

# U.S.-Cuba Trade and Economic Council, Inc.

New York, New York

Telephone (917) 453-6726 • E-mail: [council@cubatrade.org](mailto:council@cubatrade.org)

Internet: <http://www.cubatrade.org> • Twitter: @CubaCouncil

Facebook: [www.facebook.com/uscubatradeandeconomiccouncil](http://www.facebook.com/uscubatradeandeconomiccouncil)

LinkedIn: [www.linkedin.com/company/u-s--cuba-trade-and-economic-council-inc-](http://www.linkedin.com/company/u-s--cuba-trade-and-economic-council-inc-)

28-29 July 2016

*Final Opportunity For U.S. Claimants To Force Negotiations?*

*No "Details" In 233 Days*

*Two Meetings In 599 Days*

*A Wasted 18 Months?*

*Let The Claimants Negotiate Directly?*

Representatives from the government of the Republic of Cuba, United States Department of State, United States Department of Justice and United States Department of the Treasury will meet in Washington DC, on 28 July 2016 and 29 July 2016 to discuss the 5,913 claims registered with the United States Foreign Claims Settlement Commission (USFCSC), which is under the administration of the United States Department of Justice. This will be the second meeting.

Important for this meeting and discussion to transform, and quickly, into a negotiation. There is no more time for the airing of grievances and rehashing of positions.

This is a moment for PowerPoint presentations, realistic expectations, compromise, acceptance, and attorneys to draft agreements.

The Obama Administration has professed that a settlement of the certified claims is a priority- a top priority. Yet, during a 20 July 2016 background briefing by a senior official of the United States Department of State, it was clear was settlement negotiations have not commenced- and many of the certified claimants were concerned:

**REPORTER QUESTION (Miami Herald):** *My question has to do with the property rights issue. I wonder if you could give us any details there. And two, whether Cuba still has outstanding property rights issues with any other countries, and is there a target number we're looking for, like settling on 20 cents on the dollar, 10 cents on the dollar, whatever?*

**SENIOR STATE DEPARTMENT OFFICIAL:** *As I mentioned, property claims is one of our top priorities. We had an initial – or first-round meeting with the Cubans on this issue last December in Havana. We will have a second round of talks here in Washington at the end of this month. We certainly have not laid out any kind of – the details which you've described. That will emerge from the negotiations, but we're committed to pursuing all of the registered claims, as well as other claims that U.S. citizens have against Cuba. So it's a process. We had a good round last December. We hope to make further progress this month in moving forward on the issue.*

From one representative of certified claimants, *"If two meetings in 599 days about an issue defined as 'a priority,' I cringe at the prospect of learning how the State Department defines an issue that is not 'a priority,' would it be 1,000 days?"* The representative added, *"If they can't do better than they've done so far, the State Department should stand aside and authorize a claimant committee to directly negotiate a settlement."*

## Timeline

17 December 2014 to 8 December 2015- 356 days between President Barack Obama's 2,283-word statement (that did not mention certified claimants) and the first meeting of representatives from the government of the Republic of Cuba and the United States Department of State to discuss the issue of certified claims.

# U.S.-Cuba Trade and Economic Council, Inc.

8 December 2015 and 28 July 2016- **233** days between the first meeting and second meeting of representatives from the government of the Republic of Cuba and the United States Department of State to discuss the issue of certified claims.

28 July 2016 to 20 January 2017- **176** days between the second meeting of representatives from the government of the Republic of Cuba and the United States Department of State to discuss the issue of certified claims and the end of the Obama Administration.

The certified claimants are increasingly of the opinion that the Obama Administration has no intention of negotiating a settlement, but remains content with the imagery of dialogue.

- Why haven't Certified Claimants Sector Working Groups been established?
- Why haven't certified claimants been summoned to meetings at the United States Department of State for the purpose of creating a negotiating platform?
- Is there a Certified Claimants Committee? Thirty (30) of the certified claimants account for 56% of the principal value of the certified claims.
- Have Agendas been created- and followed?
- Have Modalities of Settlements been established?
- Where is the Guidance?

