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September 20, 1995

Senator W. Cohen
United States Senate
Washington, D.C. 20515

Re: "The Cuba Liberty and Democratic Solidarity Act"

Dear Senator:

My client Amstar, along with thousands of other U.S. citizen holders of claims certified against Cuba in the 1960's by the Foreign Claims Settlement Commission, will suffer devastating economic injury if Title III of Senator Helm's bill (formerly S. 381) is passed as an amendment to the Foreign Operations Appropriations Bill. It is for this reason that I am writing.

It is absolutely false that Title III has been revised in ways that make it no longer violative of both international law and the rights and interests of U.S. citizens holding claims certified against Cuba pursuant to the 1964 Cuba Claims Act. As you know, Title III allows lawsuits to be brought in the federal courts against Cuba and private individuals either living in or doing business in that country with respect to properties taken from their owners for the most part thirty-five years ago. Damages are recoverable against Cuba and others for treble the current value of those properties. Contrary to international law, it makes no difference under Title III whether a litigant was a U.S. citizen at the time the property in Cuba was taken. Indeed Title III is specifically designed to give subsequently naturalized Cuban Americans statutory lawsuit rights against Cuba of a type that we as a nation have never before given anyone else - even those who were U.S. citizens at the time of their foreign property losses.

Title III of Senator Helm's amendment will produce the following consequences if enacted in its present form:

* Our federal courts will be deluged in Cuba-related litigation. On August 28, 1995 the *National Law Journal* (attached) reported that 300,000 - 430,000 lawsuits are to be expected from Cuban Americans if Title III is enacted. According to judicial impact analysts at the Administrative Office of the U.S. Courts each of these suits will average

\$4,500 in costs, whether they go to trial or not. Therefore the administrative costs to the courts alone of Title III will reach nearly \$2 billion

* If we enact Title III those 5,911 claimants certified under the 1964 Cuban Claims Act will see their prospects of recovering compensation from an impoverished Cuba diluted to virtually nothing in a sea of Cuban American claims (To put this matter into context, the Department of State has estimated Cuban American property claims at nearly \$95 billion). It is critical that it be understood that a claim certified by the Foreign Claims Settlement Commission constitutes a property interest¹. If Congress enacts Title III with the foreseeable effect of destroying the value of the \$6 billion (according to State Department figures) in claims held by American citizens, it should expect to indemnify those citizens someday, under the Fifth Amendment's "takings clause", to the full amount of their economic injury. If Title III is made law, the American taxpayer will quite probably someday demand an explanation as to how on earth he or she has been forced to step into the shoes of the Cuban government and compensate U.S. companies and individuals for their property losses in Cuba over thirty-five years ago.

* If we violate international law and long-standing U.S. adherence to that law by enacting Title III and conferring retroactive rights upon non-U.S. nationals at time of foreign property losses, history tells us that we will *not* be permitted to stop with Cuban Americans. The equal protection provisions of the Constitution will not tolerate limiting the conferral of such an important benefit as a federal right of action on only one of our many national-origin groups whose members have suffered past foreign property losses. If, as will surely happen, a former South Vietnamese army officer who is now a U.S. citizen sues in order to gain the same right accorded Cuban Americans to recover damages for property expropriations he suffered, who, if Title III is enacted, is prepared to say he should not have such a right? On what principled basis would such a right be denied him if given by Congress to Cuban Americans? What about Chinese Americans, Hungarian Americans, Iranian Americans, Greek Americans, Palestinian Americans, Russian Americans, Polish Americans? Are we going to claim surprise when the courts tell us that the equal protection of laws requirement of the Constitution mandates that each of these national-origin groups receive the same right of action against their former governments that we are proposing to give Cuban Americans by virtue of Title III? How many such suits might we then expect from these other national-origin groups, and at what cost to both the national treasury and our relations with the many countries that will end up being sued in our federal courts? It must also be kept in mind that U.S. companies that have invested in various countries where our naturalized citizens have property claims (e.g.

