

# Report On The Resolution Of Outstanding Property Claims Between Cuba & The United States

Creighton University School of Law  
& Department of Political Science



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UNIVERSITY





On the cover: Cuba from space. Photo courtesy of the National Aeronautics & Space Administration.

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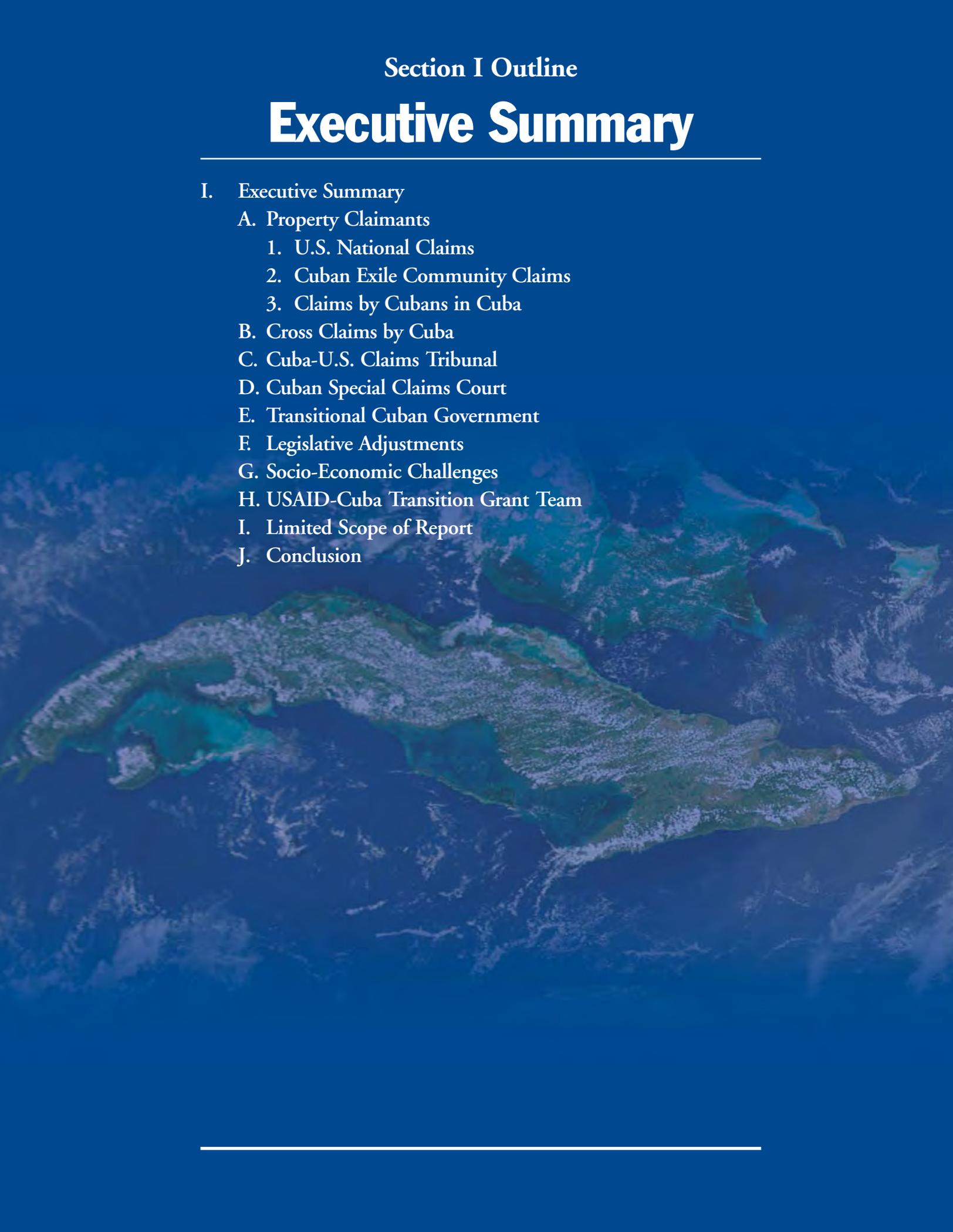
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## Section I Outline

# Executive Summary

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- 
- An aerial photograph of Cuba, showing the island's coastline and interior terrain. The land is a mix of green and brown, with a prominent mountain range running north-south. The surrounding ocean is a deep blue, with white waves breaking against the shore. The image is semi-transparent, allowing the text to be overlaid on it.

# Executive Summary

## **ON OCTOBER 1, 2005, CREIGHTON UNIVERSITY WAS AWARDED A GRANT FROM USAID**

to develop a model for a property claims settlement mechanism between Cuba and the United States. Three law faculty were joined by three political science faculty to form a team of experts supported by graduate students at both schools to investigate and report on the best outcome for such a mechanism.<sup>†</sup> The model provides a template to be utilized by the United States Government in future negotiations with a post-Castro democratic regime in Havana.

As a central feature in the U.S. Government's proactive planning for Cuba's transition to democracy, this model responds to the requirement of the Cuban Liberty and Democratic Solidarity Act (the "Libertad Act") that property claims be resolved as a precondition to the USG lifting the economic embargo against Cuba. Lifting the embargo is required to normalize Cuba-U.S. relations. Consequently, resolving the property claims issue is one of the early criteria which must be met in that process, after the president has certified to Congress that a democratically elected government has achieved power in Cuba.

This Report proposes creating a dual-track property claims settlement mechanism. The first track is a bilateral Cuba-U.S. Tribunal (the "Tribunal") established by treaty or executive agreement between a new Cuban government and the U.S.<sup>1</sup>

The jurisdiction of the Tribunal would be over property claims of U.S. nationals which have been certified by the Federal Claims Settlement Commission. The second track is a Cuban Special Claims Court (the "Court") constituted as an independent chamber of the Cuban national judiciary. The jurisdiction of this Special Court would be over property claims from Cuban-American exile community.

This Report fulfills Creighton University's commitment under its agreement with USAID's Cuba Transition to Democracy Program, completed pursuant to the grant awarded in response to RFA# M/OAA/GRO/LMA-05-LAC/CUBA. The views expressed in this Report are those of the investigators, not USAID nor the U.S. Government.



*A bird's-eye view of Havana, Cuba.*

<sup>†</sup> Patrick J. Borchers, Vice President for Academic Affairs, Professor and former Dean of the Law School (Principal Investigator); Michael J. Kelly, Professor of Law; Dr. Erika Moreno, Assistant Professor of Political Science; Dr. Richard C. Witmer, Assistant Professor of Political Science; Dr. James S. Wunsch, Professor and Chair of Political Science; Arthur Pearlstein, Professor of Law and Director of the Werner Institute for Negotiation and Dispute Resolution.

<sup>1</sup> For legal citations, this Report generally follows the form of *The Bluebook: A Uniform System of Citation* (18<sup>th</sup> ed.). For social science sources, citation form generally follows the 5<sup>th</sup> edition of the American Psychological Association's *Citation Manual*. Although this results in some inconsistency in citation style, our concern is with making the sources accessible to the interested reader.

## I.(A) Property Claimants

The Cuban government has paid lump sum amounts to settle outstanding property claims to several foreign states, including Canada, France, Spain and Switzerland. Consequently, the main universe of property claimants against the Cuban government consists largely of three groups:

1. U.S. National Claimants
2. Cuban Exile Community Claimants
3. Cuban Claimants Still in Cuba

There may also be some claims by Cubans against the U.S. Government for property such as frozen accounts or income proceeds. The Tribunal provides a forum for resolution of any cognizable property claims between the two respective governments.