Some certified claimants have pondered asking the Obama Administration to retain **Mr. Kenneth Feinberg**, a New York, New York-based attorney specializing in mediation and alternative dispute resolution, who served as Special Master for the September 11<sup>th</sup> Victim Compensation Fund and TARP Executive Compensation; Administrator of the BP Deepwater Horizon Disaster Victim Compensation Fund; retained to assist in the General Motors recall response and compensation for Volkswagen owners. Mr. Feinberg, who could be appointed as a Special Envoy, appreciates the singular importance of deadlines.

There were 8,821 claims of which 5,913 awards certified by the USFCSC are valued at US\$1,902,202,284.95. The USFCSC permitted interest to be accrued in the amount of 6% per annum; the current total value is approximately US\$6 billion to US\$8 billion.

The first official bilateral discussion relating to certified claims between representatives from the government of the Republic of Cuba and the United States Department of State was in Havana, Republic of Cuba, on 8 December 2015- nearly one year after United States President Barack Obama began his 2,283-word statement with "*Today, the United States of America is changing its relationship with the people of Cuba.*"

During that meeting, according to the Ministry of Foreign Affairs of the Republic of Cuba, "[the government of the Republic of Cuba] *delegation explained the basis of their claims, particularly, the demands of the Cubans to the US government for human and economic damages, acknowledged by the Cuban courts.*"

There is no more important issue for the Obama Administration to resolve by 20 January 2017 than a settlement of the certified claims; and that process has been made easier due to a decision by Stamford, Connecticut-based Starwood Hotels & Resorts Worldwide (2015 revenues exceeded US\$5.7 billion), which is being acquired by Bethesda, Maryland-based Marriott International (2015 revenues exceeded US\$14 billion), to engage with the government of the Republic of Cuba through the management of three (3) properties.

Starwood Hotels & Resorts Worldwide controls a certified claim with principal value of US\$51 million- representing approximately 2.68% of the total principal value of the certified claims.

In 2016, the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury granted a license(s) to Starwood Hotels & Resorts Worldwide to manage properties in the city of Havana owned by Republic of Cuba government-operated entities.

# U.S.-Cuba Trade and Economic Council, Inc.

The properties are Gran Caribe-owned Hotel Inglaterra; Habaguanex-owned Hotel Santa Isabel and Hotel Quinta Avenida (re-branded as Four Points by Sheraton Havana on 27 June 2016). The Hotel Quinta Avenida is owned by Republic of Cuba government-operated Gaviota SA, which is controlled by the Revolutionary Armed Forces of the Republic of Cuba (FAR).

## Reality Versus Mythology

Don't pressure the government of Cuba- they don't like it (who does?), but in the present circumstances it is unavoidable.

With 176 days remaining for the Obama Administration to negotiate a certified claims settlement, there may be necessity for the Obama Administration to place in the public domain the text of an offer- so that the certified claimants and their private sector and public sector advocates have an opportunity to consult the government of the Republic of Cuba- and explain what a settlement would mean, in the short term, medium term and long term for generations of Republic of Cuba nationals.

There will likely not exist an optimum moment for each country to discuss and agree to accept less than each desired. From a bilateral perspective- there will always be internal or external issues impacting both countries.

<p><u>There is one fact, however.</u> The government of the Republic of Cuba will never have a more compliant negotiating partner than it does in the Obama Administration for whom the Republic of Cuba is a visceral component of a legacy construct.</p>
---

The challenge will be for the government of the Republic of Cuba to recognize there will be no specific monetary reparations to offset for their potentially US\$121 billion to US\$800 billion in claims against the United States.

The negotiators will need to ask whether the imagery of seeking what will not be given is more important for the 11.3 million citizens of the Republic of Cuba than removing a significant impediment to further United States regulatory change and statutory change; and the immediate resulting multilateral benefits.

The government of the Republic of Cuba maintains a position that it should not be required to accept commercial, economic or political changes in order to benefit from a change to United States laws and United States regulations. There is a constituency in the United States that agrees with that position.

