

US-CUBA DIFFERENDUM: SETTLING CLAIMS-DEFAULT JUDGMENTS

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The law of international claims for injuries, wrongful deaths, property losses and damages is sometimes called “the diplomatic protection of citizens abroad” or “the responsibility of states for injuries to aliens”. Diplomatic protection is one of the traditional concepts of classical international law that has developed over the centuries. It denotes the process by which a state asserts a claim against another state because one of its nationals has been treated by the latter in violation of international law.

The U.S. Department of State and Cuba’s Ministerio de Relaciones Exteriores (MINREX) act on behalf of national claimants in the negotiation of their claims with the other country. Under the “doctrine of espousal,” the negotiations conducted by the representatives of each State are binding on the claimants, and the settlement that is reached constitutes the claimants’ sole remedy.

The act-of-state doctrine enjoins courts from examining the legality of official acts of foreign states in their own territory as it was decided by the U.S Supreme Court in the Sabbatino case in which it ruled that it would not examine the validity of a taking of property by a foreign government in its territory even if its illegality under international law was alleged. Further obstacles to lawsuits against host states in domestic courts of other states are related to the doc-

trines of non-justifiability, political questions, and lack of a close connection to the local legal system.

It is mainly for these reasons that alternative methods have been created for the settlement of disputes between states and foreign nationals. Arbitration, in a neutral forum, has been the most successful method of securing justice for the foreigner. It is advisable to submit to an ad hoc bilateral arbitration forum the claims of their nationals against the States.

This paper summarizes the Cuban people’s claims against the U.S. government and U.S. citizens’ claims against the Cuban government. The paper also describes recent challenges in the enforceability of default judgments against the Cuban government and it concludes with observations and recommendations on the authority of the U.S. President to settle the claims and default judgments under a mutually acceptable agreement between the U.S. and Cuba in accordance with international laws.

CUBAN GOVERNMENT CLAIMS

The Cuban government has spoused two large claim judgments against the United States, one for about \$121 billion USD for alleged damage and harm caused to the Cuban economy and to individual Cuban citizens, by over five decades of the U.S. trade and investment embargo¹. According to Cuban authorities², Cuban state enterprises continue being un-

1. Havana’s Provincial Court awarded Cuba \$121 billion for embargo damages in January of 2000.

2. Report by Cuba, On Resolution 69/5 of the United Nations General Assembly, entitled “Necessity of ending the economic, commercial and financial blockade imposed by the United States of America against Cuba.” June 2015

able to freely export and import products and services to or from the United States, and Cuba cannot use the U.S. dollar in its international financial transactions or hold accounts in that currency in third country banks.

Damages alleged by Cuba are primarily associated with lost income from exports of goods and services, expenses caused by geographical relocation of trade, especially that which derives from immobilized inventories, and adverse monetary-financial effects due to the exposure of economic actors to exchange rate variations (the U.S. dollar cannot be used in any payments), and the increased cost of financing.

Pursuant to Cuban Law 80 of 1996³, Cuban citizens who themselves or whose family members have been victims of personal injury or material damage as a result of actions sponsored or supported by the U.S. government are permitted to file claims for their compensation.

Based on the Cuban Court records, 3,478 Cubans lost their lives and 2,099 were seriously injured with permanent disability as a result of such actions. Accordingly, Havana's Provincial Court awarded about \$181 billion, to the Cuban government on behalf of those individuals and their family members for wrongful deaths and injuries and consequential damages against the Cuban people by the United States government and its agencies⁴.

The Cuban government may have standing to sue the government of the United States in an international court and it may be able to obtain a favorable judgment against the United States for the deaths and injuries suffered by innocent Cuban citizens due to the CIA-sponsored terrorist attacks and other internationally-repudiated criminal acts in Cuban territory as well as the terrorist attacks against Cuban aircraft and other properties outside Cuba. This legal action may be a legitimate claim on its own merits or

an effective counterclaim against the U.S. default judgments. Other countries like Viet Nam and the Soviet Union have used the counterclaims route to settle claims and obtain favorable accords with the United States.

U.S. DEFAULT JUDGMENTS

In 1996 the U.S. Foreign Sovereign Immunities Act (FSIA) was amended with a new subsection (a)(7) of Section 1605 to allow a new category of suits against a foreign state by persons (1) holding U.S. nationality at the time of death or injury; (2) who seek money damages for those personal injuries or deaths; (3) "that [were] caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... made by an official, employee, or agent of such foreign state while acting within the scope of his office, employment or agency." The first judgment under the new subsection resulted from Cuba's deliberate shooting down in 1996 of two civilian planes operated by Miami-based organization Brothers to the Rescue. The U.S. District Court awarded the plaintiffs a default judgment of \$187.6 million in compensatory and punitive damages. Currently there are 11 cases with total compensatory damages of \$2.2 billion and \$1.8 billion in punitive damages for a total of about \$4 billion in default judgments against the Cuban government and that figure increases every year with accumulated interests at the statutory rate⁵.