### I.(A)(1) U.S. National Claims

The first group of property claims are held by U.S. national claimants. These are American individuals and corporations who were Americans at the time of the unlawful expropriation (mostly in 1959 and the early 1960). They have certified their claims through the Federal Claims Settlement Commission (the “FCSC”). According to FCSC estimates, their property claims with interest amount to approximately \$6 billion. Their claims have not been satisfied with frozen Cuban assets in the United States. However, their claims are protected legislatively and are linked directly with lifting the U.S. embargo against Cuba. §207(d) of the Libertad Act states:

It is the sense of the Congress that the satisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba.

Moreover, international law generally recognizes the right of American claimants to be compensated. *See, Shahin Shane Ebrahimi v. Government of the Islamic Republic of Iran*, Award 560-44/46/47-3, Iran-U.S. Claims Tribunal (Oct. 12, 1994). Consequently, a bilateral system to resolve property claims between foreign claimants and the government of Cuba would be supported by international law.

### I.(A)(2) Cuban Exile Community Claims

The second group of property claims is held by Cuban-American exiles. Members of this group were Cuban at the time of the expropriation of their property. The exile community claimants were not part of the certification process undertaken by the Federal Claims Settlement Commission, and thus are not protected under U.S. law to the same extent as U.S. national claimants.

Although the Libertad Act allows them the right to proceed, §304 specifically excludes their property claims from the high level of legislative protection accorded to the FCSC certified claimants:

[N]either any national of the United States who was eligible to file a claim under section 503 but did not timely file such claim under that section, nor any national of the United States (on the date of the enactment of

this section) who was not eligible to file a claim under that section, nor any national of Cuba, including any agency, instrumentality, subdivision, or enterprise of the Government of Cuba or any local government of Cuba in place on the date of the enactment of this section, nor any successor thereto, whether or not recognized by the United States, shall have a claim to, participate in, or otherwise have an interest in, the compensation proceeds or other nonmonetary compensation paid or allocated to a national of the United States by virtue of a claim certified by the Commission under section 507, nor shall any court of the United States or any State court have jurisdiction to adjudicate any such claim.

Moreover, because members of this claimant group were nationals of Cuba when their property was expropriated, international law generally does not recognize right of recovery. Consequently, a bilateral system to resolve property claims between this group and the government of Cuba would not be supported by international law. Jurisdiction over their claims would reside within the Cuban judiciary.

While claims by this group are not supported specifically by either domestic or international law, politically and economically their claims should not be ignored. Politically, the exile community's support among policy-makers in Washington and activism against the Cuban regime make them a group that cannot be ignored. Their influence in Washington brought about the Libertad Act (codifying the U.S. embargo against Cuba), achieved special immigration status for Cubans leaving the island, sustained Radio Martí programming, and leveraged millions of dollars in federal money to support democracy programming for Cuba.

Economically, this group will be among the first investors in an open Cuban market. Even before direct foreign investment by multinational corporations, who may prove more cautious and wait to see how the markets emerge on the island, the enthusiasm and wealth of the Cuban-American community will help to jump-start the Cuban economy at the outset of regime change and could do much to spark the suppressed but ever-present entrepreneurial spirit of the Cuban people.

However, if the property claims of the Cuban-American exile community are left unresolved, their political and economic power could be turned against stabilizing a new government in Cuba, much to the detriment not only of the island, but also to potentially fruitful Cuba-U.S. relations. Thus, from the perspective of elemental justice and reason, the positive aspects of including this group in a broader property claims settlement policy far outweigh the general lack of domestic or international legal justification for doing so.

### **I.(A)(3) Claims by Cubans in Cuba**

The third group of property claims is held by Cubans against the Cuban government. These claims are wholly an internal matter for Cuba to resolve. There is no international dimension to them. Nevertheless, an important principle of this property claims settlement mechanism is that it does not negatively impact the Cuban population. If Cubans in Cuba, who may have their own claims against the government, view the settlement process as a venue for capital flight from the island, then they will not support it.

Moreover, to the extent that Cubans in Cuba are innocent third party owners of property that is the subject of a claim by U.S. national or exile community claimants, their property interest must be protected. Essentially, to eject people from their homes would needlessly

destabilize the island further, prove to the Cubans that Castro was right about the property issue when he warned that Cubans would be thrown out on the streets by foreign and exile claimants, and engender unnecessary anger toward the United States.

### **I.(B) Cross Claims by Cuba**

The Castro government asserts that Cubans have over \$100 billion in claims against the U.S. based on harm flowing from the American embargo. These claims are a mixture of economic losses and tort claims. It is difficult to distinguish between harm done by the embargo and that done by the Cuban government, and it is impossible to verify the claims and claim amounts. Nevertheless, a lawsuit went forward in Cuban court in May 1999 asserting massive tort claims against the U.S. for human losses and hardships flowing from the embargo. The prosecution presented evidence for thirteen days. The U.S. did not respond. The court awarded damages of \$181.1 billion and ordered the U.S. to apologize.

The judicial bodies sought to be established here should not be overrun by Cuban claimants seeking redress against the U.S. To the extent that Cuban claims are allowed, making the claim settlement process a two-way street, only valid property-based claims should be considered under the jurisdiction of the bilateral Tribunal. These could involve, for instance, the remaining frozen assets of the Cuban government. Other Cuban claims, including tort claims, should be undertaken within the domestic Cuban judicial system and treated as normal litigation. The instruments establishing the Tribunal and the Special Cuban Court contain language only allowing for property-based claims. Cases alleging other bases for compensation fall outside the jurisdiction of the judicial bodies recommended for establishment.

### **I.(C) Cuba-U.S. Claims Tribunal**

The Cuba-U.S. Claims Tribunal will be established by bilateral treaty or executive agreement between a successor government to the Castro regime and the U.S. The Tribunal will have international legal capacity as an arbitral body; its sole purpose will be to resolve outstanding property dispute issues between Cuba and the United States and the respective nationals thereof.

- The Tribunal will consist of a minimum of nine members – one third appointed each by the governments of Cuba and the U.S. and the remaining third appointed by agreement among the two thirds who have been selected.
  - The Tribunal will have interpretive jurisdiction necessary to accomplish its purpose,
    - ◆ authority to promulgate rules of procedure,
    - ◆ the power to order interim measures of relief,
    - ◆ will apply international law to resolve the claims before it.
  - Valuation of claims certified by the FCSC are to be given due weight by the Tribunal.
    - ◆ Small claims are to be compensated monetarily through a streamlined process.
    - ◆ Medium and large claims may be compensated monetarily, by specific restitution (under limited circumstances), or by alternative remedy awarded by the Government against which the claim is brought in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment if the claimant agrees. Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Tribunal.
  - The Tribunal's awards shall be final, binding and fully enforceable within Cuba and the United States.
  - No claims may be filed more than one year after the Tribunal is established.
-

- The Tribunal's expenses shall be borne equally by the two governments.
  - The seat of the Tribunal shall be selected by the President of the Tribunal.
- The U.S. may find it necessary to assist a new government in Cuba in meeting Cuban obligations in the form of a loan on favorable terms or assistance in obtaining loans from international financial institutions.

### **I.(D) Cuban Special Claims Court**

The Cuban Special Claims Court will be established by bilateral treaty or executive agreement between a successor government to the Castro regime and the U.S. The Court will be an independent chamber within the Cuban judicial system.

- The Court will consist of twelve judges appointed by the Cuban government in consultation with the U.S. No more than half of these judges may be of the same nationality.
- The sole purpose of the Court will be to resolve property claims by Cuban-American exile claimants against Cuba.
- The Court shall have authority to promulgate its rules of procedure, and will conduct business according to the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law.
- All cases shall be decided on the basis of civil law, particularly as derived from the Spanish Civil Code of 1889.
- Small claims shall be compensated monetarily through a streamlined process.
- Medium and large claims may be compensated monetarily, by specific restitution (again under limited circumstances), or by alternative remedy offered by Cuba in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment if the claimant agrees.
- Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Special Court.
- The Court's awards shall be final, binding and fully enforceable within Cuba and the United States.
- No claims may be filed more than two years after the Court is established.
- The Court's expenses shall be borne by Cuba.
- The seat of the Cuban Special Court shall be selected by the Chief Judge, but the location of the seat shall not prejudice the ability of the Court to sit at locations outside of Cuba if it so desires.