In a classroom of political theatre, the position of the government of the Republic of Cuba has legitimacy.

In the classroom of political reality, the choice is to accept, move forward, develop the country either with the assistance of United States companies and the United States government- and/or continue to use each as bait to obtain attention from others; or reject and then rejoice in the resulting, and voluntary, continued discomfort for the citizens of the Republic of Cuba. Pride has costs; the question is how much is pride worth?

## Assisting The Obama Administration

While negotiating a certified claims settlement, the Obama Administration should continue to focus upon expanding existing regulations and creating new regulations and removing regulations that impact what United States companies can do- and how they can do it, including exporting products (authorize everything by a general OFAC license) to and importing products (authorize everything by a general OFAC license) from the Republic of Cuba. Permit United States companies to use their internal vetting processes and external communications teams to determine marketplace desirability and compliance.

The Obama Administration needs to persuade the government of the Republic of Cuba to authorize more initiatives.

# U.S.-Cuba Trade and Economic Council, Inc.

Some Members of Congress and their advocates in Washington DC, may argue that if the Obama Administration agrees to a claims settlement the momentum for further statutory and regulatory changes will be weakened- the process will continue to be incremental rather than "*the big bang theory*" where the United States Congress votes to repeal all relevant statutes... that's a foolish argument.

The changes will continue to be incremental... because that is the desire of the current government of the Republic of Cuba.

The bilateral relationship has never been about a moment; it's always been about a series of moments... with each building upon the predecessor moment.

Members of Congress and United States-based advocates for statutory and regulatory change should be speaking with representatives of the government of the Republic of Cuba and traveling to the Republic of Cuba to present their support for a certified claims settlement.

Certified claimants that have a reasonable interest in returning to the Republic of Cuba marketplace (export, import, products, services, etc.) should also be visible in their advocacy- stating what they would be willing to accept in terms of a settlement.

The role of the certified claimants in the advocacy and public diplomacy process is significant and its absence will result in a landscape similar to what exists with efforts by Members of Congress and their advocates to change a statute relating to the export of food products and agricultural commodities to the Republic of Cuba.

The Trade Sanctions Reform and Export Enhancement Act (TSREEA) of 2000 re-authorized the direct export of agricultural commodities and food products from the United States to the Republic of Cuba, albeit on a cash-only basis.

Primary impediments to moving revisionist TSREEA-legislation through the United States Congress have been:

- The absence of the government of the Republic of Cuba stating what payment terms it would seek if permitted to do so for agricultural commodities food products.
- The absence of United States-based companies that have, are or desire to export agricultural commodities and food products to the Republic of Cuba stating publicly what payment terms they would provide, today, to Republic of Cuba government-operated entities.

## What Can The Obama Administration Do?

The Obama Administration could use funds obtained during the last eight years from global financial institution settlements and not redirected by the United States Congress for other purposes to offset some or all of the principal/interest amount of the certified claims.

*“The Foreign Claims Settlement Commission of the United States (FCSC) is a quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments, under specific jurisdiction conferred by Congress, pursuant to international claims settlement agreements, or at the request of the Secretary of State. Funds for payment of the Commission's awards are derived from congressional appropriations, international claims settlements, or liquidation of foreign assets in the United States by the Departments of Justice and the Treasury.”*

If the Obama Administration makes a payment to the certified claimants essentially on behalf of the government of the Republic of Cuba, might those who have civil judgements in the United States against the government of the Republic of Cuba seek to seize the funds? Someone may try. That does not mean don't do it.

# U.S.-Cuba Trade and Economic Council, Inc.

President Obama may have a time window upon the expiration of the Defense Authorization Act this fall; there is a provision in the 2015/2016 law that precludes President Obama from changing the lease for Guantanamo Bay. This could be a component of negotiation.

A certified claims settlement should be based upon the payment of 100% of the value of each certified claim. Even with a full settlement based upon principal and interest, the annual rate of inflation has substantially diminished the value of each certified claim.

