2011, Cardinal Jaime Lucas Ortega y Alamino, cardinal-archbishop of Havana, traveled to Creighton University to receive his honorary doctorate from then President John Schlegel, S.J.

As the narrator of his citation, I was honored to meet this man from a country I had become so familiar with, but had never set foot in. I am part of a generation that was taught Cuba’s critical place in American history, but part of my professional life has been dedicated to helping bringing Cuba out of the 1950s into the 21st century.
On that day, I recall Cardinal Ortega wore an effortless smile and exuded an inner peace — both of which belied the daily struggle of a country still led by the atheistic communist Castro brothers. When asked about his steadfast positive outlook given the difficult task he was charged with, he explained that in Cuba especially, one must take the long view. By doing that, together with strengthening your devotion, you and your flock are assured of coming to a better place in the end.

Faith in a better life is what Cubans long for, whether they leave the island in search of it or remain to wait for it to arrive. And although Americans don’t typically take the long view, we do share Cardinal Ortega’s belief in a better future. It is what drove us to break from British rule 240 years ago, and it’s what drives us as individual citizens to expand our horizons within this free-market democracy. It was also one of the factors that led Creighton to secure a federal grant from the United States Agency for International Development (USAID) in 2005 to study and report on resolving property claims issues in Cuba dating back to the 1959 revolution.

“Making life better for people on the island” was the mission-focused approach that our team would measure against to ensure that we were moving in the right direction. As principal investigator for the grant, professor Patrick Borchers, then dean of the Creighton law school, articulated this charge to me, Creighton political science professors Richard Witmer, Ph.D., and Erika Moreno, Ph.D., and the rest of the team — a collection of six faculty and six students drawn from the law school and the political science department. This approach was our guiding premise in our research, our investigations, our system design for dispute resolution and our final report.

While the linkage between resolving decades old property claims and making life better for people living under a planned economy that fails to deliver even the most basic means of existence seems tenuous, in the unique case of Cuba and the United States, it is not. The collapse of communist regimes and transition to open economies across the world in the 1990s demonstrated that ordinary people fare better in open economies where entrepreneurial spirit can thrive. In Cuba, the economy cannot fully flower until, first, the regime either changes or embraces an open system and, second, the U.S. embargo is lifted — leading to foreign investment. Under current U.S. law, the embargo cannot be lifted until a series of things takes place — first on the list: resolution of outstanding U.S. property claims.

Resolution of these claims is the first domino that must fall in the long march toward lifting the embargo. That Creighton was tasked by Washington to design that domino was a great honor, one that we embraced. The dispute resolution systems we designed both for American claimants and Cuban-American claimants were grounded in sound policy, international law and a sense of equitable flexibility. Inducing the rapid settlement of property claims as a step toward lifting the embargo and thereby opening up Cuba for the betterment of everyone was the goal.

Our relationship with Cuba has largely remained frozen since 1962 — politically, economically and legally. Today, our relationship with Cuba is changing rapidly through new diplomatic ties, financial and banking arrangements and increased travel. We can review three areas — politics, economics and law — to chart some interesting new movements and their attendant ripple effects.

Politics

When President Barack Obama announced in December 2014 that the United States would restore diplomatic relations with Cuba and that a preliminary agreement had been reached to do so, brokered in part by Pope Francis, he was quick to note that it was up to Congress to deal with the embargo. As president, he possesses superior constitutional authority over foreign affairs, but even he cannot override a statute — the legislative vehicle in which the embargo is embedded.

While the president’s announcement came as a surprise to many, much of the groundwork was laid out in a logical way — though not without its share of political twists. According to polls, 60 percent of Americans favor lifting the embargo. Shortly after the announcement, the private rift between Republican senators over the Cuba embargo became quite public. Leading the Wall Street wing that would like to see open investment opportunities, Sen. Jeff Flake, R-Ariz., came out strongly in favor of lifting the embargo, and Sen. Marco Rubio, R-Fla., leading the anti-Castro wing, came out strongly against doing so.

A similar rift among candidates for the 2016 Republican presidential nomination is also likely to open up as a result. No presidential candidate since Dwight D. Eisenhower has won the Republican nomination without the Florida electoral vote. And to win Florida and secure that nomination, a candidate must carry the Cuban-American vote centered in and around Miami. Even though poll shows that Floridians in general track the sentiment of the rest of the American population about opening up relations with Cuba, and the younger generation of Cuban-Americans agree, the overwhelming majority of Cuban-American Republicans, whose primary vote is highly influential in Florida, think otherwise. Seventy percent don’t want the embargo lifted and 78 percent are against normalizing relations with Cuba.

