

RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA AND THE UNITED STATES

Michael J. Kelly and Richard C. Witmer¹

On October 1, 2005, Creighton University was awarded a grant from USAID to develop a model for a property claims settlement mechanism between Cuba and the United States. Three law faculty were joined by three political science faculty to form a team of experts supported by graduate students at both schools to investigate and report on the best outcome for such a mechanism.² The model provides a template to be utilized by the United States Government in future negotiations with a post-Castro democratic regime in Havana. In October 2007, Creighton University published the final report on its investigation.³

As a central feature in the U.S. Government's proactive planning for Cuba's transition to democracy, this model responds to the requirement of the Cuban Liberty and Democratic Solidarity (Libertad) Act that property claims be resolved as a precondition to the USG lifting the economic embargo against Cuba. Lifting the embargo is required to normalize Cuba-U.S. relations. Consequently, resolving the property claims issue is one of the early criteria which must be met in

that process, after the president has certified to Congress that a democratically elected government has achieved power in Cuba.

The Report which is the basis for this paper proposes creating a dual-track property claims settlement mechanism. The first track is a bilateral Cuba-U.S. Tribunal (the "Tribunal") established by treaty or executive agreement between a democratic Cuban government and the U.S. The jurisdiction of the Tribunal would be over property claims of U.S. nationals which have been certified by the Federal Claims Settlement Commission. The second track is a Cuban Special Claims Court (the "Court") constituted as an independent chamber of the Cuban national judiciary. The jurisdiction of this Special Court would be over property claims from the Cuban-American exile community.

PROPERTY CLAIMANTS

The Cuban government has paid lump sum amounts to settle outstanding property claims to several foreign states, including Canada, France, Spain and Switzerland. Consequently, the main universe of property

1. This paper is based on the Executive Summary of *Report on the Resolution of Outstanding Property Claims Between Cuba and the United States* (Creighton University, October 2007). The views expressed in this paper and in the Report are those of the investigators, not USAID nor the U.S. Government.

2. Patrick J. Borchers, Professor and Dean of the Law School (Principal Investigator); Michael J. Kelly, Professor of Law; Dr. Erika Moreno, Assistant Professor of Political Science; Dr. Richard C. Witmer, Assistant Professor of Political Science; Dr. James S. Wunsch, Professor and Chair of Political Science; Arthur Pearlstein, Professor of Law and Director of the Werner Institute for Negotiation and Dispute Resolution.

3. *Report on the Resolution of Outstanding Property Claims Between Cuba and the United States* (Creighton University, October 2007). The Report fulfilled Creighton University's commitment under its agreement with USAID's Cuba Transition to Democracy Program, completed pursuant to the grant awarded in response to RFA# M/OAA/GRO/LMA-05-LAC/CUBA. See http://www2.creighton.edu/publicrelations/newscenter/news/2007/october2007/october32007/cubagrantedreport_nr_100307/index.php.

claimants against the Cuban government consists largely of three groups:

- 1 U.S. National Claimants
- 2 Cuban Exile Community Claimants
- 3 Cuban Claimants Still in Cuba

There may also be some claims by Cubans against the U.S. Government for property such as frozen accounts or income proceeds. The Tribunal also provides a forum for resolution of any cognizable property claims between the two respective governments.

U.S. National Claims

The first group of property claims are held by U.S. National Claimants. These are American individuals and corporations who were Americans at the time of the unlawful expropriation (mostly 1959 and the early 1960s). They have certified their claims through the Federal Claims Settlement Commission (FCSC). According to FCSC estimates, their property claims with interest amount to approximately \$6 billion. Their claims have not been satisfied with frozen Cuban assets in the United States. However, their claims are protected legislatively and are linked directly with lifting the U.S. embargo against Cuba. §207(d) of the Libertad Act states:

It is the sense of the Congress that the satisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba.

Moreover, international law generally recognizes the right of American claimants to be compensated. Consequently, a bilateral system to resolve property claims between foreign claimants and the government of Cuba would be supported by international law.

Cuban Exile Community Claims

The second group of property claims are held by Cuban-American exiles mostly living in Miami and Puerto Rico. They were Cuban at the time of the expropriation of their property. The exile community claimants were not part of the certification process undertaken by the Federal Claims Settlement Commission, and thus are not protected under U.S. law to the same extent.

