, will only make things worse. For the benefit of a single company, the proponents of Section 211 and H.R. 1627, in effect, are asking the Congress (i) to make it more difficult for U.S. companies to enforce their trademarks and trade names in U.S. courts against spurious claims of ownership, (ii) to keep U.S. companies exposed to the risk of retaliation abroad and the type of injury suffered in South Africa, and (iii) to continue putting U.S. law at cross-purposes with longstanding principles of U.S. trademark law and important intellectual property and trade policy objectives of the U.S. business community and the U.S. Government.

Despite the more than fifty year embargo on trade with Cuba, both countries have reciprocally recognized trademark and trade name rights since 1929 as signatories to the General Inter-American Convention for Trademarks and Commercial Protection. Both Cuba and the United States are parties to the Convention, and it remains in force between us notwithstanding the trade embargo.² United States federal courts have reiterated the enduring vitality of the Inter-American Convention, and treated it and the Paris Convention for the Protection of Industrial Property as cornerstones of trademark and trade name relations between the two countries.³

Continuation of this policy is an essential pre-condition for future U.S. commercial engagement with Cuba and guards against prejudice to valuable intellectual property rights in the interim. Pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), American companies are legally exporting branded food and medical products to Cuba, making these protections all the more essential. Section 211 contradicts this policy in ways that threaten to expose the trademarks and trade names of U.S. companies to retaliation in Cuba and undercuts our international position on intellectual property issues.

Section 211 violates the Inter-American Convention because it denies registration and renewal of trademarks on grounds other than those permitted by Article 3, which requires registration and legal protection “upon compliance with the formal provisions of the domestic law of such

² U.S. Dep't of State, *Treaties in Force* 393 (2000).

³ *Empresa Cubana del Tabaco v. Culbro Corp.*, 213 F. Supp. 2d 247, 279 (S.D.N.Y. 2002).

States.”⁴ By prohibiting U.S. courts from recognizing rights arising from prior use of a trademark in another treaty country, or from determining whether an earlier U.S. trademark has been abandoned, Section 211 expressly violates Article 8 and Article 9. By prohibiting U.S. courts from recognizing certain trade name rights, Section 211 violates Article 18, which gives the owner of an existing trade name in any treaty signatory the right to obtain cancellation of and an injunction against an identical trademark for similar products. And, by depriving U.S. courts of the authority to issue injunctions and other equitable relief against trademark or trade name infringement, Section 211 violates Articles 29 and 30.

Dispute settlement does not appear a practical means for the United States and Cuba to try to resolve disagreements over protection of trademark rights. Because Section 211 specifically denies U.S. courts the authority to enforce the “treaty rights” otherwise available to a party (including those available under the Inter-American Convention), it obviates Article 32 of the Inter-American Convention, which provides for national courts to resolve questions of interpretation.

As a result, Section 211 compels any dispute against the United States alleging violation of the terms of the Inter-American Convention to be resolved through customary international law. Customary international law permits “a party specially affected by the breach to invoke it as a ground for suspending the operation of the agreement in whole or in part in the relations between itself and the defaulting state.”⁵ Suspension of the operation of the Convention, were it to occur, would result in substantial uncertainty regarding the legal status in Cuba of the trademarks and trade names of U.S. companies.

On several occasions in the past, the Cuban government has raised the prospect of withdrawing the protections afforded by the Inter-American Convention. Should Congress fail to repeal Section 211, the United States will have handed the Cuban government the legal grounds for doing so.

Whether the Cuban government would take such action is anyone’s guess, but, given the experience of NFTC members in a comparable

⁴ The distinction is important because the United States argued before the WTO that “Section 211(a)(1) does not deal with the form of the trademark,” and the WTO Appellate Body concluded that Section 211 “deal[s] with the *substantive* requirements of ownership in a defined category of trademarks.” Appellate Body, *United States – Section 211 Omnibus Appropriations Act*, WT/DS176/AB/R (Jan. 2, 2002), at ¶60, ¶222 (referring to ¶121 specifically addressing Section 211(a)(1)).

⁵ Restatement 3d of the Foreign Relations Law of the U.S., § 335.

situation in South Africa, we are reluctant to take that risk. South Africa is an important precedent because it demonstrates the mischief that results when trade embargoes inhibit reciprocal trademark recognition.

Under the U.S. trade embargo of South Africa, U.S. companies were prohibited from paying the fees necessary to either file trademark applications or maintain existing trademark registrations in South Africa. When the embargo ended, a number of U.S. companies with internationally-recognized trademarks, including BURGER KING, TOYS R US, 7 ELEVEN, and VICTORIA'S SECRET, discovered that their trademarks in South Africa had been appropriated by unauthorized persons. These difficulties led the U.S. Trade Representative to identify South Africa as a "Special 301" country in 1996. Recovering the rights to their trademarks necessitated lengthy and expensive litigation and attempts to encourage the South African government to amend its laws.

Had the U.S. government maintained consistent and predictable intellectual property relations with South Africa during the U.S. embargo, it would have spared many U.S. companies significant legal expense and loss of trademark goodwill, while facilitating reform in that country. It would be unfortunate if American companies were required to do the same in Cuba because Congress failed to repeal Section 211.

H.R. 1627, on the other hand, would seek to apply section 211 to both U.S. nationals and foreign trademark holders. However, such an amendment has significant drawbacks when compared with repeal, the main one being that it would not address any of the inconsistencies of Section 211 with the Inter-American Convention. In addition to the risk to U.S. companies abroad, such a partial approach would also lead to increased litigation and legal uncertainty at home.

By making U.S. nationals subject to the restrictions of Section 211, H.R. 1627 apparently creates a new defense - independent of the Lanham Act - for trademark infringement and counterfeiting. At issue would be whether the trademark and trade name rights being asserted by a U.S. national are "the same or substantially similar" to a trademark that was used in connection with a business in pre-Castro Cuba and confiscated over 50 years ago. If so, U.S. trademark owners would be required to obtain the consent of the owner or successor of that business in Cuba.

Under existing law in the Lanham Act, a trademark is presumed to be abandoned, and thus cannot be used to impose liability on third parties, when it has not been used for two years, and there is no intent to resume using it. While these trademarks would be considered “dead” and thus without legal rights under longstanding U.S. trademark law, they are “undead” under Section 211 because their owners – who may have long since died or cannot be located – and their successors can deny their use by third parties for an indefinite and unlimited period of time.

The trademark laws that Congress has enacted have consistently sought to reduce the number of “deadwood” trademarks, by ensuring that businesses may adopt without liability a trademark that has been abandoned by its previous owner. These laws have also sought to provide security to businesses adopting trademarks, by providing a rebuttable presumption of abandonment. Section 211 runs against both of these long-standing policies by creating uncertain and even unascertainable bases for potential liability when a business wishes to use an abandoned “deadwood” trademark.

H.R. 1627 would also establish an additional condition whereby a U.S. company asserting trademark or trade name rights would need to demonstrate whether it “knew or had reason to know” that its trademark or trade name was “the same or substantially similar” to a trademark that was used in connection with a business – any business – in pre-Castro Cuba. This question could be difficult or expensive to answer. In addition, the bill would require the courts to determine whether the trademark owner knew or had reason to know “at the time when the person or entity acquired the rights asserted” – which in the case of certain U.S. companies could be over 100 years ago. If prior experience is any guide, such a significant change in U.S. trademark law would result in substantial new burdens on U.S. trademark owners in the form of increased litigation, discovery “fishing expeditions,” increased legal costs of hundreds of thousands if not millions of dollars, and reduced legal and business certainty.

