

# CREIGHTON UNIVERSITY REPORT ON THE RESOLUTION OF CUBAN CLAIMS: COMMENT

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Let me start my comments by emphasizing one unintended consequence of the Creighton University Report: to promote the long term task of a culture of lawfulness, rule of law, and establishing an independent judiciary. For that reason alone, the Report should be completed as it was intended and widely circulated here and in Cuba.

I will focus on selected aspects of the Report, especially discussing the direction the Report recommends Cuba should take with respect to the resolution of claims and evaluating the Report's recommendations in light of present day markets and globalization. But most of all, I will make suggestions for a more pragmatic approach to reach the desired goals of the Report: (1) resolve the claims issue so the U.S. embargo can be lifted and Cuba can participate in the U.S. economy; and (2) jump-start the Cuban economy so people can be fed properly and life in peace and freedom can be established.

Before I make my comments, I would like to make some general observations on the Report:

- 1 Did the Report consider past constitutional and legal practices and *teachings* in Cuba in crafting its recommendations? It is important to factor in the prevailing thinking of Cuban jurists and businesses.
- 2 There is no constitutional framework for the recommendations of the Report. I would refer the drafters to a study by the International Commission of Jurists the United Nations titled *The Rule of Law in Cuba, 1962*. The Creighton Report states that the 1940 Constitution was reformed in

mid-1959. The International Commission of Jurists disagrees: "The 1940 Constitution was never re-enacted after January 1, 1959."

- 3 Did the Report study a similar situation that developed as a result of confiscations by the Spanish Crown that were not restituted to Cubans, after the Treaty of Paris of 1898 with the United States? After that experience, I strongly oppose any Tribunal that is not framed within the Cuban Constitution and is not subject to future law suits claiming damages and/or unconstitutionality.
- 4 A tempting alternative, not considered in the Report, is for Cuba to "bond" the claims, that is, transform them into debt security for the original amount, plus interest, subject to legal resolution. To lift the embargo, as soon as it is practical, resolution of the claims should be a priority of a Cuban government in transition. Bonds would buy time and will let restitutions be removed from claims.

Legal teachings in Cuba, now and prior to the current regime, may not support a Tribunal independent from the law of the land. It is a shame that the Report was cut short by lack of funding. I hope that some institutions pick up the subject where USAID funding left off. I hope that ASCE, the University of Miami, and others complete the mission.

As the report is reviewed and revised it would be beneficial to engage Cuban jurists and even open a "web forum" where those in Cuba may be able to "talk," providing ideas anonymously. I would suggest that for the second half, the Report team engage one or more Cu-

ban jurists, and survey power and money. More on power and money later.

There is no doubt that settling the issues of the expropriated properties is essential to the reconstruction of Cuba. But we need to frame the issues not only from Cuba, from the “Macondo” perspective of a town without a soul and only spirits in the air, but also from the role Cubans can play in today’s world of globalization and trade, especially in agricultural production. Cuba has, perhaps, one of the world’s best geographic positions with respect to the U.S. market. With oil today at \$118 per barrel, consider what economists are now calling the “neighborhood effect.”

- 1 Cuba’s oil reserves are estimated by the U.S. Geological Survey at 5 to 9 billion barrels. This represents assets between 500 billion and one trillion U.S. dollars.
- 2 Income from nickel of 2 billion U.S. dollars per year, an estimate of 30 billion U.S. dollars over 15 years.
- 3 A hotel inventory, which is state property, of 50,000 rooms, which at 200,000 U.S. dollars each, means around 10 billion U.S. dollars, with potentially a lease income of 1 billion per year.
- 4 Potential ethanol and some sugar exports that may be worth 7 billion U.S. dollars per year at a 30 to 50 percent gross profit margin, before taxes.

Compare this with the unfounded fear of U.S. claims that are as high as 6 billion U.S. dollars. Deduct the share corresponding to Cuban banks that had made loans secured by those assets, and other claims to those claims I do not have time to mention today. Add the un-scrutinized foreign debt of 33 billion U.S. dollars. Are we Macondo? Certainly not, and I’m not Pollyanna.

Let me discuss the roles of power and money in the reconstruction of Cuba and how they may affect the claims issue.

#### EXAMPLES OF POWER

- Organized Labor. There are now 3.2 million organized workers in the island with meeting halls, access to telephone, operating structures.
- Organized Civil Society. There are lawyers, doctors, judges. The elements of civil society are there.

The only thing they lack is freedom to operate, elections.

- Economic Associations: Sugar mills, sugar lands, cattle lands, chambers of commerce and others.

#### EXAMPLES OF MONEY

- Agricultural assets. Land values in the range of 34 billion U.S. dollars.
  - 100,000 caballerías of sugar lands (3.3 million acres) harvested in 1958, at today’s income potential of Florida (\$7,000 per acre), equals 23 billion U.S. dollars. Sugar lands in 1958 were 61 percent of the land under production.
  - The balance (2.1 million acres), at 40 percent of the value of sugar land, would yield another 1 billion U.S. dollars.
- Real estate on which I cannot place a value at this time. But Miami-Dade alone has about 140 billion U.S. dollars in real estate taxable values. And collects 5 billion U.S. dollars in taxes each year.
- Foreign investors that see Cuba as a potential exporter of 3 billion gallons of ethanol per annum, with a market value of 7 billion U.S. dollars. Perhaps the country with the largest export potential in biofuels in the world.
- Potential in biotechnology and medical services worth hundreds of millions.

#### RESOLUTION OF CLAIMS GOING FORWARD

What would be the role of the Settlement Tribunal if the regime fell today and was replaced by a Transition Government (TG)?

If the TG chose to be practical and non-ideological, and wanted to jump-start the dormant Cuban economy, who would be the critical claimants, the ones that would have the most impact? Sugar and cattle land, brands and consumer goods, financial institutions, utilities, oil and minerals? Is restitution an option for most of these critical claimants under present market circumstances? Go and ask. Are the Cuba sugar land asset holders in the United States willing to settle for 800 U.S. dollars per acre? If restitution is not an option, are there buyers for these claims in today’s economy, especially agricultural lands, existing strategic alliances in biotechnology, medical services?

If the TG gave enough guarantees to for the rule of law to return to Cuba, would the mechanism set out in the Creighton Report be the best option to jump-start the economy, or would a quick no-questions-asked restitution scheme, if chosen by the TG, be acceptable to the claimants? What role will power and money play?

Recall that if the top 50 corporate claimants are categorized depending on industry and impact on the Cuban socioeconomic situation, the situation is as follows: (1) agriculture production; sugar industry, 43 percent; (2) financial services, banking, and consumer products, 26 percent; and (3) utilities, 31 percent.

## CONCLUSION

To jump-start the Cuban economy, only claims related to (1) and (2) above need to be address. That is, the focus should be on agriculture and sugar production as well as on financial services, banking, and consumer products. Restitution and rule of law will provide the confidence necessary to create a benefit in returning to Cuba. Dealing with the claims of the utilities is a very complex subject and anyhow those sectors are working today so that they have lower priority in terms of claims resolution.