Although the Libertad Act allows them the right to proceed, §304 specifically excludes their property claims from the high level of legislative protection accorded to the FCSC certified claimants:

[N]either any national of the United States who was eligible to file a claim under section 503 but did not timely file such claim under that section, nor any national of the United States (on the date of the enactment of this section) who was not eligible to file a claim under that section, nor any national of Cuba, including any agency, instrumentality, subdivision, or enterprise of the Government of Cuba or any local government of Cuba in place on the date of the enactment of this section, nor any successor thereto, whether or not recognized by the United States, shall have a claim to, participate in, or otherwise have an interest in, the compensation proceeds or other non-monetary compensation paid or allocated to a national of the United States by virtue of a claim certified by the Commission under section 507, nor shall any court of the United States or any State court have jurisdiction to adjudicate any such claim.

Moreover, because members of this claimant group were nationals of Cuba when their property was expropriated, international law generally does not recognize right of recovery. Consequently, a bilateral system to resolve property claims between this group and the government of Cuba would not be supported by international law. Jurisdiction over their claims would reside within the Cuban judiciary.

While claims by this group are not supported specifically by either domestic or international law, politically and economically, their claims should not be ignored. Politically, the exile community's support among policy-makers in Washington and activism against the Cuban regime make them a group that cannot be ignored. Their influence in Washington brought about the Libertad Act (codifying the USG's embargo against Cuba), achieved special immigration status for Cubans leaving the island, sustained Radio Martí programming, and leveraged millions of dollars in federal money to support democracy programming for Cuba.

Economically, this group will be among the first investors in an open Cuban market. Even before direct foreign investment by multinational corporations, who may prove more cautious and wait to see how the markets emerge on the island, the enthusiasm and wealth

of the Cuban-American community will help to jumpstart the Cuban economy at the outset of regime change and could do much to spark the suppressed but ever-present entrepreneurial spirit of the Cuban people.

However, if the property claims of the Cuban-American exile community are left unresolved, their political and economic power could be turned against stabilizing a new government in Cuba, much to the detriment not only of the island, but also to potentially fruitful Cuba-U.S. relations. Thus, from the perspective of elemental justice and reason, the positive aspects of including this group in a broader property claims settlement policy far outweigh the general lack of domestic or international legal justification for doing so.

Claims by Cubans in Cuba and Cubans

The third group of property claims are held by Cubans against the Cuban government. These claims are wholly an internal matter for Cuba to resolve. There is no international dimension to them. Nevertheless, an important principle of any property claims settlement mechanism must be that the settlements do not negatively impact the Cuban population. If Cubans in Cuba, who may have their own claims against the government, view the settlement process as a venue for capital flight from the island, then they will not support it.

Moreover, to the extent that Cubans in Cuba are innocent third party owners of property that is the subject of a claim by U.S. national or exile Community claimants, their property interest must be protected. Essentially, to eject people from their homes would needlessly destabilize the island further, prove to the Cubans that Castro was right about the property issue when he warned that Cubans would be thrown out on the streets by foreign and exile claimants, and engender unnecessary anger toward the United States.

CROSS-CLAIMS BY CUBA

The Castro government asserts that Cubans have over \$100 billion in claims against the U.S. based on harm flowing from the American embargo. These claims are a mixture of economic losses and tort claims. It is difficult to distinguish between harm done by the embargo and that done by the Cuban government, and it is impossible to verify the claims and claim amounts. Nevertheless, a lawsuit went forward in Cuban court in

May 1999 asserting massive tort claims against the U.S. for human losses and hardships flowing from the embargo. The prosecution presented evidence for thirteen days. The U.S. did not respond. The court awarded damages of \$181.1 billion and ordered the U.S. to apologize.

The judicial bodies sought to be established here should not be overrun by Cuban claimants seeking redress against the USG. To the extent that Cuban claims are allowed, making the claim settlement process a two-way street, only valid property-based claims should be considered under the jurisdiction of the bilateral Tribunal. These could involve, for instance, the remaining frozen assets of the Cuban government. Other Cuban claims, including tort claims, should be undertaken within the domestic Cuban judicial system and treated as normal litigation. The instruments establishing the Tribunal and the Special Cuban Court contain language only allowing for property-based claims. Cases alleging other bases for compensation fall outside the jurisdiction of the judicial bodies recommended for establishment.

