

THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN THE U.S. AND CUBA AND THE CONCLUSIONS OF THE CAFC II REPORT: COMMENT

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In October 2005, the U.S. Agency for International Development announced a contract award to Creighton University for a study on the resolution of property claims between Cuba and the United States. At the same time, officials from many different branches of the U.S. Government had just begun work on their own report on the same issue for the Presidential Commission for Assistance to a Free Cuba (CAFC). Initially some of those working on the CAFC report and the Creighton University study thought that the two reports would compete with each other. That concern turned out to be unjustified.

The Presidential Commission on Assistance to a Free Cuba completed its Second Report to the President (CAFC II) in May 2006.² President Bush accepted the report shortly thereafter. Creighton University released its study in 2007, and in my view, it is an excellent companion piece to the findings in CAFC II. With more time and space, the authors of the Creighton report were able to discuss the issues in detail and to draw on previous experiences with property claims in other countries. They also provided a very comprehensive collection of data on the type and nature of property claims.

There are other differences between the two reports. Per its mandate, the Creighton report focuses on legal precedent and international law. The CAFC II report was clearly a more political document, designed to provide policy recommendations. It therefore explicitly took into account other foreign policy issues in its deliberations, specifically its mandate to propose measures that would help a transitioning Cuba towards a sustainable and prosperous democracy.

The CAFC II report is not easy to read. It suffers from a disjointed presentation, which separates its recommendations for the transition period from its recommendations for the period of democratic government. It then subdivides its recommendations between those for the U.S. Government and those for the appropriate Cuban authorities. Much of this awkwardness came from the Commission's mandate. It stipulated that the report focus on the period of transition from dictatorial to democratic rule as envisioned under the Helms-Burton Act. CAFC members found the stipulation too confining and structured the report to allow discussion of issues that would transcend the two periods.

1. The author led and served as co-chairman of the Economic Working Group for the Presidential Commission for Assistance to a Free Cuba. From 1997-1999 he was Counselor for Political and Economic Affairs in the U.S. Interests Section in Havana, Cuba. The views and conclusions of this report are those of the author and do not necessarily represent the views of the Department of State, the U.S. Government, or the views of any individual Commission member.

2. Commission for Assistance to a Free Cuba, Report to the President, July 2006. Available from the Department of State at www.cafc.gov/documents/organization/68166.pdf. There was an earlier report in 2004.

As we prepared for the early meetings of the CAFC Economic Working Group (EWG), I anticipated the property issues to be the major source of controversy. In reality, there was considerable consensus even before discussions began. There was unanimity that the return of property to its original owners was neither probable nor desirable, although EWG members came to that conclusion from a variety of perspectives.

- Members were mindful that the current Cuban government has used the threat of the loss of homes to maintain its support among the Cuban population. Although the U.S. Government had long made clear it did not support the eviction of people from their homes, it was important to belie the perception created by Cuban Government propaganda.
- Members wanted to ensure that once the transition began there would be a quick return to democratic government under conditions that supported its chance for stability. They believed an attempt to return property would become a major source of conflict.
- They were aware that returning property seized a half century earlier could cause as much or more injustice than the justice it would bring.
- The Commission was also tasked with making recommendations on bringing prosperity to the Cuban people. They were aware of Nicaragua's attempt to return property after only a decade of Sandinista rule. That prolonged process continues nineteen years after that country's return to democratic rule. The failure to resolve titles or pay compensation has been a major detriment to that nation's economic recovery.³ A new Cuban government will have to deal with a period of over fifty years and several times the number of Nicaraguan cases. Commission members believed that rapid economic recovery required a quick granting of property titles.

EWG members also thought it important to consider several other issues:

- The necessity to hold a sovereign state accountable to international law when it expropriates property from citizens of other countries.
- The interests of naturalized Cuban Americans who held strong feelings that an injustice had been committed against them.
- U.S. law as it pertained to the Cuban property cases, specifically the Helms-Burton Act.

Based in part on international law, the EWG divided the property cases into two categories. The first was property owned by American citizens or corporations at the time of expropriation (American citizen cases). The second case was property owned by non-U.S. citizens at the time of expropriation (non-citizen cases).

AMERICAN CITIZEN CASES

For the American citizen cases, the EWG thought there was already ample precedence to guide U.S. policy. Both international and American law requires payment for those properties. Even the current Cuban Government agrees with the principle of compensation for property seized from non-nationals and has negotiated compensation agreements with other nations.

In accordance with the basic principles discussed above, the EWG recommended that compensation for the 600 plus cases already consolidated under the Foreign Claims Settlement Act be negotiated as a package with a freely elected Cuban government. However, within the EWG there was considerable debate on how to treat large-scale enterprises whose quick reactivation might assist in the transition. Eventually the EWG proposed, and the Commission accepted, language that allowed for some exceptions to government-to-government negotiation:

A democratic Cuban government will also have to address the disposition of confiscated industrial, commercial, and agricultural properties. For the most part, these decisions will be part of the process of

3. In a preliminary session before the meeting of the working groups, the Nicaraguan Ambassador to the United States addressed CAFC members and made a detailed presentation of the failures of the Nicaraguan approach to property restitution. He concluded that Nicaragua's attempt to settle each case on its own merits had not worked and delayed Nicaragua's recovery. Copies of the Ambassador's presentation are available from the author at ghmaybarduk@comcast.net.

privatization should there be a transition to an open, market-based economy. However, the transition government may find that some large infrastructure or industrial projects necessary to jump-start the economy may require early privatization to attract needed capital and technical expertise. In some cases, previous transitional governments have returned property to former owners on the condition of an early injection of capital. In general, however, such decisions should be left to an elected government.⁴

The Commission also accepted language that allows individual claimants to withdraw from a group settlement.