In sum, Section 211, even if amended by H.R. 1627, would continue to benefit only a single company, and provide no benefits for U.S. business. Instead, it would make it more difficult for U.S. companies to enforce their trademarks and trade names in U.S. courts against counterfeiters and infringers and, keep U.S. companies exposed to the risk of legal uncertainty and retaliation abroad. It would further complicate their efforts to develop the Cuban market for their products and services in the years ahead.

For NFTC members, this is a bad bargain that harms both U.S. business and U.S. national interests. Instead, we urge Congress to repeal Section 211 in its entirety. Repeal is the only action that will provide full compliance with all current U.S. trade obligations and deny other governments any rationale for suspending their treaty obligations or retaliating against the trademark and trade name rights of U.S. businesses.

It is important to note that repeal of Section 211 would not take sides in the underlying dispute over the Havana Club trademark, and it would not settle that question. Rather, it would return the dispute to the Patent and Trademark Office and the courts where it belongs. Experience shows that the courts are more than capable of reaching a just and equitable resolution of that dispute based on the merits.

The United States has long been a leader in securing intellectual property rights globally. Repeal of Section 211 will help sustain the U.S. position in this regard by providing assurance that American trademarks and trade names will be protected even when held by representatives of governments with which we have difficult relations. In contrast, failing to repeal Section 211 threatens to overshadow the important contributions being made by the Congress and the Executive Branch to a consistent and predictable international intellectual property policy that serves the needs of U.S. business.

This is all the more important as the United States moves to re-establish a normalized relationship with Cuba. Repeal of Section 211 is an essential element of establishing that relationship.

Mr. ISSA. Thank you. And just, as we go on, you do also—one of the 200 companies you represent does, in fact, currently hold the trademark, correct?

Mr. REINSCH. I'm sorry?

Mr. ISSA. The maker of Havana Club is one of the 200 members of your consortium?

Mr. REINSCH. If you're asking me if Pernod Ricard is one of—

Mr. ISSA. Yes.

Mr. REINSCH [continuing]. Our members, the answer is yes.

Mr. ISSA. Okay. I just want to make sure that, you know—

Mr. REINSCH. Yes.

Mr. ISSA. It's not the 199 as much as it's the one.

Mr. REINSCH. Well, no. Our members are the U.S. subs, in some cases.

Mr. ISSA. Yes.

Mr. REINSCH. I would argue that there's 200 American companies, but there are other companies as well.

Mr. ISSA. We'll see.

Mr. Tamargo.

**TESTIMONY OF MAURICIO J. TAMARGO, POBLETE TAMARGO
LLP, FORMER CHAIRMAN, FOREIGN CLAIMS SETTLEMENT
COMMISSION OF THE UNITED STATES, DEPARTMENT OF
JUSTICE**

Mr. TAMARGO. Thank you, Mr. Chairman and Members of the Subcommittee. It is an honor to appear before you today.

I commend this Subcommittee for convening this hearing and for including certified claims against Cuba. I hope the Subcommittee continues to play an active role in the long-overdue settlement of these Americans claims.

Over 55 years ago, the Communist Government of Cuba confiscated real and personal property of thousands of Americans and others living and doing business in Cuba. To this day, that chapter represents the largest confiscation of American property in history, and there has been no progress in settling the claims or addressing other potential Cuban debts, as called for under U.S. law.

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

The confiscation of American property by Cuba was so significant that the U.S. Government enacted certain trading restrictions regarding Cuba, which have become known as the Cuban embargo. The U.S. Congress has repeatedly declared that this embargo will not be lifted until the American certified claims are paid and settled by Cuba. That was the promise made by the U.S. Government to the claimants. Unfortunately, both Democratic and Republican administrations have weakened the sanctions on Cuba without securing concessions or commitments from Cuba regarding the claims.

I am encouraged but guarded by the ongoing negotiations between the United States and Cuba regarding the possible settlement of American claims and related issues. There are 5,913 certified claims against the Government of Cuba, the last two of which the Commission certified under my chairmanship. When all claims are certified, they are valued at \$1.8 billion. Today, they are valued at \$7 billion to \$8 billion. And I thank the Chairman for that clarification question to the Secretary, because, with interest, they were valued closer to \$8 billion. No American claims program has been left pending and unsettled for this long.

Under international law, the Cuban Government can confiscate property, but the U.S. has a right to fair compensation for its citizens. I believe the U.S. should agree to nothing less than full amount of value for their claims plus 100 percent of the interest. Cuba can and should pay this price. Cuba should not get a free ride for stealing American property, sometimes by force, and without compensation.

A few recommendations to the Congress.

First and foremost, these certified claims were the reason the embargo was created in the first place, and Congress must not pass any legislation which further eases the embargo unless these claims are settled.

The U.S. gets only one shot at this. We have only two things Cuba wants: access to credit and access to the U.S. marketplace. If the Congress gives those away or allows them to be given away without getting these claims paid, then the Congress will have failed to stand up for these American families and companies. It is also inviting other countries to take more American property.

Second, I urge the Congress to enact legislation granting limited authority to the Foreign Claims Settlement Commission to update the certified claims with the current claim-holder of interest for each claim.

As I explained, claims programs are not designed to go unpaid for 55 years. Multiple generations of claim-holders have come and gone, and it will possibly take years to ascertain the identity of the current claimants. Not only is it good governmental housekeeping with no additional cost to the taxpayer, but it also sends a strong message to Cuba.

Thirdly, although I am optimistic that the certified claims will get paid, you never know. We've been waiting for 55 years, and we may get more of the same status quo. Therefore, I propose the following.

We know the current American trade and travel business with Cuba is trespassing on American property. We know this because a runway expansion at Jose Marti Airport was built on land subject to a certified claim. And the same is also true of most other Cuban air and sea ports, including the Port of Mariel and much of its infrastructure. They all are on land which is the subject of an American claim. And there may be other debts by other Americans and foreign nationals.

If these talks fizzle out, Congress should consider enacting a trespass penalty of 10 percent on all transactions with Cuba. That would be on all trade, travel, commerce, remittances, toll calls, gifts, flyover fees, port duty, everything.

The proceeds collected by this trespass penalty would go into a fund which would pay all certified claimants their full amount, including interest. This trespass penalty would not release Cuba of its debt, but now the debt would be owed to the U.S. Government instead of the individual claimants. Those doing travel and trade with Cuba should consider this trespass penalty as the cost of trafficking in stolen property.

The current and seemingly never-ending waiting by the claimants is unacceptable and intolerable. It is the responsibility of the Congress to end this embarrassing 55-year wait by our fellow Americans.

Fourth, I recommend and urge all American families and companies that are holding certified claims to become engaged in this discussion. Write your Congressman, your Senator, the President, the State Department, and continue writing and calling until these claims are settled.

American taxpayers are owed compensation by Cuba. They need to demand that their claims be settled. And if they're not going to be settled, they should be paid by the trespass penalty. It is wrong to continue to hold claimants hostage to this seemingly never-ending battle over Cuba policy. It is unfair to many American families who did nothing but courageously go to Cuba to build a business or try to start a new life.

Thank you, Mr. Chairman and Members of the Subcommittee.
[The prepared statement of Mr. Tamargo follows:]



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(Former Chairman, Foreign Claims Settlement Commission
of the United States, at the Department of Justice)

Before the Subcommittee on Courts, Intellectual Property, and the Internet,

House Judiciary Committee,

U.S. House of Representatives

February 11, 2016

"Resolving Issues with Confiscated Property in Cuba,

Havana Club Rum and Other Property"

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

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

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

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

Background on Confiscations by Cuba.

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

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

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

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

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

New Negotiating Opportunity Over Certified Claims

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

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

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

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

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

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

Background on Certified Claims Process

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

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

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

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

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

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

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

Certified American Claims Against Cuba

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

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

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

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

Settlement Proposals and Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

Mr. ISSA. Thank you.