CUBA-U.S. CLAIMS TRIBUNAL

The Cuba-U.S. Claims Tribunal will be established by bilateral treaty or executive agreement between a successor government to the Castro regime and the U.S. The Tribunal will have international legal capacity as an arbitral body; its sole purpose will be to resolve outstanding property dispute issues between Cuba and the United States and the respective nationals thereof. The Tribunal will consist of a minimum of nine members—one third appointed each by the governments of Cuba and the U.S. and the remaining third appointed by agreement among the two thirds who have been selected. The Tribunal will have interpretive jurisdiction necessary to accomplish its purpose, authority to promulgate rules of procedure, the power to order interim measures of relief, and will apply international law to resolve the claims before it.

Valuation of claims certified by the FCSC shall be given due weight by the Tribunal. Small claims shall be compensated monetarily through a streamlined process. Medium and large claims may be compensated monetarily, by specific restitution, or by alternative remedy awarded by the Government against which the

claim is brought in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment if the claimant agrees. Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Tribunal.

The Tribunal's awards shall be final, binding and fully enforceable within Cuba and the United States. No claims may be filed more than one year after the Tribunal is established. The Tribunal's expenses shall be borne equally by the two governments. The seat of the Tribunal shall be selected by the President of the Tribunal. The U.S. may find it necessary to assist a new government in Cuba in meeting Cuban obligations in the form of a loan on favorable terms or assistance in obtaining loans from international financial institutions.

CUBAN SPECIAL CLAIMS COURT

The Cuban Special Claims Court will be established by bilateral treaty or executive agreement between a successor government to the Castro regime and the U.S. The Court will be an independent Chamber within the Cuban judicial system consisting of twelve judges appointed by the Cuban government in consultation with the U.S. No more than half of these judges may be of the same nationality. The sole purpose of the Court will be to resolve property claims by Cuban-American exile claimants against Cuba. The Court shall have authority to promulgate its rules of procedure, and will conduct business according to the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law. All cases shall be decided on the basis of civil law, particularly as derived from the Spanish Civil Code of 1889.

Small claims shall be compensated monetarily through a streamlined process. Medium and large claims may be compensated monetarily, by specific restitution, or by alternative remedy offered by Cuba in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment if the claimant agrees. Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Special Court.

The Court's awards shall be final, binding and fully enforceable within Cuba and the United States. No claims may be filed more than two years after the Court is established. The Court's expenses shall be borne by Cuba. The seat of the Cuban Special Court shall be selected by the Chief Judge, but the location of the seat shall not prejudice the ability of the Court to sit at locations outside of Cuba if it so desires. The U.S. may find it necessary to assist a new government in Cuba in meeting Cuban obligations in the form of a loan on favorable terms or assistance in obtaining loans from international financial institutions.

TRANSITIONAL CUBAN GOVERNMENT

The Libertad Act prohibits normalized relations between Cuba and the U.S. so long as the regimes of Fidel or Raúl Castro remain in power. Moreover, §§205 and 206 of the law contain a long list of criteria which must be met for a transitional government in Cuba to be considered democratic. Once those criteria are met, normalized relations are possible.

Currently, Cuba is undergoing a succession. Fidel Castro ceded power to his brother Raúl on August 1, 2006 to undergo surgery and has not returned to power. Raúl Castro has been in control since that date and remains in control as of the date of this Report. Consequently, while a succession has occurred in Cuba, a transition has not. Many experts believe that a slow transition is the most likely scenario for Cuba beginning toward the end of the Raúl Castro regime and then moving cautiously forward under a new socialist regime. Thus, a quick transition to full-blown democracy, wherein most of the Libertad Act requirements are met, is not likely.

LEGISLATIVE ADJUSTMENTS

If the USG desires to enter into more normalized relations with Cuba, including resolving outstanding property claims issues between the two countries, before the criteria of the Libertad Act are met, then legislative adjustments will be necessary. Congress must alter some or all of the criteria, thereby allowing the President to enter into negotiations with a new government in Cuba or the successor regime to Fidel Castro. This could take the form of specific amendments or entirely new legislation establishing a new framework for dealing with Cuba.

Moreover, the nature of the agreements establishing the Tribunal and the Court could determine how much legislative adjustment is necessary. If the instruments are adopted in the form of bilateral treaties, then fewer legislative adjustments will be required by the U.S. Subsequent Article II treaties effectively modify earlier statutes, and specifically so if implementing legislation is passed. The Libertad Act is the controlling legislation on Cuba-U.S. relations, and its provisions establish both process and substance governing what relations the U.S. has with the current and future Cuban governments and how those relations may be effectuated. However, if the instruments are adopted as executive agreements, then more extensive legislative adjustments would be necessary.