This especially puts former Florida Gov. Jeb Bush in a tight spot. Clearly, he must carry Florida, as his home state. And he is on record as governor, and more recently, as supporting the embargo against Cuba. But to win the presidency in the general election, Republican candidates historically must also bring the broader business community and rural America into their fold. In this case, not only does Wall Street want the embargo lifted in order to do business in Cuba, but “big agriculture” wants it lifted as well.

Within six days of President Obama’s announcement of
normalization of relations with Cuba, a new lobbying group was launched on Capitol Hill representing 25 U.S. food and agriculture companies and associations seeking to end the embargo and start doing business with Cuba. Led by Cargill, the U.S. Agriculture Coalition for Cuba (USACC) knows Cubans are hungry and wants to feed them; they also know that the Cuban agriculture sector is immature and underdeveloped — which represents a tremendous opportunity very close to home.

Consequently, saying what he needs to say to capture Florida and secure the Republican nomination, yet not alienating his natural business and rural constituencies, will be Gov. Bush’s delicate task. It’s one which his Democratic opponent (and potentially some Republican primary opponents) may seek to exploit. But the Democratic nominee will have potential embargo-related issues to contend with as well.

The interest of big American agriculture concerns in Cuba has environmental groups worried about quick, unregulated development on the island that could devastate ecosystems there. One key side effect of the embargo has been not only to preserve Cuba’s famous 1950s American automobiles still negotiating the streets of Havana, but also to preserve Cuba’s environment. As the New York Times recently noted:

*The country is in desperate need of the economic benefits that a lifting of the embargo would almost certainly bring. But the ban, combined with Cuba’s brand of controlled socialism, has also limited development and tourism that in other countries, including many of Cuba’s Caribbean neighbors, have eroded beaches, destroyed forests, polluted rivers, damaged coral reefs and wreaked other forms of environmental havoc.*

Any modern photo of Havana harbor is noteworthy for what’s not in the picture — boats. If Cubans have access to boats, they tend to try to leave the island. But in a new economic environment, not only will they tend to stay and take advantage of developing opportunities, Havana’s harbor will suddenly be filled with cargo vessels, tourist boats and large Caribbean cruise ships. The danger to Cuba’s famously pristine coral reefs from increased shipping activity is clear. But so too is the danger to habitats on the island that would be cleared for increased agricultural, logging and industrial activity.

Of the more than 350 bird species present in Cuba, one quarter are found nowhere else on earth. Moreover, Cuba is the main stopover for literally millions of migratory birds that might lose this sanctuary to development as they transit from North to South America. Many other plants and animals endemic to the island could also be threatened with development.

Just as the business community is a natural constituent for Republican presidential candidates, the environmental community is even more so for Democratic presidential candidates. If that community coalesces around a policy of keeping the embargo intact in order to keep development at bay until sufficient environmental controls are in place, that puts the Democratic presidential nominee in the awkward spot of backing President Obama’s opening to Cuba while assuaging the reticence of environmentalists. Secondarily, the organized labor community, another natural Democratic constituent, can be expected to have something to say about cheap labor and lax working standards in Cuba drawing away American jobs and making certain U.S. labor-intensive industries even more uncompetitive once the embargo is lifted.

**Economics**

The World Bank ranks Cuba’s economy based on gross domestic product 66th in the world (four spots behind Puerto Rico), although this assessment could be far worse, as the Castro regime is believed to have favorably altered the books on its reporting.

Both politically and economically, Cuba was a satellite state of the Soviet Union during the Cold War. This was not happenstance. Fidel Castro traveled to Washington, D.C., after the revolution brought him to power in 1959, seeking an audience with President Eisenhower. However, Ike refused to see him. Afterwards, he went to Moscow, where Premier Khrushchev was all too happy to embrace him and forge the long Havana-Moscow alliance that bedeviled the United States for so many years.

After the collapse of the U.S.S.R. in 1991, Castro turned to China for financial support, which got Cuba through most of that decade, albeit with a GDP that contracted by 35 percent — a time of austerity the Castros’ referred to as the “special period.” But it was the pivotal election of Hugo Chavez to the presidency of Venezuela in 1999 that proved to be the largest economic boon for Cuba following the demise of the Soviet Union.

Political soul mates, Castro and Chavez quickly struck an anti-U.S. alliance whereby Cuba would receive about two-thirds of its

![Fidel Castro, then Cuba’s prime minister, looks up at a statue of emancipator Abraham Lincoln after laying a wreath at the Lincoln Memorial in 1959.](image)
oil needs from Venezuela in exchange for providing Venezuela with much needed health care expertise via Cuban doctors and medical specialists. This arrangement was expensive for Venezuela, which was effectively absorbing 45 percent of Cuba’s trade deficit, but one which Chavez could afford with high oil prices. However, the death of Chavez and the plunge in oil prices have jeopardized that quid pro quo.