Ms. Escasena.

**TESTIMONY OF LILLIAM ESCASENA,
CUBAN PROPERTY CLAIMANT, MIAMI, FL**

Ms. ESCASENA. Thank you, Mr. Chairman, and thank you to the Members of the Committee.

Mr. ISSA. I think maybe pull your mike a little closer.

Ms. ESCASENA. A little bit closer?

Mr. ISSA. Yeah, please. Thank you.

Ms. ESCASENA. Thank you for giving me this wonderful opportunity to tell my story.

I am a Cuban-born and American citizen. My family left Cuba in 1960. They silently planned their exodus for fear of persecution. They also had to plan financially how they would survive this exile.

No matter how terrified they were of their immediate future, their mentality was that this would not be permanent and that they would return to their beautiful island once again.

My grandfather, Federico, on my mother's side came from a humble beginning. He was born in Caibarien las Villas, lost his dad at the age of 9, and in order to help his mother provide for him and his four siblings, he worked on the docks after school every day. He would finish high school before he began working full-time.

While his future looked promising, the financial crisis in 1929 left him jobless. He took all the savings he had, his experience and contacts, and became a steamship agent, opening his own office as a customhouse broker in Caibarien and some years later in Havana. He would then open sub-agencies in every key port in Cuba and an office on Wall Street.

In 1938, his success in Cuba would get him recognized by the U.S. and make him a consular agent. My grandfather had finally built a name for his family and their future generations.

My father, Manolin, started at the age of 10 working alongside his dad to help create and build the family business. My grandfather, Manolo, started a company of explosives that would later be contracted for mining and the creation of roads throughout the entire island. Their growth and success would soon move their main factory and operations to Havana. The business continued to flourish, and my father continued making large investments, aiding the growth and expansion.

Castro's regime of terror started by confiscating property from big landowners, arresting and accusing innocent individuals of being against the government, sending these individuals to the firing squad without a trial. Castro would stop at no cost.

The Cuban reality came knocking at my parents' front door, literally, when Castro's men came searching for my father at gunpoint. Their demands were simple. They would take my father's business, his factory, equipment, and offices, and all of the land.

My grandfather, Federico, was stripped of his four homes in Miramar, his business, commercial property, and all other equipment from which he ran his operation. Currently, my house where I was born is an embassy, for the record. Not only did Castro steal physical property that belonged to my family, but also destroyed the legacy that they worked their whole lives to build and someday

pass on to the children and grandchildren. And even though the Castro brothers and others said they would pay the family for this, they never did.

My family was not the only one to suffer this fate. Hundreds of thousands of Cuban families and Americans were forced to leave their homeland and everything they built.

After over 55 years, the same Communist dictator continues to destroy the beautiful island that more than a million Cuban Americans used to call home. The time is long overdue for the U.S. Government to acknowledge and demand restitution for all the Cuban Americans and so many other victims of Cuban communism.

We have pledged our allegiance to this beautiful country and ask our country help us secure justice. While the properties that were stripped from us may hold a monetary value, the pain and suffering of my parents and my entire generation is far greater than any dollar amount. My parents longed to return to Cuba, the country that they adored, to smell the ocean in Varadero, to walk El Malecon, to feel free once again in their ancestral homeland. They passed never being able to fulfill these dreams.

Although my parents couldn't fulfill these dreams, I am here to see their dreams out for them and for every Cuban American family. These dreams are not driven by money. They are driven by the need for justice, the same kind of justice the U.S. advocates to the people of this country.

Today, I feel you have offered our family and others like it an opportunity to help start to right this wrong and begin to heal very old wounds. You honor the memory and sacrifice of our families, and for that, we thank you. Please, help all victims of Cuban communism seek justice. Thank you.

[The prepared statement of Ms. Escasena follows:]

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

Lilliam Escasena

2/8/2016

Resolving Issues with Confiscated Property in Cuba Hearing

My name is Lilliam Blanca Escasena. I am a Cuban born American citizen and this is my story.

My family left Cuba in November of 1960, before Fidel Castro prohibited travel outside of Cuba. During those times there was a lot of uncertainty, fear, and confusion. My family silently planned their exodus for fear of torture and persecution. They had to plan our family's escape in complete secrecy from everyone around them, including neighbors and friends. It took a year of planning of how the four families on my mother's side would sneak out 10 children, ages ranging from 2 to 11. They had to plan financially how they would all survive this exile. No matter how terrified they were of their immediate future, their mentality was that this would not be permanent and that they would return to their beautiful island once again.

Castro's regime of terror started by confiscating properties from big land owners, arresting and accusing innocent individuals of being against the government, sending these individuals to the firing squad, without trial, and lining up hundreds of innocent Cubans and sending them to jail. Castro would stop at no cost to make his message of power clear. No person would stand in his way.

My grandfather, Federico, on my mother's side came from a humble beginning. He was born in Caibarien las Villas, Cuba, lost his dad at the age of 9 and in order to help his mother provide for him and his 4 siblings he worked on the docks after school everyday. He would finish high school before he began working full time. As he continued to work, the reality became that he would not be able to hold a higher more prestigious position if he did not learn English. While the struggle to maintain his family continued he saved what he could and was able to come to the United States for almost a year. He would return to Cuba a bilingual determined to make a name for himself. Federico married my grandmother, Blanca at the age of 24. They would have four children together.

While his future looked promising, the financial crisis in 1929 left him jobless. He refused to allow this to deter his sense of pride and hope for his family. He took all the savings he had, his experience and contacts, and became a Steamship Agent, opening his own office as a Customhouse Broker in Caibarien, and some years later in Havana, Cuba. He would then open sub-agencies in every key port in Cuba and an office on Wall Street, N.Y. In 1938, his success in Cuba would get him recognized by the U.S and make him a Consular Agent. My grandfather had finally built a name for his family and their future generations.

My mother, Myriam, would end up marrying a man with the same kind of aspirations, hopes and dreams. They had four children's together.

My father, Manolin, started at the age of 10 working along side his dad to help create and build the family business. My grandfather, Manolo, started a company of explosives

Resolving Issues with Confiscated Property in Cuba Hearing

that would later be contracted for mining and the creation of roads throughout the entire island. Their growth and success would soon move their main factory and operations to a town on the outskirts of Havana, Cuba. My father would become the head of the business shortly after his dad passed. The business continued to flourish and my father continued making large investments aiding the growth and expansion.

The communist revolution hit, Castro's propaganda machine flooded the radio stations. Havoc was on the horizon. It was palpable. The Cuban reality came knocking at my Dad's business, literally, when Castro's men came searching for my father at gunpoint. Their demands were simple. They would take my father's business, his factory, equipment and offices, and all of the land.

My grandfather, Federico, was stripped of his four homes in Miramar, his business and commercial property. The regime took; tug boats and steel barges and all other equipment, the marina and pier from which he ran his operations from, freights and storage facilities, Cash and over a dozen lots of land. Not only did Castro steal physical property that belonged to my family but also destroyed the legacy that they worked their whole lives to build and, someday, pass on to the children and grandchildren. And even though the Castro brothers and others said they would pay the family for this, they never did. They stole it all, as the world would learn later, as part of a Communist plot.

My family was not the only one to suffer this fate. Hundreds of thousands Cuban families, and Americans were forced to leave their homelands and everything they built to escape death, torture and poverty. Some were better off than others financially, but we had one thing in common: we cherished freedom, respect for private property and family. They could take the first two and tried to destroy the last and were it not for America, they may have succeeded.