The U.S. may find it necessary to assist a new government in Cuba in meeting Cuban obligations in the form of a loan on favorable terms or assistance in obtaining loans from international financial institutions.

### **I.(E) Transitional Cuban Government**

The Libertad Act prohibits normalized relations between Cuba and the U.S. so long as the regimes of Fidel or Raul Castro remain in power. Moreover, sections 205 and 206 of the law contain a long list of criteria which must be met for a transitional government in Cuba to be considered democratic. Once those criteria are met, normalized relations are possible.

Currently, Cuba is undergoing a succession. Fidel Castro ceded power to his brother Raul on August 1, 2006 to undergo surgery and has not returned to power. Raul Castro has been in control since that date and remains in control as of the date of this Report. Consequently, while a succession has occurred in Cuba, a transition has not. Many experts believe that a slow transition

---

is the most likely scenario for Cuba beginning toward the end of the Raul Castro regime and then moving cautiously forward under a new socialist regime. Thus, a quick transition to full-blown democracy, wherein most of the Libertad Act requirements are met, is not likely.

### **I.(F) Legislative Adjustments**

If the U.S. desires to enter into more normalized relations with Cuba, including resolving outstanding property claims issues between the two countries, before the criteria of the Libertad Act are met, then legislative adjustments will be necessary. Congress must alter some or all of the criteria, thereby allowing the President to enter into negotiations with a new government in Cuba or the successor regime to Fidel Castro. This could take the form of specific amendments or entirely new legislation establishing a new framework for dealing with Cuba.

Moreover, the nature of the agreements establishing the Tribunal and the Court could determine how much legislative adjustment is necessary. If the instruments are adopted in the form of bilateral treaties, then fewer legislative adjustments will be required by the U.S. Subsequent Article II treaties effectively modify earlier statutes, and specifically so if implementing legislation is passed. The Libertad Act is the controlling legislation on Cuba-U.S. relations, and its provisions establish both process and substance governing what relations the U.S. has with the current and future Cuban governments and how those relations may be effectuated. However, if the instruments are adopted as executive agreements, then more extensive legislative adjustments would be necessary.

### **I.(G) Socio-Economic Challenges**

Economically, while multinational corporations are not as likely to move as fast as Cuban-American investors into Cuba, they will want to get into Cuba fairly quickly as the government stabilizes and the market opens up. U.S. corporations will want to move in before foreign multinational corporations occupy the field. For those multinational corporations seeking to invest in Cuba, this reality will motivate them to take much less on their FCSC certified claims because their claims would be worth far less than the business opportunities that will present themselves. The mediation opportunity for medium and large claims within the Tribunal instrument seeks to meet this challenge.

Socially, and politically, the racial disconnect between the populations in Cuba and the exile community could be problematic. The exile community is mainly Caucasian, contrasted with the population in Cuba which is 62% Afro-Cuban. This ethno-social disconnect has the potential to create friction between the two populations. Under the Batista regime, Caucasian Cubans held power, but were also an ethnic majority on the island. Under the Castro regime, Caucasian Cubans remain in power, but constitute a minority of the population on the island. The current system of political and economic power distribution in Cuba has been characterized as a quasi-Apartheid system.

The four major pillars of the Cuban economy are tourism, Venezuelan subsidies, Cuban health care to foreign patients, and nickel mining. Oil drilling has not yet been exploited by the government as a fifth pillar of the economy, although significant reserves have been discovered in the Gulf of Mexico. Afro-Cubans are allowed to mine nickel



*Monument to Maceo, near the Malecón.*

and only participate in a limited way in the other sectors, but do not control them. Moreover, aid sent from the exile community goes to Caucasian Cubans, not Afro-Cubans. Early members of the exile community were the wealthy Caucasian supporters of the corrupt land-regime under Batista which similarly held back Afro-Cubans. To the Afro-Cuban population on the island, then, a fight over property settlement is a fight amongst the Caucasians and the Afro-Cubans continue to lose either way.

If Afro-Cubans come to power in a democratic government (which by definition they might since they are the majority), the second instrument advocating a special Cuban court for exile claims could be seen as nothing more than a give-away to a wealthy Caucasian exile community that abandoned the struggle on the island and failed to support Afro-Cubans even during the Castro regime.

Consequently, several elements have been built into the instrument creating the Special Cuban Claims Court to mitigate this view. First, investment in the Cuban economy is encouraged instead of monetary compensation or property restitution. Second, innocent third parties currently occupying confiscated property are protected in their property rights – restitution will not occur in those instances. Third, financial assistance to the Cuban government specifically earmarked for this process is called for to come either directly from the USG or foreign financial institutions; thus, Cuban assets will not be diverted from assistance to the Cuban people to meeting property claim awards.

While predicting the exact court of any transition is impossible, we have tried to take into account the complex social and economic realities that will influence the course of a new Cuba.

### **I.(H) USAID-Cuba Transition Grant Team**

Creighton University is a comprehensive Jesuit Catholic institution. Founded in 1878 in Omaha, Nebraska, Creighton enrolls almost 7,000 students in 50 undergraduate and 20 graduate programs. Creighton University receives federal funding on a regular basis. Last year, Creighton was awarded over \$21 million in federal grants throughout the university. In addition to the RFA# M/OAA/GRO/LMA-05-LAC/CUBA award, Creighton Law School was awarded \$395,791 in a three-year federal grant to develop the legal clinic.

The team of scholars at Creighton University who were entrusted by USAID with the Cuba-U.S. property claims project are among the top experts in their respective fields. They brought unique qualifications to undertake this work, and have succeeded in producing a blueprint for property claims settlement between Cuba and the United States that will not only resolve the outstanding claims of Americans and Cuban-Americans, but also contribute to the economic recovery of the island. The team was comprised of:

- **Patrick J. Borchers**, Vice President for Academic Affairs, Professor and former Dean of Creighton University School of Law. V.P. Borchers was the principal investigator on this grant. He is co-author of the leading American casebook on Conflicts of Laws and is a private international law specialist.
  - **Michael J. Kelly**, Professor of Law. Professor Kelly is a public international law specialist.
  - **Erika Moreno**, Assistant Professor of Political Science. Dr. Moreno is a Spanish-fluent Latin American politics specialist.
  - **Richard C. Witmer**, Assistant Professor of Political Science. Dr. Witmer is a social science empirical data specialist.
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  - **Arthur B. Pearlstein**, Professor of Law, Professor Pearlstein is an alternative dispute resolution specialist. He is also Director of the Werner Institute for Negotiation & Dispute Resolution.
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Many groups and group members participated at several levels of formal and informal discussion and development of the claims settlement instruments, including the leadership of the Cuban American Bar Association (CABA), the leadership of the Association for the Study of the Cuban Economy (ASCE), United States Southern Command, the Cuba Study Group, and the Cuba Transition Project at the University of Miami. The grant team was supported by an excellent group of graduate students in the Law School and the Political Science Department, including Kevin Tuininga, Leah Shadle, Julie Borchers, Danielle Pressler, Jessica Lynch and John Gervich. Much appreciated editing assistance was provided by Caroline LaForge.

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### **I.(I) Limited Scope of Report**

In January 2006, the Cuba Program at USAID was informed that, due to budget shortfalls in other priority areas, budget resources were not available to continue funding certain individual Cuba grants. As the newest Cuba grant, Creighton’s two-year grant was among those that were de-funded or not renewed.