SOCIO-ECONOMIC CHALLENGES

Economically, while multinational corporations are not as likely to move as fast as Cuban-American investors into Cuba, they will want to get into Cuba fairly quickly as the government stabilizes and the market opens up. U.S. corporations will want to move in before foreign multinational corporations occupy the field. For those multinational corporations seeking to invest in Cuba, this reality will motivate them to take much less on their FCSC certified claims because their claims would be worth far less than the business opportunities that will present themselves. The mediation opportunity for medium and large claims within the Tribunal instrument seeks to meet this challenge.

Socially, and politically, the racial disconnect between the populations in Cuba and the exile community could be problematic. The exile community in Miami is mainly Caucasian, contrasted with the population in Cuba which is 62% Afro-Cuban. This ethno-social disconnect will create friction between the two populations. Under the Batista regime, Caucasian Cubans held power, but were also an ethnic majority on the island. Under the Castro regime, Caucasian Cubans remain in power, but constitute a minority of the population on the island. The current system of political and economic power distribution in Cuba has been characterized as a quasi-Apartheid system.

The four major pillars of the Cuban economy are tourism, Venezuelan subsidies, Cuban health care to foreign patients, and nickel mining. Oil drilling has not

yet been exploited by the government as a fifth pillar of the economy, although significant reserves have been discovered in the Gulf of Mexico. Afro-Cubans are allowed to mine nickel and only participate in a limited way in the other sectors, but do not control them. Moreover, aid sent from the exile community goes to Caucasian Cubans, not Afro-Cubans. Early members of the exile community were the wealthy Caucasian supporters of the corrupt land-regime under Batista which similarly held back Afro-Cubans. To the Afro-Cuban population on the island, then, a fight over property settlement is a fight amongst the Caucasians and the Afro-Cubans continue to lose either way.

If Afro-Cubans come to power in a democratic government (which by definition they might since they are the majority), the second instrument advocating a special Cuban court for exile claims could be seen as nothing more than a give-away to a wealthy Caucasian exile community that abandoned the struggle on the island and failed to support Afro-Cubans even during the Castro regime.

Consequently, several elements have been built into the instrument creating the Special Cuban Court to mitigate this view. First, investment in the Cuban economy is encouraged instead of monetary compensation or property restitution. Second, innocent third parties currently occupying confiscated property are protected in their property rights—restitution will not occur in those instances. Third, financial assistance to the Cuban government specifically earmarked for this process is called for to come either directly from the USG or foreign financial institutions; thus, Cuban assets will not be diverted from assistance to the Cuban people to meeting property claim awards.

CONCLUSION

The model for property claims settlement between Cuba and the United States put forth in this Report is one in which the short-term interests of the Claimants are addressed simultaneously with the long-term interests of normalized Cuba-U.S. relations, stabilized post-embargo circumstances in Cuba, sustainable foreign investment in the Cuban economy, and direct and indirect benefit to the Cuban people. Moreover, the interests of all Claimant classes are addressed in further-

ance of decreasing cross-strait turmoil and mending Cuban-American/Cuban relations.

Additionally, property interests of Claimant parties are recognized and addressed with compensatory, restitution, or mediated investment awards while the property interests of innocent third parties in Cuba are also recognized and protected. Nobody on the island will be turned out of their homes. Yet nobody with a verifiable claim of property confiscation will come away empty-handed.

The model for property claims settlement offered in this Report is the best, most legitimate, and most efficient means that Creighton University considered for adoption. The twin goals of maximizing the pool of stakeholders likely to opt into this process while minimizing a disruptive effect during Cuba's post-Castro transition (eliminating the property issue, boosting

foreign investment and benefiting the people of Cuba) have been met by this model if it is adopted and properly implemented.

Finally, the vital importance of cultural understanding as a key element in making such institutions workable ones cannot be overstressed. Infusing not only the bench but also the registrar's bureaucracy with cultural sensitivity is vital to avoiding further political and legal problems which cause considerable delay and require more expensive adjustments later. This includes giving a spectrum of Cuban representatives, whose culture the U.S. recognizes as internally and geographically heterogeneous, as much leeway as possible in running the Court and the Tribunal.

Creighton University is ready to assist the USG in furtherance of these objectives when the transition occurs.