With respect to confiscated property that falls under the Foreign Claims Settlement Act, the U.S. government should offer to settle these claims in government-to-government negotiations. The United States should also offer to allow any claimants who wish to seek private settlements to do so.⁵

NON-CITIZEN CASES

For the property of non-U.S. citizens at the time of confiscation, the Commission understood that, under international law, the U.S. Government had no standing to make legal claims for compensation. International law is clear that these matters belong to the sovereign state where the confiscation took place. From the example of the Nicaraguan experience, there was also general agreement that it was impractical to expect the return of properties, and especially residential properties, to their original owners.

Working Group members vigorously debated the need to compensate this category of claimants for their lost property. Again, they agreed compensation was neither practical nor necessarily just. Some members believed the argument for compensation could not justify requiring the current generation of Cuban citizens to pay for the actions by the previous generation, especially since the recipients would be substantially wealthier than those who would pay compensation. They also argued that the former property owners and

their descendants had benefited from decades of living in the United States, where they were likely to have had the opportunity for a much higher standard of living and greater opportunities to pursue their lives' goals than those who remained on the Island. Some members, however, while generally agreeing with the above argument, were nevertheless concerned with the need to reconcile all Cubans inside and outside of the country. They preferred the U.S. Government not prejudice the issues of restitution or compensation, which were best decided by the Cuban people.⁶

The final version reflected both views. The Commission accepted language that recommended the U.S. Government state it would accept the will of the Cuban people on the issues of restitution and compensation for property confiscated from non-U.S. citizens.

Nevertheless, by declaring these issues to be properly the responsibility of a future elected democratic government, EWG members accepted the likelihood that property would not be returned. Likewise, by also recommending that a future democratic Cuban government not follow the example of Nicaragua, which has now spent nineteen years trying to negotiate individually each property case, the Commission was accepting that compensation was not practical.

A number of issues critical to the long-term economic success of a free Cuba may likely need to be addressed once a freely elected, democratic Government is in place. Three in particular are: the disposition of state-owned enterprises (SOEs); the central role of the Cuban military in the Cuban economy; and property rights. The sensitivity of each of these issues requires that an elected government, enjoying widespread legitimacy with the Cuban people, make the ultimate decisions in these instances. In the interim, the Cuban Transition Government could consider undertaking an inventory of SOEs, to determine which ones may be viable for later privatization, imposing budget constraints on non-viable SOEs, enacting measures designed to prevent tunneling or asset stripping in state-owned or military-controlled enterpris-

4. CAFC II Report, pp. 68-69.

5. CAFC II Report, p. 76.

6. The discussion of national reconciliation in the final report did not intend to suggest the payment of compensation. Some EWG members believed that reconciliation could be adequately accomplished by an acknowledgement by the democratically elected government that the confiscations had been unjust, even if now irreversible.

es, and ensuring that private property rights are respected.

It will be the role of the democratically elected Government to decide in a fair, humane and transparent manner how to reconcile the needs of the Cuban people at home and abroad with respect to the crucial issue of property rights. In that role, a free Cuban government will need to take into account the need for national reconciliation and the desire of Cubans living abroad to return to and/or invest in a new Cuba. It should avoid the example of some other transition countries, such as Nicaragua, where the contentious issue of confiscated properties has been allowed to fester for years.

Once a democratic government is in place, the U.S. Government should state clearly that it would respect the will of the Cuban people as they deal with the problem of confiscated property based on fairness, equity and national reconciliation. It should also offer technical and monetary assistance to expedite the titling process.⁷

AGRICULTURAL PROPERTIES

The Commission failed to deal adequately with the problem of re-privatization of agricultural lands, although it discussed the difficulties the process would entail in a separate section on agriculture. That failure partly originated in the EWG. It was unable to find expertise on the subject within the U.S. Government and did not have time to seek the necessary expertise from outside experts, which in any event are few in number.⁸

However, after reviewing the multitude of land ownership patterns, the EWG concluded that no single

model of privatization could cover all types of state-owned or collective properties, and in its draft suggested that the final decision might be left to the members of each state farm or cooperative. That suggestion was the only recommendation by the EWG that was removed by the Commission.

SOME CONCLUDING THOUGHTS

In the end, the EWG and the Commission placed as its highest priority the smooth transition of Cuba to prosperous democracy. To accomplish that goal, they believed property titles has to be settled as quickly as possible, with a minimum of conflict, and in a manner that was perceived as fair and reasonable. They understood, however, that it was not possible to find a truly just solution after so much time had elapsed.

Although accepted by President Bush, the recommendations of the CAFC II report are not binding on either the current or any future administration. Nor are its recommendations complete. There are few suggestions for Cuban authorities on how to implement the recommendations. The recommendations only partially deal with the privatization of state enterprises and even less with agricultural privatization. They also do not envision a long transition where economic reform might precede political reform and an early resolution of property titles might be required.⁹

Nevertheless, the Commission's recommendations on dealing with the problem of confiscated properties, which had broad approval at all levels and many agencies throughout the U.S. Government, were a major step forward in U.S. Government thinking and should provide a good basis for future reflection and refinement.

7. CAFC II Report, pp. 75-76.

8. The problem of reactivating Cuba's agricultural sector during and after a transition has largely been ignored in the literature, yet that sector encompasses almost one-third of the population.

9. The mandate that the Commission follow the precepts of the Helms-Burton Act precluded the Commission from dealing with this last issue. The Helms-Burton Act prohibits U.S. assistance to a transition government that does not commit to elections within 18 months.