As a result, several key aspects of this project were not completed. Among the avenues of investigation not pursued were a month-long on-site survey of the Cuban American group of claimants followed by intensive social science data analysis designed to produce a picture similar to that achieved by the audit of FCSC files for the American group of claimants, a survey of the situation in Nicaragua following the implementation of several property claim settlement vehicles, discussions with representatives of the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Germany and the Baltic states designed to yield the same valuable insights on property claim settlement derived from discussions with representatives of the Polish government, and initial trials of selected corporate and individual claims monitored by a second round of experts hired to critique processes and outcomes.

It is hoped that further research can be undertaken in these areas under separate sponsorship utilizing the data already secured and the instruments created in this report.

### **I.(J) Conclusion**

The model for property claims settlement between Cuba and the United States put forth in this Report is one in which the short-term interests of the Claimants are addressed simultaneously with the long-term interests of normalized Cuba-U.S. relations, stabilized post-embargo circumstances in Cuba, sustainable foreign investment in the Cuban economy, and direct and indirect benefit to the Cuban people. Moreover, the interests of all Claimant classes are addressed in furtherance of decreasing cross-strait turmoil and mending Cuban-American/Cuban relations.

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Additionally, property interests of Claimant parties are recognized and addressed with compensatory, restitution, or mediated investment awards while the property interests of innocent third parties in Cuba are also recognized and protected. Nobody on the island will be turned out of their homes. Yet nobody with a verifiable claim of property confiscation will come away empty-handed.

The model for property claims settlement offered in this Report is the best, most legitimate, and most efficient means that Creighton University considered for adoption. The twin goals of maximizing the pool of stakeholders likely to opt into this process while minimizing a disruptive effect during Cuba's post-Castro transition (eliminating the property issue, boosting foreign investment and benefiting the people of Cuba) have been met by this model if it is adopted and properly implemented.

Finally, the vital importance of cultural understanding as a key element in making such institutions workable ones cannot be overstressed. Infusing not only the bench but also the registrar's bureaucracy with cultural sensitivity is vital to avoiding further political and legal problems which cause considerable delay and require more expensive adjustments later. This includes giving a spectrum of Cuban representatives, whose culture the U.S. recognizes as internally and geographically heterogeneous, as much leeway as possible in running the Court and the Tribunal.

Creighton University is ready to assist the USG in furtherance of these objectives when the transition occurs.

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## Section II Outline

# Transition Scenarios

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## II. Transition Scenarios

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# Transition Scenarios

## II.(A) Cuba: A Brief Background

### **CUBA, A SMALL ISLAND LYING A MERE NINETY MILES FROM U.S. SHORES, HAS HAD A LONG**

and often troubled relationship with the United States. The Spanish-American war, which freed the island from colonial rule, was replaced with decades of direct and indirect intervention from the U.S. Domestically, the island was plagued by countless interruptions in governance and the absence of democratic governing institutions and norms. By the 1950s, large swaths of the Cuban public were prepared for a strong nationalist leader who could bring the island into a new, more modern period.

When Fidel Castro marched triumphantly into Havana on New Year's Day in 1959, he was met with substantial public support. Nearly fifty years later, Castro's imprint on the island remains strong, though several might suggest that the highest goals of the revolution have been betrayed. While the immediate goals of the ruling triumvirate were initially unclear, it was not long before Fidel Castro – a key figure in the rebellion that toppled Batista's corrupt government and effective spokesperson for the revolution – clearly took the reins of government in his hands. The elaboration of a government clearly fell into the hands of Fidel Castro, a feature that becomes more starkly evident in the decades that follow the revolution's success in ousting the Batista regime.

Although the first years of the revolutionary regime are noted for their lack of institution building, save for the creation of the

CDR's (Committees for the Defense of the Revolution) and other organs of self-defense, the Castro government did eventually turn its attention to building governmental institutions. Following the failure of the Ten-million ton goal and the "New Cuban Man" model during the late 1960s,<sup>1</sup> the regime sought to finally institutionalize the revolution (Skidmore and Smith 2001). The record of institution building during the 1970s is impressive indeed. With the guidance of the Soviet Union and under the watchful eyes of Fidel Castro, Cuba created a variety of mass organizations, introduced new programs to oversee agricultural production (e.g. JUCEPLAN),<sup>2</sup> formed the Communist party,



*Revolutionary propaganda can still be found in Cuba, nearly 50 years after the revolution.*

<sup>1</sup> The Ten million ton goal was an effort to collect 10 million tons of sugar cane by 1970, an ambitious goal that exceeded the largest harvests in Cuba's history. The Ten million ton goal was seen as a measurable manifestation of the Revolution's success in creating a radically new society and polity. The New Cuban Man policy, a policy pioneered by Che Guevara, encouraged citizens to contribute to the Revolution through voluntary works and was essential to the Ten Million ton goal.

<sup>2</sup> JUCEPLAN was instituted to oversee agricultural production through the use of decentralized organizations that rendered accounts and coordinated with national-level agricultural planning agencies. JUCEPLAN was an effort to create a coordinated command economy while maintaining some discretion for farmer cooperatives.

and strengthened ties with the Soviet Union. The flurry of institution building also represented a shift away from charismatic models of governance, which relied almost exclusively on Fidel Castro, towards the creation of new sources of power and decision-making.

Efforts to institutionalize the revolution were short-lived, however, and Castro returned to a more charismatic ruling style by the 1980s. This is most notable in the way in he and those closest to him worked to de-institutionalize many of the reforms undertaken in the 1970s and sought to undermine any potential rivals (Azicri 2001). This return to a charismatic style was furthered by the mythology that surrounds Fidel Castro. His cultural image is that of a larger-than-life figure who embodies more than just the revolution; but rather the island nation's history and saviorsalvation (Almond 1983). Rectification, which began in 1986 and extended until the early 1990s, sought to put an end to the small market openings of elements of a market economy made possible in the 1970s and placed a strong emphasis on the role of volunteerism, which was reminiscent of the "New Cuban Man" policies of the 1960s. Primarily, Rectification served as a means to counteract the openings that were underway in the U.S.S.R. (Corrales 2004; Cruz and Seleny 2004; Eckstein 1980; Feinsilver 1989). These policies, of course, gave way to the panoply of measures taken under the "Special Period" that marked the island's most severe economic and societal crisis to date following the fall of the U.S.S.R. (Perez-Stable 1999). The crisis was brought on by the U.S.S.R.'s collapse in the early 1990s and represented a severe contraction of the Cuban economy. The loss of trading partners, loans, cheap energy and the like were replicated across various sectors. Nutritional deficiencies, such as those that caused in excess of 40,000 cases of optic neuritis (and blindness), the scarcity of energy and medicine were all blamed on the economic contraction (Eckstein 1986). Today, most experts have concluded that the severe economic contractions that occurred in the 1990s have ended and that the economy has rebounded to some extent.

Throughout this time, the Revolutionary Armed Forces (F.A.R.) gained a strong foothold in Cuban society, politics, and economics. The F.A.R. represent some of the strongest features of the regime. The military was lauded for its role in several African ventures in the 1970s and was seen as a loyal and patriotic institution. As a reward, and under the tutelage of Raúl Castro, the F.A.R. has increasingly taken on an important role in overseeing major sectors of the economy, including the airlines and other basic industries (Azicri 2001). Today, the F.A.R. is more of a corporate player in the regime, since it does not conduct internal policing nor is it actively involved in campaigns abroad. Thus, it stands to be a major player in any future regime or government on the island.