¹ See, *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, (1983) *affd. in part*, 765 2d 59 (1st Cir. 1984), *cert. denied* 474 U.S. 909 (1985).

Vietnam) will be held liable for so-called "trafficking" in those claimed properties if Title III is enacted and extended constitutionally to other national-origin groups.

* The multitude of lawsuits that will be filed pursuant to Title III will over time be converted to final judgments against Cuba, and as such will constitute a running sore problem for the United States. Title III lawsuits are explicitly made nondismissible. The fact of hundreds of thousands of Cuban American judgment creditors against Cuba will make it impossible for us to normalize relations with a friendly government in that country. Aircraft and ships would be seized, Cuban assets in the U.S. banking system would be attached, goods produced in Cuba would be executed upon when they arrive in U.S. ports - all in pursuit of recovery of billions of dollars in federal court awards. The population of Cuba (the majority of whom were not even born when the properties of the Cuban American judgment creditors were taken) will be indentured for decades to come to the judgments entered against their country on our federal court dockets. How is such a state of affairs conducive to a reconciliation between Cubans on the island and the Cuban community of the United States?

The alternative to the permanent estrangement Title III lawsuits will produce between Cuba and the United States would of course be for a U.S. president to dismiss the judgments entered against Cuba. Notwithstanding the prohibition against such executive branch action contained in Title III, it is probable that the courts will ultimately uphold the dismissals as a legitimate exercise of the presidential prerogative to conduct foreign affairs.² What then?

The creation of a cause of action by Congress is obviously not a trivial matter. Hundreds of thousands of Cuban Americans will quite properly avail themselves of the right of action to be given them by Title III. These cases will proceed inexorably to final judgments. (There are really no defenses available to Cuba under Title III. It is a strict liability statute). As final federal court judgments they will carry the faith and credit of the United States government, with all the rights and remedies of execution set out in our laws. What will be the consequence of the president extinguishing these judgments and their concomitant rights of execution?

Again, as in the case of certified claimants, a federal court judgment is a property interest protected by the Constitution. If that interest is extinguished by presidential order, the Fifth Amendment "takings clause" with its duty of full compensation will be triggered. If Title III is enacted it should be with full knowledge that Congress may someday be asked by the public to explain how the American people came ultimately to be liable for tens of billions of dollars of damages in recompense to a group of non-U.S. nationals at

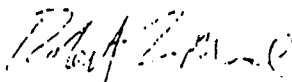
² See, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

the time they lost properties in Cuba.³ In a period of heightened concern for potential governmental liability under the takings clause of the Fifth Amendment, Title III should be approached with the greatest caution and seen for the liability time bomb that it is.

* A troubling aspect of Title III is its contemptuous disregard of international law. As a nation we and our citizens benefit from international law in a myriad of forms, such as overseas investment and intellectual property protection, the safety of our diplomats and sovereignty over our marine resources. Many other examples of the benefits to the United States of an international rule of law could be given. How can we in future demand compliance with international law by other nations if we are prepared to violate that very law by enacting Title III? The proponents of this legislation have never satisfactorily answered that fundamental question.

To conclude, certain proponents of Title III from outside the Senate have engaged in a campaign to minimize its significance. Boiled down, their message is that a vote for Title III is an inconsequential thing. For example, they will say that a litigant cannot or will not sue Cuba itself, but rather any actions are limited to "third party traffickers" in confiscated properties. Let there be no mistake on this point. Title III is an unprecedented federal court claims program against the nation of Cuba. Section 302 of Title III is plain and unambiguous in its meaning. It is the inescapable consequences of that meaning that the Senate must address.

Yours sincerely,



Robert L. Muse

³ See, *Dames & Moore v. Reagan*, *supra*, at 688: "Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States." (Emphasis added). Justice Powell, concurring in part and dissenting in part, had this to say: "The Government must pay just compensation when it furthers the nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.* at 691.