The key question is how these U.S. citizens and those with later judgments will be able to collect from the Cuban government when there are no Cuban frozen assets left in the U.S. (the frozen assets have been dispersed to pay a handful of early successful plaintiffs against Cuba.) Traditionally, outstanding claims between the U.S. and another country have been settled by a foreign claims settlement agreement similar to the one used to settle nationalization claims. In the present situation, however, there is a serious question

3. Law 80 of 1996, also called "Reaffirmation of Cuban Dignity and Sovereignty Act". See articles 11 and 12. At www.cuba.cu/gobierno/antidoto.htm

4. See 2009 Press Release of the Cuban Ministry of Foreign Affairs (MINREX) on Claims brought by the people of Cuba for human and economic damages caused by terrorist acts and actions.

5. See <https://www.fas.org/sgp/crs/terror/creditors.pdf>

whether a foreign claims settlement agreement is a reasonable approach in light of the large outstanding and likely future judgments against Cuba under the (a)(7) provision of the FSIA (in 2008 relabeled Section 1605A) and the limited assets now frozen by the U.S. government. Since the FSIA is federal law, the President (Executive) may need the approval of Congress to enter into a settlement for less than full compensation to avoid giving bona fide judgment holders a Fifth Amendment takings claim against the U.S. government. There is a possibility of using the fines and penalties assessed and collected enforcing the Cuban Assets Control Regulations (Embargo) against foreign banks and other large multinational corporations to compensate those judgment holders on a case-by-case settlement between them and the U.S. Department of Justice with the assistance of the U.S. Department of State.

Cuba was included in the U.S. list of states sponsoring terrorism (“rogue states”) from 1982 to 2015. On May 29, 2015, the U.S. removed Cuba from the list of state sponsors of terrorism. Given the questions about the present implementation of the FSIA and how to reestablish a “normal” relationship with Cuba after removal from the list of states sponsoring terrorism, it would seem appropriate to consider possible changes to section 1605A and the U.S. government role in these processes regarding a foreign state.

First, the U.S. government should intervene based on 28 USC Section 517⁶ to seek dismissal of cases where the requirements of FSIA were not met. This is especially relevant in the cases against the Cuban government where the Cuban government did not respond to the lawsuits or raise its immunity. In many of those cases, Florida courts did not even question the subject matter jurisdiction and still ruled in favor of the plaintiff in clear violation of the statute. There are examples of questionable jurisdictional determi-

nations under the applicable federal statutes in some of the Florida cases, such as *McCarthy v. Rep. of Cuba*; *Weininger v. Rep. of Cuba*; *Jerez v. Rep. of Cuba*; *Vera v. Rep. of Cuba*, and *Villoldo v. Ruz*.⁷ If the U.S. government were to intervene, some of the default judgments may be vacated and declared void and current and future cases would be suspended on behalf of the national interest of the U.S.⁸ Should some of the judgments be vacated, the government of Cuba may reciprocate by withdrawing at least its counterclaims for personal death and injury against the government of the United States.

Second, these cases should be transferred to a foreign arbitration forum based on 28 USC Section 1605A(a)(2)(A)(iii). Cuba has ratified different international conventions regarding the settlement of disputes through arbitration. There is no doubt that the Cuban government would prefer the certainty of resolving disputes under acceptable and recognized alternative mechanisms over the risks of litigation in U.S. courts. Thus, the Cuban government would recognize and enforce a foreign arbitration award based on the applicable international conventions.

Third, any successful judgments may be limited to “actual” government accounts and not against accounts or assets owned by Cuban state enterprises.

Fourth, the successful claimants and the U.S. government would negotiate a settlement and that settlement would be final without constituting a taking.

SPOUSAL DOCTRINE (DIPLOMATIC PROTECTION) AND DEFAULT JUDGMENTS

Cuba’s removal from the State Department’s list of state sponsors of terrorism effective May 29, 2015, means that it is immune from lawsuits in U.S. courts for any acts of terrorism outside the United States it commits (or supports) after that date.

6. 28 U.S. C. § 517.

7. For a detailed analysis and comments on the cases, please see: Lyubarsky, Andrew, “Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgment to Ensure Normalization of Relations between the United States and Cuba”. New York University School of Law, 2016.

8. As of November 29, 2015 lawsuits will no longer be available against Cuba as a result of its removal from the state sponsors of terrorism list. The question of outstanding judgments will however remain.

But are Cuba's assets in the United States immune from attachment to satisfy judgments obtained under the FSIA terrorism exception prior to that date? The answer appears to depend on the courts' interpretation of two statutes that lift foreign sovereign immunity for foreign government property in the United States in terrorism cases.