By the 1990s it became increasingly clear that the island would have to find innovative ways to maintain itself, especially after having lost the support of a world power and its bloc of supporters. This meant innovation in economic affairs, and the use of some market mechanisms, as well as the cultivation of a supporting cast or potential successors. At the top of the list of successors to Fidel is his brother, Raúl Castro, who has been groomed as Fidel's replacement. But in addition to Raúl Castro is a small, but nonetheless important, supporting cast that will likely continue to play a role in the island's future: Ricardo Alarcón, head of the National Assembly and former ambassador to the U.N.; Felipe Pérez Roque, acting foreign minister; and Carlos Lage, chief economic policy maker. Surrounding these three are a handful of assistants and aides that will also play a pivotal role in directing Cuba in the near term. These individuals, added to top figures in the F.A.R., especially those closely allied with Raúl Castro, are likely to remain important in the short, medium, and long term.

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## II.(B) Transition Versus Succession

In discussing issues of outstanding property rights, it is important to first address the likelihood of transition versus succession because these two concepts are closely tied to current U.S. policy towards Cuba. In this section we will define these terms and address how they may affect the likelihood of resolution of these outstanding claims and the protection of property rights, more generally.

### II.(B)(1) Definition of Terms

Inherent in the most recent legislative efforts aimed at Cuba is an overwhelming concern for a transition of power, rather than a succession. The distinction between these two concepts is articulated in the Cuban Democracy Act of 1992 as well as the most recent iteration of the CAFC (Commission for Assistance to Free Cuba) Report issued by the State Department in June of 2006. Below, we identify the key distinctions between these two concepts as presented throughout several examples of policy towards the island:

- **Transition:** A government defined by the presence of regularly scheduled, free and fair elections. Government actions promote and respect internationally accepted definitions of human rights and other democratic rights and norms.
- **Succession:** A change in leadership within a pre-existing regime. Signals continuation of the regime while providing a means of renovating it through the installation of a new leader or leaders.

While transition suggests an interruption of the regime and the establishment of a new regime type, succession represents a change in leadership but maintenance of the regime. Although democratic governance and norms are often invoked in the broader concept of a transitional government, democracy is not always clearly defined. Democracy, of course, can be defined many different ways. Narrow definitions of democracy may simply signal the presence of elections (often referred to as electoral democracies). In contrast, fuller definitions may include the presence of governing institutions (often referred to as a procedural minimal definition of democracy) and the pre-eminence of civilian rule and democratic norms (often referred to as “liberal” democracies) (for instance, *see* Dahl 1971; Diamond 2000). While it is not entirely clear which if any of these definitions are sought in the short or long term, it is evident that transition in the sense that it has been used by U.S. policy-makers towards Cuba implies some form of democratic governance that goes beyond a simple electoral democracy; that is, it is more than the mere presence of elections. Determining the democracy quotient sought by U.S. policy is not entirely clear given the current body of legislation and policy towards Cuba. Current policy towards the island also fails to clearly state whether democracy ought to be fully consolidated before it is deemed a true transition. We will return to these themes as we discuss the range of possible short, medium, and long-term scenarios in section II.C.

The differences between transition and succession are crucial, in large part because they reflect clear concerns among those in the U.S. policy community regarding the long-term direction of the island. However, it is important to keep in mind that just as they are conceptually distinct, so are the probabilities of seeing these scenarios in the short, medium, and long terms. In other words, the likelihood of witnessing a full-scale transition (to some form of democratic governance) will vary quite dramatically from a succession. We return to these themes in sections II.B.3 and II. C.

Further, these distinctions have important implications for the kinds of policies that are possible *vis-à-vis* the island, especially as respects property rights issues. In the following section, we address the impact of focusing on regime change on the island for outstanding property

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rights claims. We will also address how the focus on a transitional government in Cuba may effectively limit the speed and depth of any resolution of outstanding property disputes.

## **II.(B)(2) The Libertad Act, CAFC & Property Rights Resolution**

The distinctions between transition and succession are important for more than their reflections of U.S. policy towards Cuba. The focus on a transitional government in Cuba is relevant to the broader discussion of resolving outstanding property rights claims on the island. After all, any resolution of claims lodged against the Cuban government by U.S. citizens and former Cuban expatriates is currently guided by legislative efforts to usher in a transitional government. This is made clear in the language adopted in the Libertad Act, which suggests that improved bilateral relations between the two countries must follow Cuba's acceptance of democratic norms and the presence of a transitional government. Since the legislation makes clear that the U.S. will not negotiate with a successor government of any sort, efforts to address outstanding property rights concerns may be slowed by the requirements of the Libertad Act. The legislation issues an indictment of the current Cuban regime's human rights record along with its lack of democratic institutions and norms (*See* Libertad Act, section 1702). It states U.S. policy towards Cuba in terms of seeking a full-scale transition to democratic governance. Specifically, section 1703 states U.S. policy in the following terms:

- To seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people;
- To seek the cooperation of other democratic countries in this policy;
- To make clear to other countries that, in determining its relations with them, the United States will take into account their willingness to cooperate in such a policy;
- To seek the speedy termination of any remaining military or technical assistance, subsidies, or other forms of assistance to the Government of Cuba from any of the independent states of the former Soviet Union;
- To continue vigorously to oppose the human rights violations of the Castro regime;
- To maintain sanctions on the Castro regime so long as it continues to refuse to move toward democratization and greater respect for human rights;
- To be prepared to reduce the sanctions in carefully calibrated ways in response to positive developments in Cuba;
- To encourage free and fair elections to determine Cuba's political future;
- To request the speedy termination of any military or technical assistance, subsidies, or other forms of assistance to the Government of Cuba from the government of any other country; and
- To initiate immediately the development of a comprehensive United States policy toward Cuba in a post-Castro era.

The Libertad Act develops a series of mechanisms to promote such goals, both by punishing the current regime through the use of sanctions as well as punishing other states that do not serve to further U.S. policy towards the island. For instance, section 1704 asserts that states deemed to be "assisting" Cuba will be subject to U.S. sanctions. It goes on to define assistance as:

[A]ssistance to or for the benefit of the Government of Cuba that is provided by grant, concessional sale, guaranty, or insurance, or by any other means on terms more favorable than that generally available in

the applicable market, whether in the form of a loan, lease, credit, or otherwise, and such term includes subsidies for exports to Cuba and favorable tariff treatment of articles that are the growth, product, or manufacture of Cuba; includes an exchange, reduction, or forgiveness of Cuban debt owed to a foreign country in return for a grant of an equity interest in a property, investment, or operation of the Government of Cuba (including the government of any political subdivision of Cuba, or any agency or instrumentality of the Government of Cuba) or of a Cuban national.

The Cuba Democracy Act of 1992 represents a major policy statement towards Cuba and it has important implications for property rights on the island. Most importantly, it requires that a transitional government be in place before any new policies towards the island can be crafted. Since the Act effectively states U.S. policy, any efforts to establish bilateral relationships between the U.S. and a non-transitional government in Cuba, even those that may resolve property rights claims, will require substantial amendments of the Act.

The most recent CAFC report also restates the basic preference for transition over succession. It stipulates the importance of establishing a transitional government before any major changes – economic, political or otherwise – are possible between the U.S. and Cuba. The CAFC report includes a section titled “Property Rights and Confiscated Properties” (CAFC 2006, p. 68), which notes: “Perhaps no issue will be fraught with more difficulty and complexity for the Cuban Transitional Government than the status of property rights and confiscated property.” It notes the need for the transitional government to assure the current residents of Cuba that they will be secure in their homes and property and not subject to “arbitrary expulsion.” It also suggests, that “a democratically elected government, representing the will of the Cuban people, should make decisions regarding confiscated property.”