After over 55 years the same Communist continues to destroy the beautiful Island that more than a million of Cuban Americans used to call home. America took us in when we had nowhere else to go. And, as Americans, we worked hard, as we did in Cuba, to pay back that debt.

So that these things never happen again. I am urging you to help these families rectify the wrongs of an evil, corrupt, heartless criminal Communist syndicate that stole, murdered and impoverished the people of Cuba. The time is long over due for the US government to acknowledge and demand restitution for all the Cuban Americans and so many other victims of Cuban Communism. We have pledged our allegiance to this beautiful country and ask, one more time, that our country help us secure justice.

The scars of exile are deep, especially for our older relatives. I grew up watching my parents deal not only with the loss of their home and country but also rebuild and start from nothing. While the properties that were stripped from us may hold a monetary

Resolving Issues with Confiscated Property in Cuba Hearing

value, the pain and suffering of my parents and my entire generation is far greater than any dollar amount. My parents longed to return to Cuba, the country that they adored; to smell the ocean in Varadero, to walk El Malecon, to feel free once again in their ancestral homeland. They passed never being able to fulfill these dreams. Although my parents couldn't fulfill these dreams, I am here to see their dreams out for them and for every Cuban American family. These dreams are not driven by money; they are driven by the need for justice. The same kind of justice the U.S. advocates to the people of this country.

Today, I feel you have offered our family and others like it, an opportunity to help to start to right these wrongs and begin to heal very old wounds. You honor the memory and sacrifice of our families and for that, we thank you. Please help all victims of Cuban Communism seek justice.

Thank you.

Mr. ISSA. Thank you. That's a very compelling story.

We now go to the gentleman from Florida, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman. Thank you for the testimony of the witnesses.

You know, this policy is frustrating because you have a country and a regime that has been hostile to us since its inception at the revolution. They confiscated all this property. No one's ever been given recompense for that. They've tortured people. They've imprisoned people for political purposes. During the Cold War, they would export guerilla fighters to do our enemies' bidding.

And so now we are, with this regime, they're harboring one of the FBI's most wanted terrorists, Joanne Chesimard. And so we do this change in policy and what are we getting? I think Mr. Tamargo said we should not give them a free ride. Unfortunately, I think the Administration is doing exactly that.

All this property should have been paid as the price of negotiation. And, yet, we're showing, basically, we're providing Castro, the Castro brothers a road where they can get away with this, because they're getting some of the cash and credit they need. They're getting the lifeline that they need. But we, you still have Joanne Chesimard there. You still have all these claimants who had their property seized. And so I think it's very, very frustrating. And you even have outlets like The Washington Post editorializing, hey, this is not working, the Castro brothers are not changing.

Let me ask you, Ms. Escasena, has the Administration listened to your concerns?

Ms. ESCASENA. Not to my knowledge.

Mr. DESANTIS. So do you feel a sense of betrayal that they're not listening to you or doing anything for you?

Ms. ESCASENA. I feel that he has not reached out to any of us, any of the Cuban Americans, and has not heard our stories.

Mr. DESANTIS. Now, Mr. Wilson, the State Department testified, you were here for that, and they basically said, look, the courts are going to resolve this issue in terms of the Havana Club Rum. But hasn't this issue already been resolved?

Mr. WILSON. Yes, yes, Mr. Congressman DeSantis. There's been tons of litigation already, and actually unfair litigation, that we and the Arechabalas have had to endure for years. And yes, with this action, we're going to end up having to do more litigation and attempt to make sure that the wrong is righted. But the problem is, and I think it was stated earlier in the first panel, why should families like the Arechabalas have to resort to litigation? Why?

And that's why Section 211 was passed, because there's a bright line rule there not to recognize those confiscatory measures. Look at the Arechabalas. They were put out of business. Their family lawyer was put in jail for 18 years. They didn't have advice. They didn't know how to do things in America. And now they're going to be resorted to have to go through expensive litigation? That's not fair.

And I'm concerned that our government starts their path down to resolve these confiscations, and the first one they start with is to recognize the rights to the confiscator who took the rights from that family. My God.

Mr. DESANTIS. It's not providing great incentives for future behavior, I mean, that's for sure.

Mr. Tamargo, you mentioned, and I think this is a good point, you're talking about expanding commerce with the Castro regime. So someone pulls into a port. That port very well may likely have been seized by a private property owner. Someone staying in a hotel, that may very well have been seized property.

So some people have this argument that, oh, you're opening it up, you can create more market, and this is how economies change and societies change. But free enterprise depends on the rule of law, and this is basically conducting commerce on the backs of confiscated property. So it's really undercutting the rule of law because the regime is going to now profit even more based on the actions they took. Do you agree with that?

Mr. TAMARGO. I certainly do, Congressman. It's worth pointing out that the licensing that Treasury is issuing for a lot of this commerce and travel and trade and shipping is using confiscated property that has not been compensated, and that's contrary to U.S. law. And they simply issue the license, but they don't inquire or drill down in the application enough to bring that to light. And that's how they're able to issue this license without having to admit that they're in violation of the law.

Mr. DESANTIS. Well, I appreciate the testimony. I mean, the bottom line is this is a major change in policy. We've seen the Cuban regime benefit.

And here's the thing: They've been trading with all these other countries for this whole time. Has that benefited the people of Cuba? No, it doesn't, because the money goes to the military, the intelligence services, and the regime. It doesn't go to the Cuban people.

And so this is a benefit to the Castro brothers. And for us not to get even one claim paid before we've gone down this road, I obviously think it's bad policy.

But I really appreciate the Chairman calling the hearing, and Congress needs to stay engaged in this issue. I yield back.

Mr. ISSA. Thank you. And thank you for your insightful questions.

I'll now recognize myself for a few questions.

Mr. Tamargo, you're an expert in the area of these claims, and you worked on it, and I thank you for your efforts with the Commission, for a very long time.

You proposed essentially Congress acting to reopen. Could you elaborate a little bit more on that? I want to make sure I understand it. Because it does seem like the only way to get justice—and I'm going to take Mr. Reinsch a little bit to task here. If I understood him correctly, he sort of called our treatment of South Africa when it was an apartheid as a failed policy that didn't work. And I'm old enough—

Mr. REINSCH. That was not what I said. But we can discuss it later.

Mr. ISSA. Well, when you referenced it as not going down the road of South Africa, I must tell you, I'm very proud that America and the world went down a road with South Africa and forced a change.

So as we look at forcing a change, if this Administration won't do it, or at least accounting for that change, would you go through the benefits of reopening and properly assessing the claims.

Mr. TAMARGO. Yes, thank you, Mr. Chairman. This is a proposal that we've been advocating for a while now. The Commission, when it adjudicated these claims, it completed its work in 1972, and by statute its authority ended over the claims. And the claimant is the one responsible for keeping his own records current. But that was 50—you know, 40 years ago.

Mr. ISSA. So what you're saying is people die.

Mr. TAMARGO. People die.

Mr. ISSA. There's probate. The only way to really know that the \$7 billion or \$8 billion, who is entitled to it, would be to essentially allow the Commission to reopen and evaluate who they are.

Mr. TAMARGO. While I was there as chairman, we did try to unofficially update the records as best we could. We did research. We contacted claimants. We reached out with outreach efforts. And we did a fraction of updating. But even that is unofficial. And we don't have the authority to require documentation that would prove their actual ownership. And I suspect that many of the claimants of record have conflicting interest in the same claim, because nobody knows for sure, there is no authority to determine who was the actual claimant.

That normally gets sorted out by the Treasury Department when it's distribution time. When the offending country pays the settlement amount, then this distribution happens at Treasury. But the claims programs don't go 55 years unpaid. So we're in a new situation here.

