ESTABLISHING GROUND RULES FOR POLITICAL RISK CLAIMS ABOUT CUBA

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At present, both Cuba and the U.S. subject the Cuban economy to substantial political risk, i.e., nonmarket loss from state actions like eminent domain, embargos, and tax policy. In Miami, unresolved claims for property expropriated by the Cuban government are the most visible examples. More globally, potential foreign investors in Cuba seek assurance that neither the U.S. nor Cuba will take state action that threatens commercial activity. The problem of political risk in Cuba is wider, more bilateral, and more complicated than just these two special interests. For several decades, no real movement on addressing these problems has been made.

As part of normalizing relations between the U.S. and Cuba, though, it now becomes possible to imagine making some headway. Settlement mechanisms for claims and foreign investment regimes have been proposed, but they tend not to grapple with the full range of competing interests at stake. In particular, existing proposals focus narrowly only on the private property interests of particular owners. Moreover, D17 (December 17, 2014, the day the two countries announced a concerted policy of normalization) fundamentally changes the rules of the game.

So a fresh look at political risk in Cuba is in order, especially now as private expectations about the Cuban economy are beginning to take shape. Rather than adding to the existing proposals, this paper sets out the interests that any successful framework for managing political risk in Cuba must satisfy. These interests are meta-criteria that serve as the beginning of a conversation about political risk.

I identify four such sets of interests: *sovereign bilateralism, legal finality, dignitarian interests,* and *public supremacy*. Any settlement mechanism must rest on the idea that Cuba and the U.S. are legal equals as sovereigns. This is a process interest. To produce legal finality for these claims, the mechanism must be exclusive, timely, comprehensive, and binding on all affected parties. This is a structure interest. For some, property claims may stand in for nonfinancial dignitarian interests that cannot be monetized. Acknowledging these cultural claims (rather than property claims) will help to resolve both sets of claims. Finally, questions about property interests must be put in the context of wider public interests at stake in the normalization between the two countries. When public and private interests conflict, the public should trump the private. This is a context interest that will help to decide when choosing between trade-offs.

As a preliminary exercise, this essay starts by sketching the pending political risk claims in respect of Cuba. It then sets out the terms of reference for each set of interests.

TYPOLOGY OF CLAIMS

What makes political risk about the Cuban economy complex is that the risk is created both by the U.S. and Cuba. Moreover, in addition to any private claims against either country, each country has claims against the other.

Certified Claims Against Cuba

When the Cuban government expropriated property through the urban and agrarian reforms, it created

claims to indemnification from those who lost property. Most of the U.S. claims arose in connection with oil refineries and other industrial operations owned by foreign investors. Cuba's internal law governed disputes with its citizens but the claims of foreigners is subject to international law. Cuba settled most of its expropriation claims with citizens from other countries but not those of U.S. citizens whose property was taken. With respect to these claims, the Cuban Claims Program of the U.S. Foreign Claims Settlement Commission has conducted two Cuban Claims Programs, which have certified 5,913 restitutionary claims with a market value—including interest—of about $6–8 billion. About 900 of these claims belong to corporations that own 85% of their face value, with the remaining 15% divided among roughly 5,000 individuals; of the 48 largest claims, all but five belong to corporations.[1]

Public International Law Claims of Cuba Against the U.S.

In addition to these claims, Cuba has asserted claims of its own against the U.S. for embargo losses (imagine Cuba as a balance sheet with the expropriation claims on the liability-side and the embargo claims on the asset-side). For example, an international tribunal convened by the Cuban government to consider claims against the U.S. (including for embargo losses of over $100 billion) held that U.S. policy against Cuba constituted genocide.

Claims of the U.S. Against Cuba

The Johnson Debt Default Act prohibits credit access in the United States for countries that are in default of their obligations to the United States.[2] At present, Cuba is in default on one U.S. obligation—a non-concessional credit of $32,267,000 issued by the U.S. Export-Import Bank.[3]

Private Claims Against Third Parties

Expanding the range of claimants, Congress in 1996 passed the Cuban Liberty and Democratic Solidarity Act ("Helms-Burton"), letting certain classes of claimants whose property was expropriated by the Cuban government sue in federal court against third parties who had acquired interests in the expropriated property.

Claims of Third Parties Against the U.S.

Insofar as the U.S. attempts to intervene in the Cuban economy, foreign investors might have a claim against the Treasury Department for interference with contracts.

SOVEREIGN BILATERALISM

The first conceptual hurdle (and the easiest one to handle) deals with perceptions about the relative legitimacy of the U.S. and Cuba as potential partners in any settlement mechanism. No serious questions exist about whether the government of the U.S. is empowered to enter into a settlement mechanism. However, certain sectors of U.S. society have long resisted recognizing the sovereignty of the Cuban government. This sector includes influential members of the Cuban-American political community and, to a lesser extent, their allies. Moreover, at various times the U.S. government has tried to recruit Cuban citizens to destabilize the Cuban government. The rationale for this view is that the current Cuban government lacks legitimacy because it—or its antecedent—came to power through violent rather

1. Rolando Anillo-Badía, *Outstanding Claims To Expropriated Property in Cuba*, Cuba in Transition—Volume 21, ASCE 2011.

2. The Johnson Act provides: "Whoever, within the United States, purchases or sells the bonds, securities, or other obligations of any foreign government or political subdivision thereof or any organization or association acting for or on behalf of a foreign government or political subdivision thereof, issued after April 13, 1934, or makes any loan to such foreign government, political subdivision, organization or association, except a renewal or adjustment of existing indebtedness, while such government, political subdivision, organization or association, is in default in the payment of its obligations, or any part thereof, to the United States, shall be fined under this title or imprisoned for not more than five years, or both." 18 U.S.C. § 955.