While these conditions have some obvious merit, hinging resolution of long-festered property rights issues on dramatic changes in government may prove burdensome. After all, the probability of transition will depend on a multiplicity of factors. Meanwhile, the probability of succession is in some ways far more likely than full-scale transition in the short and (possibly) medium term – as we have seen in the last year with the ascension of Raúl Castro. So, if speedy resolution of property claims is sought, waiting for a complete regime change may serve to make such a possibility less likely, at least under current law. What is more, as we suggest in the following section, if the overriding concern is the resolution of outstanding claims, there may be a number of scenarios that may meet those goals as effectively, if not more so, than awaiting full scale democratic transition.

### **II.(B)(3) Political Transition & Implications for the Protection of Property Rights**

To inform our understanding of political transitions, we turn to a rich and varied political science literature on democratization. While a full review of the democratization literature is unnecessary, we will make reference to several seminal works to highlight the ways in which transition and succession scenarios may unfold in Cuba. More importantly, we will use that body of literature to inform our understanding of the implications of regime type for the protection of property rights.

As mentioned in Section II.B.1., democracy has many connotations and can be defined narrowly or broadly, encompassing more of the elements that are often associated with fully

democratic societies. Before we begin a discussion of possible transition and succession scenarios, it is vital to revisit some of the more commonly applied definitions of democracy. As noted earlier, the most narrow definition posits the regular observance of elections as sufficient to qualify a state as democratic. An “electoral democracy” is in many ways far from the ideal that most people maintain for a fully democratic society, as it does not require the build up of democratic institutions, respect for democratic rights and norms of behavior, and may encourage military rather than civilian supremacy. Not only is this definition intuitively unappealing, it also tends to misrepresent the number and quality of democratic societies across the world. A fuller definition, often used in the literature on democratization comes from the work of Robert Dahl (1971). The “procedural minimum definition of democracy” includes seven key criteria that are necessary to deem a polity democratic. These criteria include:

- Control over government decisions about policy is constitutionally vested in elected officials.
- Elected officials are chosen in frequent and fairly conducted elections in which coercion in comparatively uncommon.
- Practically all adults have the right to run for elective office in the government.
- Practically all adults have the right to vote in the election of officials.
- Citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined.
- Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
- Citizens also have the right to form relatively independent associations or organizations, including independent political parties and interest groups.

Inherent in Dahl’s definition is a concern for free and fair elections, a general respect for basic democratic rights, and the creation of a set of procedures to support democratic governance. While this definition is far more appealing than a simple electoral democracy, it does not attempt to represent the fullest expression of democratic societies. This is most evident when the procedural minimum definition is contrasted with the concept of a liberal democracy (*see* Diamond 2000). Liberal democracies are loosely characterized as polities where:

- Freedom of belief, expression, organization and other civil rights, including protection from political terror and unjustified imprisonment.
- A rule of law under which all citizens are treated equally.
- Neutrality of judiciary and other governmental institutions.
- Open, pluralistic civil society.
- Civilian control of the military.

Thus, in contrast to Dahl’s definition, which focuses on the development of procedures to support democratic governance, a liberal democracy attempts to address issues of fairness and pluralism within society as well as the importance of the rule of law and civilian supremacy. While there are many variants of this particular definition of liberal democracy, they tend to share several key aspects. Even more inclusive definitions exist that reach beyond the limits of liberal democracies by suggesting that democracies must require free and fair elections, proper government procedures, and just government policy outcomes (or “substantive” democracy). Definitions of substantive democracies suggest that citizens must have equal access to public schooling and healthcare regardless of their social class or ethnicity. This conceptualization of democracy would effectively disqualify many “procedural” democracies, like Brazil or India, from the camp of truly democratic states.

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Not only are these examples of democracy important insofar as they reflect different definitional criteria, they have important empirical implications for which states fall under the democratic heading and which do not. Take for instance, the following contrast between electoral and liberal democracies.

| Regions                             | Electoral Democracies          | Liberal Democracies           |
|-------------------------------------|--------------------------------|-------------------------------|
| Latin America & Caribbean           | 88% (29 of 33 states)          | 48% (16 of 33 states)         |
| East Central Europe & Baltic States | 93% (14 of 15 states)          | 60% (9 of 15 states)          |
| Asia (East, Southeast, South)       | 46% (12 of 26 states)          | 12% (3 of 26 states)          |
| Africa (Sub-Saharan)                | 42% (20 of 48 states)          | 10% (5 of 48 states)          |
| Middle East/North Africa            | 11% (2 of 19 states)           | 5% (1 of 19 states)           |
| <b>Total</b>                        | <b>63% (120 of 192 states)</b> | <b>37% (71 of 192 states)</b> |

Source: Diamond, Larry. 2000. "The Global State of Democracy." *Current History*. 99: 641-702.

Table 1: Comparison of the number of electoral and liberal democracies<sup>1</sup> across the World, 2000.

<sup>1</sup> The operationalization of electoral and liberal democracies is based on data from Freedom House, one of the most widely cited sources of worldwide data on democracy in 192 countries.

As is evident in Table 1, one's choice of definition will make a dramatic difference in determining the success of democratic development across every region of the world. Even the most democratic regions during 2000, East Central Europe (and Baltic States) and Latin America have far fewer democracies when we employ the concept of a liberal democracy. In fact, the choice of a different definition of democracy reduced the percentage of democracies by nearly two-thirds; across the world, it reduced the percentage of democracies by nearly half. Were we to use "substantive" democracy as our measuring criteria, no doubt that percentage would fall even further for all regions.

Thus, the definition that we employ when we begin any discussion of democratic transition, especially in Cuba, is of paramount importance. It is worth noting that these examples of democracy are just the tip of the conceptual iceberg. Political scientists have spent decades refining the concept of democracy such that these three conceptualizations only represent a tiny fraction of the kinds of criteria that are sought when scholars examine whether a polity is or could be democratic (for instance, *see* Collier and Levitsky 1997). We employ them here as a heuristic tool to highlight how concepts used to measure democracy can provide us many different conclusions.

We would see even more nuance if we were to parse out distinctions between consolidated democracies; that is, where the practices and norms of democracy have become fully entrenched. There are five key arenas that engender a modern consolidated democracy. Each element contains mediating and supporting characteristics of the other four. A civil society derives from freedoms of association and communication. Groups of individuals are formed, organized and bound by shared interests working together to realize those interests. The interests and values rooted in a civil society are major contributors to the creation of a political society. A civil society generates ideas and assists in the monitoring of the state and economic society. A political society requires principally free and inclusive electoral contestation. The political society helps to fashion major laws and a constitution. It manages the state apparatus,

and produces a general regulatory framework for the economic society. The element of rule of law implicates the notion of constitutionalism. It creates a legal culture with strong roots in civil society and provides restraint for actions of the state and political society. The rule of law establishes a hierarchy of behavioral norms that make actions in the other arenas of a democracy predictable and legitimate. Next, the state apparatus must be comprised of rational and legal bureaucratic norms. It provides crucial enforcement on the civil, political, and economic sectors and acts for the collective good. Lastly, the economic society is an institutionalized market that produces vital surplus and funds to allow the state to carry out its collective good functions. It provides a material base for pluralism and autonomy of both the civil and political arenas as well. No single key element can properly function without the reinforcement from the others (Linz and Stepan 1996). As Linz and Stepan (1997) would suggest, democracies are fully consolidated when they become “the only game in town” even in the face of severe economic or social adversity.