And when and if there is a settlement with the government of Cuba, it'll take quite a bit of effort for Treasury to find out who are the appropriate recipients of these certified claim amounts and it will just take too long. I mean, I believe this is time being wasted.

The Commission has the expertise to do this updating of the records. It's already budgeted. They have a staff. They could be doing this under their own authority. And they could be, with limited reopening of the program, not to revisit the amounts or anything, but simply the identity of who the certified claimant is supposed to be. And that would be what I would propose.

Mr. ISSA. So unless we want to go to Ancestry.com to find out all of this, we must find a way to make sure that the records stay current so that, if there's a disagreement, it can be adjudicated by a family. Because, I mean, we all understand that mom left everything to you but didn't name that asset. When you die, who is to say that your siblings' children aren't going to make the claim since it wasn't named in the will, just as an example.

Mr. TAMARGO. That's a very good example. These family probate matters get very complicated. And Treasury normally would sort through that, but they only do, like—they don't have this many of them to do. I suspect there's going to be 5,000 of them or maybe 5,500 of them to do and it'll just be quite an undertaking. The probate cases would have to be probably opened in many cases to begin a probate process that never was done because there were no assets at the time.

Mr. ISSA. And, Ms. Escasena—I apologize, one of my worst things is pronunciation of names. And with a name like Issa, go figure. You mentioned, though, that your family home was large enough that today it's an embassy. It's an embassy of whom?

Ms. ESCASENA. It's the Embassy of Belize.

Mr. ISSA. Okay. Now, an embassy is sovereign land of the country that occupies it. So if I'm to understand, the Cuban Government at gunpoint took your family home and has sold it and made it a sovereign asset of another country. So Belize took, you as an American, they took your land, and they sold it to another country that now occupies it and considers it their embassy, their sovereign land. That's your testimony?

Ms. ESCASENA. Yes. That's what it appears. We found out actually last year that it was an embassy.

Mr. ISSA. And it's a small amount of the assets that were taken, but meaningful.

Ms. ESCASENA. Correct.

Mr. ISSA. Mr. Wilson, I'm going to ask you a little tougher question. The Bacardi family at the time of the revolution were Cubans. Is that correct?

Mr. WILSON. Yes, sir.

Mr. ISSA. They were Cuban citizens?

Mr. WILSON. Yes.

Mr. ISSA. They had assets outside of Cuba, but they resided disproportionately in Cuba, correct?

Mr. WILSON. Yes, most, I'm sure most. It's a large family. It's much larger now. But most, for sure.

Mr. ISSA. Okay. So the corporation was based in Cuba, correct?

Mr. WILSON. Correct.

Mr. ISSA. So I just want to make sure I understand—I'm holding up Havana Club, but I could be holding up a bottle of Bacardi—I want to make sure I understand this as best you can legally. If it was legal to take this from one family, then whatever the legality of their already selling everywhere in the world, 80 percent of the world's economy is not the United States, they're already selling this in 80 percent, is there any legal difference in your mind between what they did to one family and what they would have, could have, and, if we're to believe the State Department, essentially should have done to the Bacardi family, which is they should have your company's name and be selling it and reclaim it, at least in America, based on the fact that they took it, therefore, they should have it? Am I missing something in the understanding of property rights?

Mr. WILSON. No, Mr. Chairman, you're not. And they attempted very much to do that same thing to Bacardi. They very much did. They tried to. They produced a product and called it Bacardi and tried to sell it around the world.

Fortunately, Bacardi had assets outside of Cuba, and so it could produce its Bacardi rum product and go to those same countries and fight in litigation and within the governments. And we won. Yes, we did. We were fortunate enough to be in that position. But many other Cuban families, like the Arechabala, were not in that position and are still not in that position.

Mr. ISSA. And the Arechabala family, I want to understand this, because I think it's important to make the record complete. You did not wholly acquire the rights to Havana Club, you have a license agreement effectively, don't you? They receive a benefit from every bottle sold.

Mr. WILSON. We do have a—we have a Commission agreement with them. I prefer not to go into the details.

Mr. ISSA. No, and we don't need to know the details. The point is, the Picard Company of France, they offered to buy it. They knew that there was a right, and they offered to buy it from the Arechabala family. But, apparently, they were only willing to pay a de minimus amount and said, you know, we already have the rest of the world, but we'll give you a little something for the U.S., is my understanding.

Mr. WILSON. Yes. Or something similar to that, yes.

Mr. ISSA. The late owner came to your company's principals and negotiated a deal that he felt for his family was fair. Is that correct?

Mr. WILSON. That is correct, sir.

Mr. ISSA. And that arrangement continues today as the Bacardi family expands the sales that you began in 1994.

How many States are you currently selling in?

Mr. WILSON. It goes up and down, but we've been, over the last 10, 12 years, we've sold in roughly 18 different States. But it goes up and down.

Mr. ISSA. Okay. And you're unable to sell in the rest of the world because Cuba, what they stole they got to keep by an agreement with the French company to distribute it, right?

Mr. WILSON. Yes. The Cuban joint venture is selling that product throughout the rest of the world, really off of the unfair, illegal confiscations in Cuba, because that's obviously where it started, as I mentioned earlier.

Mr. ISSA. Right. They obviously get all the assets.

I did a little looking before this hearing, and Cuba exports about \$5 billion of goods, some sugar, obviously Cuban cigars, and rum. They import about \$15 billion. Now, the arithmetic of that befuddled me a little, so I did a little checking. Apparently, what they import is the value, but they actually don't pay for it. A great deal of it comes from countries, such as Venezuela, that essentially it's a subsidy.

So with 80 percent of the world's market available to this totalitarian dictatorship, this last remaining bastion of Stalinism other than North Korea, they basically have \$5 billion of economy selling the whole rest of the world. So when Mr. Reinsch, on behalf of 200-plus companies he represents, talks about 4,000 trademarks that might be in peril, those trademarks, U.S. company trademarks, how many dollars of sales are there in Cuba by U.S. companies today, to your knowledge?

Mr. WILSON. I don't have that number. But my—

Mr. ISSA. Would zero be a pretty round number, since there's an outright embargo and we're not selling?

Mr. WILSON. I don't know specifically, Mr. Chairman. But there are some very small AG or medical—

Mr. ISSA. Right, I know there's a small amount of exemptions. Which brings up the point of if you applied for a license, since you have the worldwide rights for Bacardi, would they recognize your trademark application in Cuba?

Mr. WILSON. Well, we do not own the Bacardi trademark there. Cuba Rum Corporation owns our trademark in Cuba.

Mr. ISSA. Oh, okay. So they only recognize American marks unless, of course, they've already confiscated it.

To your knowledge, has Coca-Cola been able to sell there? Didn't they seize all the Coca-Cola assets? Isn't that part of the, Mr. Tamargo, isn't Coca-Cola a major claimant in those 6,000?

Mr. TAMARGO. Yes, they are. That's one of the top 10 or 15 claims.

Mr. ISSA. And the operation there was owned by the Coca-Cola Company, right?

Mr. TAMARGO. Yes, it is.

Mr. ISSA. So it was a U.S. company. Had it been a franchise or some other agreement, they wouldn't get a penny, right? They wouldn't be on your list of 6,000?

Mr. TAMARGO. Well, they wouldn't have been certified as an American claim. It would have been not an American claim. But it was an American company, so they were certified for, I think, \$27.5 million.

Mr. ISSA. Okay.

Now, I'm just going to close with a question. And this is not intended to conflate the two, to say that these things are equal. But when you were dealing with these injustices, your Commission, didn't it come out of basically the war crimes of World War II.

Mr. TAMARGO. Yes. The Commission is over 50 years old. Before those years, it was comprised of two commissions, the War Claims Commission and the International Settlement Commission. And they were merged together to create the Foreign Claims Settlement Commission.