Opportunities for settlement include, but are not limited to, debt-for-equity swaps and substitution investments (one structure for another; one piece of land for another, etc.). In combination with or separately from compensation formats, the government of the Republic of Cuba could provide transferable values to the certified claimants including:

- Income tax holidays
- Import duty exemptions
- Reduced energy rates
- Property tax credits
- Earned income tax credits

The OFAC should issue a general license for certified claimants, their representatives and agents to visit the Republic of Cuba for the purpose of negotiating a settlement.

The government of the Republic of Cuba should consider hosting a multi-day Certified Claimant Settlement Forum and any certified claimant who desires to return to the Republic of Cuba marketplace and has a proposal would be welcomed; and all proposals would be subject to a thirty (30) day yes-or-no response.

Given the lack of progress, if the Obama Administration wanted a certified claims settlement, it would step aside and authorize a Certified Claims Committee (using the thirty largest certified claimants) to directly negotiate a certified claims settlement with the government of the Republic of Cuba; or, as the Libertad Act of 1996 permits, create individual private settlements amongst themselves and the government of the Republic of Cuba.

The president, chief executive officer, chief financial officer, and legal counsel of a company, or an individual certified claimant is far better positioned (and incentivized) to discuss what they might want to do and what the government of the Republic of Cuba might have the commercial and economic capacity to provide... more so than representatives of the United States government. If a certified claimant would be accepting, so be it.

## **Consequences Of Inaction**

Without a settlement of the certified claims, every Obama Administration initiative becomes less secure and more tenuous in terms of post-Obama Administration survival.

This is not to suggest that initiatives will be reversed; it does project that initiatives in place will be stagnant or slow to become reality because of impediments within the Republic of Cuba and a lack of resolve by Members of Congress.

Without a settlement of the certified claims, and without an expedited acceptance by and implementation of commercially-focused Obama Administration initiatives by the government of the Republic of Cuba during the next 176 days, the more likely further meaningful statutory and regulatory changes will await 24 February 2018- the date of the retirement of H.E. General Raul Castro, President of the Republic of Cuba.

The nearer to the date of retirement, the more likely will be reticence by the United States Congress to create additional commercial, economic and political landscapes to benefit the incumbent, so as to have an arsenal of opportunities to entice or reward the successor.

# U.S.-Cuba Trade and Economic Council, Inc.

A settlement of the certified claims would create momentum in the United States Congress that would unlikely be derailed... and that may cause concern for some in the government of the Republic of Cuba, where a slight derailment of energy might be welcomed to slow the process of re-engagement. Washington, DC-based advocates may also desire a tempered roadway as their financial existence depends upon issues to advocate.

The United States and the Republic of Cuba need to extract the negotiation for the settlement of the certified claims from other claims-related issues. A resolution of the certified claims will provide the most value to the Republic of Cuba and provide a foundation for a return to the Republic of Cuba by United States companies.

## Legacy?

There is often discussion of the legacy relating to the decisions of the Obama Administration since 17 December 2014.

Legacy, however, is better defined by resolving the difficult issues (certified claims), not the easier issues (travel and coffee).

Has the last eighteen months resulted in a widespread eruption of affluence throughout the Republic of Cuba? No, it has not. There has been a reconstitution of a (thus far primarily limited to Havana) middle class. That is significant. It's not enough.

For the efforts of the Obama Administration to be defined as legacy, United States-based historians share that there are four (4) components of the bilateral relationship with the Republic of Cuba that would need to be remedied:

- Settlement of the certified claims
- Permit the termination of the lease for Guantanamo Bay
- Repatriation of recognized fugitives
- Citizen rights enhancements

What is true and is unalterable... there are 176 days remaining for the Obama Administration to negotiate a settlement of the certified claims.... and for the government of the Republic of Cuba to accept it.

## For Reference:

**Article From The Miami Herald:**

**<http://www.mcclatchydc.com/news/politics-government/congress/article89373947.html>**