Cuba was designated a state sponsor of terrorism from 1982 to May 2015. As mentioned above, plaintiffs have won 11 cases against Cuba under the FSIA terrorism exception, with damages now totaling about \$4 billion, not including interest. Most of these judgments were obtained in state courts, many involved conduct that occurred prior to Cuba's terrorism designation, and all were obtained as default judgments without an entry of appearance by the Cuban government. This figure does not include one judgment of \$200 million won in a Florida state court that did not invoke the FSIA. The judgment has been deemed unenforceable by the U.S. Court of Appeals for the D.C. Circuit due to lack of jurisdiction in the awarding court. The plaintiff has asked the Supreme Court to review this finding.

Some of the awards have been satisfied from frozen Cuban assets in the United States, at least in part, but the bulk of the amount remains uncollected as judgment creditors scour the country for attachable assets. Creditors must locate property in the United States that is owned by Cuba and is subject to an FSIA exception to immunity.

The main barrier to collection by judgment holders is the availability of Cuban assets in the United States subject to attachment under the laws of the state where the executing court is located. As of the end of 2014, the Department of the Treasury's Office of Foreign Assets Control (OFAC) reported the existence of just \$270.3 million worth of blocked assets related to Cuba in the United States, but not all of this property is actually owned by Cuba.

Courts have held that the federal provisions permitting attachment of foreign property to satisfy terrorism judgments do not permit the attachment of assets solely on the basis that they are subject to regulation or are blocked by OFAC; the judgment

creditors must also establish an ownership interest on the part of the defendant country.

In the absence of new legislation or a diplomatic resolution of the issue, it is conceivable that the reestablishment of diplomatic relations between the United States and Cuba and the envisioned increase in commercial ties between the two countries will eventually result in the availability of more Cuban assets subject to attachment in the United States, at least for some of the creditors. On the other hand, the existence of outstanding judgments against Cuba without the protection of foreign sovereign immunity may deter those commercial ties from developing.

PRESIDENTIAL AUTHORITY TO SETTLE THE CLAIMS

There are three potential ways for the U.S. government to enter into an international agreement with Cuba to settle the claims (the "Agreement"):

- Sole Executive Agreements, in which an agreement is made pursuant to the President's constitutional authority without further congressional authorization. The U.S. President has the power to enter into the Agreement without the need to ask Congress or Senate for ratification; however, this Executive Agreement may be challenged in court.
- Article II Treaty: Pursuant to the U.S. Constitution, the President shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.
- Congressional-Executive Agreements: Unlike in the case of treaties, where only the Senate plays a role in approving the Agreement, both houses of Congress are involved in the authorizing process for congressional-executive agreements. Congressional authorization of such agreements takes the form of a statute which must pass both houses of Congress. Historically, congressional-executive agreements have been made for bilateral trade and investment agreements such as NAFTA and GATT. Any U.S. President who chooses to seek legislative approval of a treaty risks delay, textual modification and even a defeat. Despite these shortcomings, legislative con-

sent will make the terms of the agreement more protected and honored.

Recommended steps in the negotiation and implementation of the Agreement under the U.S. President's constitutional executive authority are:

1. Secretary of State authorizes negotiation with Cuban counterparts;
2. U.S. and Cuban negotiators meet and reach terms of an Agreement;
3. Secretary of State recommends negotiated terms to the President;
4. U.S. President approves and authorizes the signature of the Agreement;
5. The Agreement becomes binding under international law;⁹ and

6. The U.S. President transmits the Agreement to Congress for informational purposes within 60 days after entry into force.

CONCLUSION AND RECOMMENDATIONS

The above mentioned claims/counterclaims/judgments will have to be resolved as part of a comprehensive and balanced negotiation between the U.S. and Cuba. No shortage of creativity and innovation will be necessary to find the right mechanisms to move these issues off the table. Cuba is a poor developing country and U.S. and Cuban nationals' claim holders will not receive the amounts that some of them had hoped for over many years, and Cuba will have to give up some cash or economic value to provide compensation and get in return the huge potential of investment and foreign assistance. This is a win-win strategy for Cuba and the U.S.

9. The U.S. assumes international obligations most frequently when it makes agreements with other States that are intended to be legally binding upon the parties involved. The U.S. signed the Vienna Convention on the Law of Treaties on April 24, 1970, but the U.S. Senate has not given its advice and consent to the treaty. Therefore, the U.S. is not a party to the Treaty. Nonetheless, the U.S. considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also, e.g., *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003); *Galo-Garcia v. I.N.S.*, 86 F.3d 916 (9th Cir. 1996) ("where a controlling executive or legislative act ... exist[s], customary international law is inapplicable"); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir.1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 479 U.S. 889 (1986). But see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the Alien Tort Statute, 28 U.S.C. §1350, recognized an individual cause of action for certain egregious violations of the law of nations).