When oil was trading at $145 a barrel, Venezuela could shoulder this imbalance. As recently as 2012, the Cuba-Venezuela “bilateral trade in goods and services amounted to 20.8 percent of Cuba’s GDP in 2012 yet only 4 percent of Venezuela’s GDP,” according to trade in goods and services amounted to 20.8 percent of Cuba’s GDP in 2012 yet only 4 percent of Venezuela’s GDP,” according to a 2014 Brookings Institution policy brief. But with oil now around $50 a barrel, Fidel Castro on the sidelines and a new president in Caracas, many wonder whether the fraying of this economic axis that kept the Cuban economy going was one of the key factors influencing Raul Castro’s acceptance of President Obama’s diplomatic initiative to open Cuba.

If direct investment by the American private sector became a reality in Cuba, life on the island would change dramatically — and not just in urban Havana. Cuba’s main export goods include sugar, nickel, tobacco, citrus and coffee. All these commodities are located in “the campo,” which would undergo a tremendous modernization with American technical expertise and development. In short, the entire island would benefit. But current U.S. law is an impediment.

Law

The U.S. embargo against Cuba, now well into its fifth decade, is actually contained within a half dozen federal statutes that have, in various forms, re-articulated and refined it — most famously via the 1996 Helms-Burton Act. Only a subsequent act of Congress or judicial review by the U.S. Supreme Court can overturn a federal statute; consequently, the battle over the embargo will ultimately be waged in the halls of Congress under this president or the next.

What President Obama can do in the interim is settle the property claims issue with respect to American property seized in 1959 during the Castro-led revolution. The Supreme Court has repeatedly recognized a president’s power to conclude property settlement agreements with foreign nations via executive agreement. An executive agreement is an internationally legally binding commitment — very much like a treaty. But for domestic legal purposes, it is not a treaty because it is not a document that is submitted to the Senate for approval. Nevertheless, it has what the court calls “similar dignity” as federal law and, as such, must be followed.

President Roosevelt settled property claims issues dating from the Czarist era with the Soviet Union in 1933 under the Litvinov Assignment, and President Carter created a property claims settlement system in the Algiers Accords that established an international arbitral tribunal in The Hague to sort out U.S. claims against Iran for American property nationalized by Iran during the revolution. Similarly, President Obama could conclude an executive agreement with President Castro to resolve outstanding U.S. property claims that were, in fact, one of the main bases for imposing the embargo in the first place.

To do so would not only remove a key rationale for the embargo, but would also begin to comply with the statutory requirements that must be met before the embargo can be lifted. There are two obvious ways this can be achieved. The easiest method, but also politically trickiest, would be for the U.S. to back a loan to Cuba from the World Bank, the International Monetary Fund or the Inter-American Development Bank to pay for most of the debt owed on the property that was confiscated — the value of which with interest is now above $7 billion. The U.S. is the largest shareholder in all three international financial institutions, but Cuba would need to join. With U.S. backing, that of course could happen.

The second method would be for the president to utilize the property claims settlement mechanism envisioned by the Creighton team in its 2007 report to USAID. Like the U.S.-Iran Claims Tribunal created by the Algiers Accords, the tribunal for this system would resolve the property claims of U.S. nationals against the Cuban government, but it would do so in a flexible way that would allow for the largest claimants, mostly corporations, to seek joint ventures and other forms of compensation in exchange for settlement of their claims — thereby sparking certain sectors of the Cuban economy.

The president’s executive agreement could also extract a promise by the Cuban government to settle claims by Cuban-Americans, who were of Cuban nationality at the time their property was confiscated, within a special chamber of the Cuban judicial system (perhaps established in Puerto Rico or Florida) in order to clean that slate as well — although international law does not require Havana to do so. Settling the Cuban-American claims would be a smart move on Castro’s part in that this would be the natural constituency to immediately invest in a resurgent Cuban economy with their established family connections and understanding of Cuban culture.

Either way, the lives of the people in Cuba would be remarkably improved. If this is the ultimate aim kept in mind by policymakers in Washington as they decide how to move forward with Cuba, as it was with our group when we undertook our Cuba project, then the outcome will surely be one that will cause Cardinal Ortega to smile even more broadly. The long view will indeed have been validated.

About the author: Michael Kelly is professor of law and associate dean for faculty research, graduate and international programs. He was co-author of the Report on Outstanding Property Claims Between Cuba and the United States (Creighton University Press 2007) for USAID and testified in 2011 before the House Ways and Means Committee in Congress about property claims issues with Cuba and the embargo. Since the opening of diplomatic relations between Cuba and the United States, Kelly’s commentary on Cuba has appeared in the Wall Street Journal, New York Times, Boston Globe, Associated Press and Bloomberg News. He continues to work on this issue together with property claims of former Cuban nationals now living in Spain.