For the purposes of our discussion of possible and probable scenarios in modern-day Cuba, we will focus our attention on Dahl’s procedural minimal definition (1971) with some comparisons to liberal democracy. So the question before us now hinges on the probability of a democratic transition versus a succession in Cuba in the near, medium, and long-term. Again, there is a long and distinguished body of research that addresses the myriad requisites – social, political, and economic – that facilitate the emergence and maintenance of democratic governance. While the literature on democratization goes as far back as the discipline of political science, recent contributions reflecting on the third wave of democracy are also useful to explore as we imagine the possibilities of transition in Cuba. Some of the earliest contributions to our understanding of democratization focused on the importance of social class, the development of “modern” economic structures, and the creation of propitious cultural traits (Huntington 1968, Lipset 1980, Moore 1966, Almond and Verba 1966). The kinds of factors addressed in this literature vary widely and include a number of historical, structural, and cultural variables. Many of these theories have been tested, with varying levels of success, by the emergence of a historical trend that has developed during the latter stages of the twentieth century: the “third wave of democracy” (1974-present).

The “third wave” not only represents the most recent efforts at democratization across the world, it also represents the most significant and prolonged example of democratic expansion to date. In contrast to the two previous waves, the third wave involved a much larger share of the world’s sovereign states including large swaths of the developing world. This was largely due to the fact that parts of the developing world, including Sub-Saharan Africa, were simultaneously undergoing a process of decolonization thus increasing the number of states that could undertake democratic forms of governance. The third wave reflects two concurrent phenomena: the acceptance of democratic rule and the rejection of authoritarian rule across the world.

The collapse of a non-democratic regime is a necessary, though not sufficient, prerequisite for the introduction of a democratic system. Yet, a regime collapse is not in and of itself an indicator of a demand for democracy. If elites are willing and capable of supplying a non-democratic alternative and the masses reject a democratic system, denial of a new democracy will take place. Democracy can be repudiated from the top by a military or political coup seizing power and ruling without popular consent. Repudiation can also occur from the bottom up with a populist movement and establishment of an undemocratic populist regime. The democratization of Eastern Europe illustrates the ability of authoritarian (in this case, post-Communist states) to transform into democratic regimes. Nonetheless, the repression of civil and political rights in

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the states of Central Asia show that not all formerly authoritarian regimes seek to be democratic. Thus, whether in the case of Cuba or another state, a democratic transition requires either a softening or collapse of the current regime and the adoption of democratic forms of governance.

With respect to the Cuban case, the adoption of democratic forms of governance is obviously an important goal. This is evident in the various examples of U.S. policy towards the island in recent history. While we do not minimize the importance of a potential democratic transition in Cuba, it is important to note that democratization is also closely tied to property rights and the development of liberal, or market, economies. Thus, the potential for a democratic transition is not simply an issue of public policy but it informs any discussion of the outstanding property rights questions.

A significant theme in the literature is the interaction between economic and political structures; namely, modern capitalist development and democracy. While that body of work is varied in its definition of democracy, it suggests that modern economic structures, especially those that uphold the virtues of capitalist development, are compatible and conducive to the creation of modern democratic governing structures and values (Freidman 1962; Macpherson 1962; Olson 1993). The theoretical and empirical linkage between economic and political structures represents part of a long tradition in the field of political science. According to most authors in this school of thought, the protection of property rights is a necessary, though not sufficient, condition to the creation of modern, market-based economies. As such, states that serve to protect existing property rights are developing the building blocks of market economies. In other words, states that uphold the rights of individual owners to maintain and develop their properties in accordance with their wishes are promoting the kinds of individual decision-making that capitalist economies thrive on. Ultimately, those same individual decisions that guide decisions about property also extend to other arenas of social and political choice, thus promoting the kinds of free exchange of ideas that support democratic development (Freidman 1962). As these transactions become routinized, and broader segments of the population feel the benefits of this sort of economic growth, we could expect mass-based and elite-based consensus on the adoption of democracy. This rationale has guided a host of scholars who contend that the protection of property rights and its concomitant ability to create a growing market based economy will necessarily lead to the adoption of democracy following the collapse of an authoritarian regime (*see* Chieub 1994; Hayak 1944; Freidman 1962; Lindbloom 1977; Macpherson 1962; Olson 1993). It is not hard to see the underlying logic of such a proposition. However, it is worth noting that the link between property rights and democracy is often examined indirectly, with most empirical studies suggesting a direct link between capitalist economic growth and democracy. This means that property rights protection is assumed to occur where market economies grow (Chieub 1994; Hayak 1944; Freidman 1962; Lindbloom 1977; Macpherson 1962; Olson 1993).

However, recent contributions to this literature suggest that a more nuanced understanding of these links is warranted. A growing body of literature has suggested that economic growth, even among market-based economies, is most likely when states can act as autonomous agents (*see*, Haggard 1993; Haggard and Kaufman 1992). In other words, states that have the capacity and ability to act independently of groups beholden to previous (non-market based) economic arrangements are better equipped to protect property rights and create viable markets. To many, including Haggard and Kaufman (1992; 1993), autonomy is often seen as a form of isolation from social and economic pressure groups in a society; as such, it is often viewed as a variant of authoritarian control. This suggests that autocratic settings, even though they may be subject

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to predatory actions by undemocratically selected leaders, are just as concerned with economic growth and may be better suited to provide full protection for these founding principles of capitalist development. Many of these same authors point to a number of East Asian and Latin American countries as evidence to support these claims (*see* Haggard 1990). Indeed, there is a long list of countries that have successfully broken away from non-market based forms of economic development under authoritarian leaders who upheld property rights, as was the case in Chile under the control of Augusto Pinochet (1973-1989). When it comes to empirics, especially for countries that have only recently democratized or adopted market-based economies, the link between property rights and democracy is less than clear. Thus, new evidence, brought forth by a host of newly democratized and newly created market economies suggests that the connection between property rights, economic growth, and democracy may not be as strong as earlier thought. In addition, while electoral and – especially – liberal democracies may emerge in the long-run where markets are created by authoritarian leaders (e.g. Chile) they are not inevitable (e.g. modern day China) (Haggard 1990). Thus, economic growth made possible by autocratic leaders may forestall the decline of the authoritarian regime, which, as we noted earlier, is absolutely necessary for democracy to emerge as an alternative.

What is more, a number of mainly theoretical studies have pointed out that democratic governance gives a wide swath of individuals some say in policy. Thus a truly democratic regime, with its potential to empower many segments of society, may create incentives for leaders to engage in predatory actions; that is, the expropriation (and possible redistribution) of property. Populist leaders, for instance, brought into power by democratic means may be tempted to violate established norms protecting property rights in the hopes of securing support in society, especially where deep inequalities exist (Huntington and Nelson 1976; Olson 1982; Przeworski and Limongi 1992). Efforts by Hugo Chavez to expropriate lands in Venezuela are only the most recent in a long history of examples.

It is not hard to find an example from Latin America that supports almost any of the proposed relationships between economic and political structures. After all, authoritarian governments across Latin America engaged in wide-scale nationalization schemes (e.g. Perón in Argentina, 1946-1955; Cardenas in Mexico, 1934-1940; and Velasco in Peru, 1968-1975) at least as frequently as their democratically elected counterparts (e.g. Goulart in Brazil, 1961-1978; Allende in Chile, 1970-1973; and Pérez in Venezuela, 1974-1978). In many of the most famous cases in the region, efforts to nationalize basic industries were coupled with strong populist rhetoric and ambitious economic development programs, such as import substitution industrialization (or I.S.I.). Some authoritarian regimes fared well in both protecting individual property rights and ushering in market reforms, such as Pinochet in Chile from 1973 to 1989. Although Chile eventually democratized, like many of the other examples noted thus far, it is difficult to see a clear causal relationship between the protection of property rights and market reforms at one point in time and the adoption of democracy years or decades later. Thus, the potential for predatory behavior across Latin America's developing states have been at least as strong for democratically elected leaders as for authoritarian leaders.