Mr. ISSA. Okay. So I want to go through the Commission, because we are going to look at legislation that falls under this Committee related to that. Essentially, your legacy is that you are—your Commission is, in fact, the commission that looked at the confiscation by the Nazis—the Japanese too—but by the Nazis, the Italians, et cetera, in World War II.

Now, you weren't empowered to take care of victims of the Holocaust unless it was an American family? How did that work?

Mr. TAMARGO. The Commission did conduct a small Holocaust program, and it was back in the 1990's. It was comprised of mostly American POWs, when captured by the Germans, who were put in Holocaust camps.

Mr. ISSA. The work camps and so on.

Mr. TAMARGO. Correct.

Mr. ISSA. Okay.

Mr. TAMARGO. Otherwise, the Holocaust—

Mr. ISSA. Were separate.

Mr. TAMARGO [continuing]. Were separate.

Mr. ISSA. But you did work with essentially assets that were stolen from Americans in that period of time in Italy, in France, in Germany, in Japan?

Mr. TAMARGO. Yes, sir.

Mr. ISSA. Okay. So your recognition is that these countries committed crimes, took money, took assets without any payment. And, ultimately, we made whole, as you said earlier, in some cases, by an appropriation from Congress, but we made whole the victims or we didn't quit with those countries. In other words, we didn't let Germany off the hook or Japan off the hook unless there was a resolution agreed and an agreement of who paid what, correct?

Mr. TAMARGO. That's absolutely correct, Mr. Chairman. All claims programs were settled. The American claimants were compensated. And it was a condition of the offending country having normalized trade relations with us.

Mr. ISSA. So this Administration is ignoring the history of your Commission, the history of it, by normalizing relations with absolutely no agreement other than we've agreed that we're going to begin talking. They have no agreement whatsoever to take care of those 6,000 people that you represent in some ways here today and the perhaps tens of thousands of Cuban Americans who were not Americans in 1960.

Mr. TAMARGO. It is possible that they are working toward a negotiated settlement which would result in the compensation of the claimants. That is my hope. But what really I suspect holds them to that effort is the Congress needs to—the embargo, for the most part, cannot be lifted, the remaining parts of the embargo won't be lifted without congressional action. And the Congress won't accept, I would hope, a bad deal that does not give justice to the certified claimants.

Mr. ISSA. So presuming the President with the stroke of a pen and a phone call doesn't somehow do it, there is one and only one tool left to force the Castros to properly compensate for what they did, at least as to American persons, 55 years ago, and that's the embargo.

Mr. TAMARGO. Yes, sir. That is what I believe is the only thing that would bring them—that has actually brought them to the table right now. Because their other, their subsidized trading partner of Venezuela is faltering, as is their other trading commerce is faltering, and they would need this embargo to be lifted.

Mr. ISSA. Well, I'm not a businessman the way I once was, but when I was a full-time businessman and I looked at—if I looked at \$5 billion out and \$15 billion in, I would, as you say, be looking to change an arrangement. The one amazing thing I think that we all recognize is, unless Cuba changes and allows their people to be empowered, even with access to an additional 20 percent of the world's market, I don't believe they can ever compete globally or even feed their people properly.

I want to thank all of you for your testimony. As in the last panel, we will leave the record open for 5 days. There may be additional questions from Members who could not make it here this evening.

This was a reschedule, and I appreciate all of you being able to meet the reschedule. But it wasn't at an ideal time for a hearing.

Additionally, I would welcome any supplemental remarks you may have or information you want to put in, including matters for the record.

And with that, you have my thanks. And we are adjourned.
[Whereupon, at 7:33 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by Jaime Suchlicki, Emilio Bacardi Moreau Distinguished Professor and Director, Institute for Cuban and Cuban-American Studies, University of Miami; and Jose Azel, Senior Research Associate, Institute for Cuban and Cuban-American Studies, University of Miami

**RESOLVING ISSUES WITH CONFISCATED PROPERTY IN CUBA,
HAVANA CLUB & OTHER PROPERTIES**

Testimony
U.S. Judiciary Committee
U.S. House of Representatives
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Prepared by

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Introduction

In the early 1960's the Castro regime confiscated all foreign owned businesses in Cuba as well as the majority of large Cuban owned businesses. The communization of Cuba, which included not only private property, but also the school system, the media, religious organizations, etc. took place in less than two years, the fastest in the history of mankind.

Included among U.S. confiscated Companies were Texaco and Esso (Exxon Corporation) oil refineries; ITT; Cuban Electric Co; MOA Bay Mining Company; United Fruit Sugar Company and North American Sugar Industries, Inc. Cuban companies included Bacardi; the Arechabala rum company (Havana Club); all sugar mills and all banks. The Cuban government has never paid for any of these properties. The value of American properties was estimated at \$1.8 billion at the time. With interest accumulated at 6% for the past half century, Cuba's debt is estimated at \$8 billion. There are no estimates for the value of properties confiscated to Cubans.

When the Castro regime comes to an end, the Cuban people will face the monumental task of building a new political and economic system out of the remnants of the old. If the recent history of the Western Hemisphere serves as a guide, they will reject Castro's totalitarian legacy and embrace instead the ideas of democracy, free-market economics, and the rule of law. The development of a new political and economic system based on these ideas will require a new constitution, which will lay the foundation for a resurgent Cuba.

Among the principles of that new constitution, none will be more critical to the success of the rebuilding enterprise than the protection of private property rights. Property rights are basic human rights, and an essential foundation for other human rights. Without property rights and freedom to contract, other liberties are impossible.

The constitutional protection of private property rights is a matter not only of principle, but also of economic necessity. As a matter of principle, a system of private property rights adequately protected by law and free of excessive restrictions is a necessary condition to the development of free-market democracy.

Such a system will also be needed as a matter of economic reality for Cuba to have any hope of attracting sufficient investment capital to rebuild its economy. No capital will flow to Cuba in the amounts that Cuba needs, absent strong and credible guarantees that private property and enterprise will enjoy at least as much protection in Cuba as in the competing capital-importing nations of the hemisphere. Property rights have to be firmly established under the Rule of Law in order to lay the foundation for a market-based economy. Strong legal protections for property rights will also foster the growth of the Cuban economy by creating the incentive to use property efficiently.

Resolving the Issue of Expropriated Properties

The restoration of property rights is an imperative of fundamental fairness. The cardinal principal in the restoration of property rights is that it be carried out transparently and equitably. It is also a goal supported by sound political and economic reasons. Politically, a property-restoration program will legitimize the new government in the eyes of the former owners and will show to the international investment community that the protection of property rights in the new constitution is not an empty promise.

Economically, the program will provide a means of resolving claims on confiscated property and privatizing enterprises and assets still held by the Cuban state. An orderly and predictable program to resolve conflicting claims to property should encourage capital investment by foreign and exiled entrepreneurs. Rapid privatization of state-owned property, especially by means of restitution to dispossessed owners, should promote efficient use of the property, greater productivity, and economic growth. In sum, the redress of the wrongs suffered by the dispossessed owners at the hands of the Castro regime is an essential component of the system of property rights to be defined and protected in the new constitution.

The confiscations and expropriations by the Castro government violated the Cuban constitution and consequently were unlawful. Specific provisions must be made to restore property rights in Cuba and as part of that restoration, Cuba should establish a mechanism to either return expropriated properties to their rightful owners or compensate owners for the wrongful expropriation of their property.

Cuba should provide remedies to claimants, both U.S. and Cuban, whose properties were expropriated and insure that those remedies are equivalent even if the Cuban claimant's claims are not protected under international law. It would be unjust as well as politically unpalatable to provide remedies to foreign/U.S. claimants that are not provided to Cuban claimants.