3. *See 2002 U.S. Government Foreign Credit Exposure report* (known as the *Salmon Report* for the color of the report) prepared as requested by Conference Report on the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101–167, 103 Stat. 1195. See also José M. Gabilondo, *Sending the Right Signals: Using Rent-Seeking Theory to Analyze the Cuban Central Bank*, 27 Hous J. Int'l L. 483, 506–07 (2005). Available at: http://ecollections.law.fiu.edu/faculty_publications/90

than democratic means.[4] The idea that Cuba's sovereignty is defective has virtually no support outside of this small but highly influential community, but that minority view has had outsized influence in the popular imagination of some sectors of the diaspora, especially in Miami.

In terms of designing a settlement mechanism between the two countries this is not, strictly speaking, a legal issue because there are no legal challenges to the ongoing negotiations. Implicitly, the U.S. recognizes without reservation the legal authority and the legitimacy of the Cuban government to conduct these negotiations. So nothing has to be done as a legal matter. However, it may be useful to engage, address, and definitely resolve any lingering objections to Cuban sovereignty to facilitate a formal resolution of ongoing disputes between the two countries.

For example, both countries and numerous commentators point out that the two countries do not agree on several major political issues. Given that this is the norm between countries, it seems odd to keep pointing it out. It may be that as part of normalization between the two counties, some expect Cuba to capitulate to U.S. preferences about the island's internal affairs. Since this is inconsistent with a long-arm notion of Cuban sovereignty, the notion of capitulation should be addressed and rejected as inconsistent with a country's sovereign prerogatives.

This is not to say that no disputes about sovereignty exist between the two countries. The longstanding U.S. embargo of the island involves a form of economic warfare intended explicitly and in effect to undermine the Cuban government. The extraterritorial reach of the embargo also implicates the sovereignty of other countries. Also, still unresolved is the question of the U.S. presence in Guantanamo. Any serious settlement of these political questions will have to address both the embargo and Guantanamo.

LEGAL FINALITY

Political risk involves uncertainty about actions that a government may take in the future. To eliminate this risk effectively, a mechanism must create finality, not only as a legal matter but, perhaps more importantly, in terms of the resulting expectations of participants and observers. Some will welcome the outcome of settlement and others will not, but all must be convinced that there is no legal appeal from the decision. This requires designing a mechanism consistent with general ideas about process, fairness, and judicial power.

Creating legal finality may also help individuals to reach emotional finality about these issues. Many people who have experienced financial and cultural losses in Cuba still hold out hope that something can be done. Legal finality—however it ends up distributing the gains and losses involved in political risk—will help to extinguish expectations about things turning out differently.

DIGNITARIAN INTERESTS

Settlement of any private property claims must be situated in the wider context of national reconciliation. By this I mean the process by which island Cubans and diaspora Cubans (in the U.S. and elsewhere) must discover a new modus vivendi that takes note of the past without being mired in it. This means creating a new narrative about property claims. Because they have been reduced to a dollar value, property losses create the illusion that their meaningful settlement is possible. In part, though, restitution claims only "stand in" for more complex experiences of loss, including to dignitarian interests that cannot be monetized. Some kind of reconciliation process to address dignitarian interests rather than financial ones may help to serve both.[5]

4. This is part of a wider view that Cuba's legal system is structurally defective or—in its most extreme version—that there is no legal system on the island. Attorneys and academics familiar with Cuba have long criticized these assertions, but they have enjoyed so much support among certain quarters that they have captured some of the popular imagination.

5. I explored this issue in greater detail in *Cuban Claims: Embargoed Identities and the Cuban-American Oedipal Conflict* (el grito de la Yuma), 9 Rutgers Race & L. Rev. 335 (2008). Available at: http://ecollections.law.fiu.edu/faculty_publications/85.

PUBLIC PRIMACY

The final set of interests recognizes that normalization of relations between the U.S. and Cuba involves public interests that go beyond private expectations and property interests. Especially because these public and private interests may come into conflict, a rule of decision is needed to resolve these conflicts. I suggest that the rule of decision should consistently favor public interests over private ones. Granted, what counts as a *public interest* in Cuba is highly contestable because socialist ideology has subordinated the private to the collective. Ironically, this happened while other countries experimented with neoliberal arrangements that reduced state power. As Cuba becomes more active in the global market, the incipient liberalization of the island's economic system will likely increase economic inequality, at least at first. This trend poses the greatest risk to groups like the aged, children, the disabled, the existing poor, and the unskilled, those least able to hit the ground running in a market economy. In the long run, a strong private sector and market incentives should lift the fortunes of many; in the short run, though, private interests have little to offer the vulnerable. A welfare state whose public interests can trump private prerogatives can better tend to these groups.

CONCLUSION

In a tentative and preliminary form, this essay has suggested meta-criteria that should inform the resolution of political risk claims in respect of Cuba. Both Cuba and the U.S. should endorse these meta-criteria in general form. It is hoped that doing so would make it easier to work out the technical particulars of any settlement mechanism. Like a judgment-proof debtor, however, Cuba lacks the liquidity needed to fund settlement of any major claims. A properly designed mechanism could create an interest shared by various claimants in providing Cuba with this settlement liquidity. Candidates for these interest groups include current holders of certified claims, other claimants, commercial firms and commercial and industrial lobbies interested in participating in the Cuban economy, the Cuban government, and others who want to engage with Cuba.