- A restoration program should be instituted designed to provide a flexible combination of remedies that include restoration, monetary compensation and compensation in kind.
- In some cases monetary compensation alone is insufficient to compensate a prior owner. Accordingly, flexibility must be provided in order to balance the equities and provide appropriate relief.
- A program, which favors restitution, seeks to weigh numerous factors such as 1) the principles at stake, 2) the feasibility of restitution, 3) the physical condition, legal status and current use of the property, 4) the possibility of intervening transfers, 5) the need to

foster the productive use of the property, and 6) the financial resources available to a post Castro Cuba.

- Original owners and their heirs or successors in interest would be entitled to pursue claims for restitution and any subsequent bona fide holders of the properties, as secondary beneficiaries of the program, would be entitled to compensation. The Cuban state, any Cuban governmental entity, any individual or entity who obtained property through the exploitation of a position of power in the Castro regime, without paying reasonably equivalent value or anyone who acquired title from any ineligible party without providing reasonable value in exchange for the property would be ineligible for participation.
- Compensation includes interest and requires calculation of the amount of compensation in Cuban pesos and then payment at the buy free market rate in U.S. Dollars. Payment may be in cash or debt obligations of the Cuban Treasury or a combination of those.

The importance of resolving claims to expropriated property should not be underestimated. Foreign aid from and trade with the United States will be unavailable until the claims of at least United States nationals are resolved. (Under United States law, resolution of the claims of U.S. nationals is a precondition to lifting the embargo and permitting United States aid to Cuba to resume). Moreover, without a resolution of these claims, new investments will be slow to come due to the uncertainty of investing in properties with a cloud on title and competing claims to ownership.

The Havana Club Case

The Castro government confiscated the Arechabala distillery in Cuba and its Havana Club trademark in 1960. Bacardi purchased the rights to the HAVANA CLUB trademark from the creators and original owners – the Arechabala family – who manufactured their rum in Cuba from the 1930s until 1960 and exported it to the U.S. and other countries until their rum-making facilities and personal assets were seized without compensation during the Cuban revolution.

Bacardi has been selling HAVANA CLUB rum (made in Puerto Rico) in the U.S. since the mid-1990s, except when temporarily suspended to defend litigation brought against it by Cuba's joint-venture partner, Pernod Ricard. After numerous legal battles, the Cuban government's illegally obtained U.S. trademark registration for the brand expired in 2006.

U.S. courts have consistently ruled that the Cuban joint-venture has no rights to the HAVANA CLUB trademark in the U.S.

Previous U.S. administrations have denied license applications from the Cuban government seeking the rights to maintain Cuba's illegally obtained U.S. trademark registration for HAVANA CLUB. Without having the appropriate license from the U.S. government, the Cuban government was not able to renew its illegally obtained trademark registration. However, this Administration now has taken actions without transparency to allow the Cuban government to attempt to resurrect this dead registration.

First, a license should have not be granted for the same reasons that led Congress to enact Section 211. This provision reflects Congress' judgment that the Cuban government should not be allowed to renew the registration for a trademark such as HAVANA CLUB, which it would not possess but for its confiscatory actions, without the express consent of the original owner or its successor-in-interest. If the Cuban government wishes to maintain such a registration in force, it should offer to the legitimate owner (or its bona fide successor-in-interest) the fair compensation that it has withheld for over fifty years. In Section 211, Congress devised a mechanism to acknowledge the rights and interests of the victims of Cuban confiscations regarding U.S. trademarks and prevent expropriators from using the U.S. regulatory and court system to their advantage. That mechanism and the policies underlying it should be respected.

Second, Section 211 as a whole reflects the United States' well established public policy against giving extraterritorial effect to foreign confiscatory actions purporting to affect property in the United States. In this case, Congress has applied this principle to U.S. trademarks (such as HAVANA CLUB) that the Cuban government would not have been able to acquire if it had not confiscated the businesses that owned those trademarks.

Third, granting a specific license in the case of HAVANA CLUB erodes Section 211. While there may be cases in which a specific license might be justified, granting one in this case thwarts the legislative intent to protect the original owners of confiscated property.



Response to Questions for the Record from the Honorable Kurt Tong, Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, U.S. Department of State

**Questions for the Record Submitted to
Kurt Tong, Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs
By Representative Darrell Issa (#1)
House of Representatives Subcommittee on Courts, Intellectual Property and the Internet
February 11, 2016**

Question:

You testified that OFAC sought the State Department's guidance with respect to Cubaexport's November 2015 application for a specific license (which had been denied almost 10 years earlier). What was the "guidance" that the State Department provided to OFAC? Did the State Department consult with any other government agencies or executive offices (including the White House) regarding this issue? Was the guidance provided in writing and if so, please produce copies of all such writings and drafts.

Answer:

The Office of Foreign Assets Control (OFAC) is the office within the Department of the Treasury that is principally responsible for administering U.S. economic sanctions, including the Cuban Assets Control Regulations. In the interest of ensuring that its actions are consistent with the national security and foreign policy of the United States, OFAC regularly consults with the Department of State (the Department) on foreign policy, referring to the Department for its review and guidance, among other matters, specific license applications in certain cases. This consultation process occurs across the range of economic sanctions programs that OFAC implements.

In November 2015, OFAC requested foreign policy guidance from the Department with respect to an application from Cubaexport for a specific license authorizing all necessary transactions with the U.S. Patent and Trademark Office (USPTO) related to Cubaexport's renewal and maintenance of the Havana Club trademark registration. The Department evaluated this referral in light of a number of factors, including the particular facts of the case, the landmark shift in U.S. policy toward bilateral relations with Cuba, U.S. foreign policy with respect to key allies in Europe, and the U.S. policy with regard to trademark rights associated with confiscated property. Based on its evaluation, the Department recommended that OFAC issue the requested license.

In January 2016, OFAC issued a specific license authorizing Cubaexport to engage in all transactions necessary to renew and maintain the Havana Club trademark registration at the USPTO. Neither OFAC nor the Department has taken any position on ownership of the Havana Club trademark, which we understand is the subject of ongoing litigation before the U.S. District Court for the District of Columbia. *Bacardi & Co. Limited v. Empresa Cubana Exportadora de Alimentos y Productos Varios*, No. 04-cv-519 (EGS) (D.D.C.). The OFAC license merely permits Cubaexport to renew and maintain the trademark registration at the USPTO.

**Questions for the Record Submitted to
Kurt Tong, Principal Deputy Assistant Secretary, Bureau of Economic and
Business Affairs
By Representative Darrell Issa (#2)
House of Representatives Subcommittee on Courts, Intellectual Property and
the Internet
February 11, 2016**

Question:

You testified that the State Department recommended that OFAC issue the specific license based on an evaluation of, among other things, “the landmark shift in the United States’ policy toward bilateral relations with Cuba, United States foreign policy with respect to key allies in Europe, and the U.S. policy with regard to the trademark rights associated with confiscated property.”

- a. First, what announced policy change of the United States toward Cuba would justify approving a specific license for the renewal of a trademark which was indisputably confiscated without compensation by the Cuban government in 1960 (as found by three United State federal appellate courts) and which was stolen from a family that was then jailed and driven out of Cuba at gunpoint with no resources.
- b. Second, to which “key allies in Europe” are you referring? Did any European governments request that the United States permit renewal of Cubaexport’s trademark registrations and, if so, please describe the nature, timing, and substance of those conversations.
- c. Third, please explain how the United States’ policy regarding confiscated property would support granting Cubaexport the right to renew its registration in a mark that was confiscated at gunpoint from the original owners?

Answer:

The State Department evaluated OFAC’s request for foreign policy guidance in this case in light of a number of factors, including the particular facts of the

case, the landmark shift in U.S. policy toward bilateral relations with Cuba, U.S. foreign policy with respect to key allies in Europe, and U.S. policy with regard to trademark rights associated with confiscated property.

In December 2014, the President announced a number of historic steps to work toward normalizing relations with Cuba, beginning with the re-establishment of diplomatic relations, which had been severed for 54 years, and the reopening of embassies in respective capitals, which took place on July 20, 2015, as well as the review of Cuba's designation as a state sponsor of terrorism, which was rescinded on May 29, 2015. Pursuant to the December 2014 announcement, the United States is pursuing a policy of engagement with Cuba that is no longer focused on isolating that country and its people and denying them resources.

The Department also evaluated the referral in light of U.S. foreign policy interests with important trading and diplomatic partners in Europe. France is the corporate home of Pernod Ricard S.A., which has entered into a joint venture with Cubaexport relating to Havana Club. Along with France, the European Union ("EU"), which in 1999 lodged a complaint against the United States with the WTO Dispute Settlement Body relating to the Havana Club trademark, and which is currently in negotiations with the United States on a comprehensive trade agreement, has raised the Havana Club matter through diplomatic channels on repeated occasions. We also gave thoughtful consideration to factors that may

weigh against issuance of the license in this case, including, as stated in our July 28, 2006 Foreign Policy Guidance, “[d]enial of the license application would be consistent with the U.S. approach toward non-recognition of trademark rights associated with confiscated property.” In this regard, courts have held that the Cuban government confiscated property associated with the Havana Club trademark rights. *See Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 129-130 (2d Cir. 2000); *Havana Club Holding, S.A. v. Galleon S.A.*, 62 F. Supp.2d 1085, 1092, 1094 (S.D.N.Y. 1999).

We would note, however, that there are pending federal court proceedings in which Bacardi & Company Limited filed suit “to contest the ‘Havana Club’ trademark owned by [Cubaexport],” *see Bacardi & Co. Ltd., et al. v. Empresa Cubana Exportadora de Alimentos y Productos Varios, et al.*, No. 1:04-cv-00519-EGS, 2007 WL 1541386 (D.D.C. May 24, 2007); *see also Galleon S.A. et al. v. Havana Club Holding, S.A., et al.*, No. 92024108 (T.T.A.B. 2004). Having considered and balanced all of the relevant facts and the foreign policy implications presented by the referral, as explained above, the Department of State recommended that OFAC issue Cubaexport the requested specific license. In January 2016, OFAC issued a specific license authorizing Cubaexport to engage in all transactions necessary to renew and maintain the Havana Club trademark registration at the USPTO.

**Questions for the Record Submitted to
Kurt Tong, Principal Deputy Assistant Secretary, Bureau of Economic and
Business Affairs
By Representative Darrell Issa (#3)
House of Representatives Subcommittee on Courts, Intellectual Property and
the Internet
February 11, 2016**

Question:

You also testified that the U.S. is obligated to carry out treaty obligations of the United States. What if any consideration did the State Department give to the decision by the Court of Appeals for the Second Circuit, in a case involving the Havana Club trade name, which held that Section 211 precluded assertion of treaty rights under Section 44 of the Lanham Act, see *Havana Club Holdings S.A. v. Galleon S.A.*, 203 F.3d 116 (2d Cir. 2000)? Please explain why this decision and Section 211 did not impact the guidance you provided to OFAC and others.

Answer:

The State Department gave thoughtful consideration to all of the relevant facts and foreign policy implications presented in this case, including those that may weigh against issuance of the license in this case. In this regard, the Department considered the statement in its July 28, 2006 Foreign Policy Guidance that “[d]enial of the license application would be consistent with the U.S. approach toward non-recognition of trademark rights associated with confiscated property.” It also considered the fact that courts, including the United States Court of Appeals for the Second Circuit, have held that the Cuban government confiscated property associated with the Havana Club trademark rights. *See Havana Club Holding, S.A.*

v. Galleon S.A., 203 F.3d 116, 129-130 (2d Cir. 2000); *Havana Club Holding, S.A.*

v. Galleon S.A., 62 F. Supp.2d 1085, 1092, 1094 (S.D.N.Y. 1999).

The Department considered other factors as well, including the pending federal court proceedings involving Bacardi & Company Limited and Cubaexport in the United States District Court for the District of Columbia. These factors are set forth in my written and oral testimony to the Committee and in my responses to Questions 1 and 2 for the Questions for the Record.



Ms. Mary Denison
March 7, 2016
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Questions for the record from Representative Darrell Issa (CA-49):

Question 1:

You stated in your testimony that after Cubaexport's unsuccessful litigation ended, there was extended back and forth between your office and OFAC, which prevented PTO from acting. However, by November 2012, the Director of OFAC at the time, Adam Szubin, specifically advised the PTO in writing that there was nothing to prevent the PTO from performing the "ministerial, record-keeping function" of updating its registry to reflect that Trademark Registration No. 1031651 had been cancelled or expired. Why did the PTO ignore Director Szubin's advice? Please explain all reasons (legal and factual) why the PTO did not take action on the Petition at or around this time? Or at any time during the subsequent two years?

Question 2:

You testified that the White House contacted the PTO to inquire about the Petition process. Please produce any documents, including emails or memos, regarding those communications. Please identify all people involved in those communications, the dates of the communications, and describe in detail the substance and nature of those communications.

Question 3:

You testified several times that the PTO is obligated to carry out the treaty obligations of the United States pursuant to Section 44 of the Lanham Act, which justified your decision to permit registration and renewal of the Cubaexport registration. What if any consideration did the PTO give to the decision by the Court of Appeals for the Second Circuit, in a case involving the Havana Club trade name, which held that Section 211 precluded assertion of treaty rights under Section 44 of the Lanham Act, see *Havana Club Holdings S.A. v. Galleon S.A.*, 203 F.3d 116 (2d Cir. 2000)? Please explain why that decision and Section 211 do not preclude renewal of Cubaexport's registration.

Question 4:

Was the decision to grant the petition written before January 13, 2016 and if so, when? Please provide all drafts.

Question 5:

In the decision, it states that Cubaexport's failure to pay the filing fee in 2006 was a deficiency which can be corrected "within the time prescribed after notification of the deficiency". The time prescribed for correcting the deficiency was 6 months. Under what authority did the Director of the PTO permit correction of Cubaexport's deficiency 10 years later? Who made that decision? Were any other government agencies or executive offices (including the White House) consulted on this decision?

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Question 6:

Is it the PTO's position that all deficiencies in registration and renewal applications can be corrected at any time provided that a timely petition is still pending with the director? On what statute or regulation does the PTO base this position?

**Response to Questions for the Record from William A. Reinsch, President,
National Foreign Trade Council**

**Response to Questions for the Record from Mr. William A. Reinsch, President,
National Foreign Trade Council**

Questions for the record from Representative Darrell Issa (CA-49):

Question 1:

You stated that the joint venture partner of Cuba, Pernod Ricard, is a contributor to your organization. Have other joint venture partners of the Cuban government contributed to your organization? Has the Cuban government, or any instrumentality of the Cuban government, contributed to your organization?

Answer:

The U.S. subsidiary of Pernod Ricard – Pernod Ricard USA – is a member of NFTC. The parent company, Pernod Ricard, is the joint venture partner with Cuba, but is not itself an NFTC member. The NFTC is 101 years old, and I cannot speak definitively about contributions received prior to my arrival 15 years ago. Since I have been here, there have been no contributions from the Cuban government or any instrumentality of it. Similarly, I am also not aware of any contributions from any other entity that is a joint venture partner with the Cuban government.