Thus the empirics are at best fuzzy as to the precise relationship between regime (or democracy) and the protection of property rights, at least in Latin America. At a minimum, we have some reason to suspect that democracies may not necessarily be better at protecting property rights than their authoritarian counterparts. It is also difficult to establish a direct link between efforts to promote property rights and capitalist economic growth and the likelihood of a democratic transition (*see* BA O'Donnell 1974). The extant literature is equally mixed in its conclusions

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about the precise relationship between property rights and regime type. In part this is due to the lack of empirical work that directly measures property rights protections against regime types. Most empirical studies assume that properties are protected or create aggregate measures that lump together property protection with other measures of the legal system and growth together (*see* Chong and Calderon 2000; Knack and Keefer 1995).

To provide a somewhat clearer picture of the links between these two concepts, we examined the correlation between property rights and democracy in 17 Latin American countries during the 1983-1997 period. Table 2 shows the level of correlation between democracy and property rights protection. Democracy is operationalized using four distinct measures. The first comes to us from Polity IV (*see* <http://www.cidcm.umd.edu/polity/>), a data project overseen by the University of Maryland's Center for International Development and Conflict Management. The Polity IV measure is a simplified version of the ten-point scale that is normally used to measure democracy along lines that fit the definition of a liberal democracy. The second measure is taken from Freedom House's seven-point scale measuring democracy (<http://www.freedomhouse.org/template.cfm?page=1>), which includes a host of items including measures of the freedom of expression, the press, and electoral contestation. The Freedom House measure, like the Polity IV, measure delves into many of the requisites raised in procedural minimum and liberal definitions of democracy. The third measure identifies the number of years that have elapsed since the transition to democracy. This measure is a crude effort to approximate consolidation of democracy since it assumes that as more time passes, the chances of consolidating democracy are greater. Finally, the last measure of democracy tries to approximate the presence of an electoral democracy since it only tells us how much time has elapsed since elections were held. These four measures of democracy are examined against two measures of property rights protection. The first (PRS measure) is measured on a scale of 1 to 10 with higher numbers indicating greater protection of property rights and lower numbers indicating a higher risk of state expropriation (*see* Biglaiser and DeRouen 2006). The second (Heritage Foundation measure) is measured on a scale of 1 to 10 with lower numbers indicating greater protection of property rights and higher numbers indicating a higher risk of state expropriation.

As in any correlation analysis, the strongest relationships are those that range between  $\pm 0.70$  and  $\pm 1.0$ . Weak relationships are those that hover around  $\pm 0.30/.40$  cutoff. Correlation coefficients that fall below the  $\pm 0.30/.40$  cutoff suggest no relationship between variables. As is evident in Table 2 (below), the data suggest that there are no strong relationships between most definitions of democracy and the protection of property rights in Latin America, 1983-1997. There is only one exception worth noting. The Freedom House definition of democracy, shows a relationship – albeit not a strong one – with the protection of property rights. The link between that definition of democracy and the Heritage Foundation's measure of property rights protection suggests that there is a positive association between the two. In other words, more democratic states are associated with a higher risk of expropriation. However, as is the case for all correlation analyses, associations do not necessarily suggest that the relationship is a causal one; rather, the analysis suggests that the data seem to move together in the same direction. There may, in fact, be another (possibly antecedent) factor that explains why those two measures move in the same direction. For the most part, though, the relationship between property rights and democracy is not consistently supported by the Latin American data.

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|                                      | Protection of property rights-<br>PRS measure | Protection of property rights-<br>Heritage Foundation measure |
|--------------------------------------|---|---|
| Democracy<br>(Polity IV measure)     | -.05<br>n=196                                 | -.04<br>n=96  |
| Democracy<br>(Freedom House measure) | .18*<br>n=210                                 | .62*<br>n=257   |
| Years since<br>democratic transition | .19*<br>n=196                                 | .08<br>n=96   |
| Years since last election            | -.04<br>n=210                                 | .07<br>n=104  |

\*\*p\* ≤.01 level (two tailed)

*Table 2: Correlation analysis of the protection of property rights and democracy across Latin America, 1983-1997.*

Ultimately, the theoretical and empirical contributions to the field of political science are not clear or definitive with respect to this complex issue. As such, no policymaker should make facile conclusions regarding the renewal and protection of individual property rights in any society, including Cuba, and democracy. It may well be that structures put in place to protect property rights and create market economies may stymie not necessarily support efforts to establish democratic governance. Further, it may be the case that the protection of property rights may be best handled by authoritarian regimes. So, if the goal is to transform Cuba to a democratic state, efforts to address property issues are not necessarily the ideal mechanism. Similarly, if the goal is to establish property rights protections, democratic regimes may or may not be the most efficient mechanism to do so. This is not to suggest that creating a democracy is unimportant or not worthwhile because giving ordinary Cubans a voice in their future is essential on many levels. Rather we caution that these two developments, democratic governance and property rights, should not be assumed to move together in the same direction. In other words, solving one problem will not necessarily solve the other. With this caution in mind, we will address the probability of transition and succession scenarios in Cuba, either before or after property issues have been settled.

### **II.(C) The Post-Fidel Period**

The adoption of democracy necessitates concerted action on the part of the elites, the masses, or both. Some have suggested that certain pre-conditions must be met for democracy to flourish, including the presence of modern economic and social structures, a strong middle class, or a democratic political culture. In addition, before a transition of any sort is possible, the existing regime must collapse first. Thus, transition is only possible when a failed succession has taken place.

There are myriad models that could be used to explain the failure of a succession and the possibility of a (democratic) transition. While they all have some merit, we will focus on Terry L. Karl's typology of democratic transitions (Karl 1990). The value of this model is that it explicitly addresses the relative strength of masses and members of the elite within a society. This relatively recent contribution is also useful because it explicitly addresses modern transitions across Latin America, a region that is of particular relevance for the Cuban case because it maintains cultural and temporal characteristics relatively constant.

Figure 1 (below) presents a simplified version of Karl's typology of transition. As is evident, the relative strength of the masses or the elites and the mode of transition help to dictate the kind of transition that is likely to occur. Karl also suggests that in addition to helping determine the kinds of transitions that occur, these two factors are useful in predicting the long-term success of that transition and its likelihood of consolidation. All of these features are important as societies must be able to make a clear choice *in favor of democracy*, not just against a specific authoritarian regime. So, the adoption of democratic rules and norms must be constantly reaffirmed if democracy is to survive and be consolidated.

| Relative Actor Strength | Mode of Transition |            |
|-------------------------|--------------------|------------|
|                         | Compromise         | Force      |
| Elite Ascendant         | Pact               | Imposition |
| Mass Ascendant          | Reform             | Revolution |

Figure 1: Karl's typology of democratic transition in Latin America.

Where the elites play the most critical role in dictating the terms of the transition to democracy we could expect two outcomes: pacted or imposed transitions. Pacted transitions, like those that characterized the transitions in Colombia (1957), Costa Rica (1949) and Venezuela (1958), generally involved complex and consensual arrangements among previously warring members of the elite classes. Pacted transitions tended to produce relatively stable regimes, even when they effectively reduced the number of players involved in writing the rules of the new democracy. These transitions also had the added benefit of providing a large enough "buy in" for the most powerful elements of society – often including major parties, economic/political elites, and the military.

Impositions, on the other hand, suggest that the process of transition involved some level of force during the transition. In other words, the process of writing the rules of the new democracy may have fallen disproportionately on a smaller segment of elites, such as the military. The net result was democratic regimes that had included elaborate mechanisms to favor those who ushered in the transition. This included provisions to protect institutions, like the military, or individuals from prosecution, as well as guaranteed representation for the outgoing regime in the nascent democracy. Some have included the Chilean (1989) and Brazilian (1985) transitions as examples of imposition. In both cases, the outgoing military regime was able to dictate the terms of its departure as well as the basic features of the new democracy in ways that served to benefit its interests in the short and medium term. In both cases, efforts to prosecute the authoritarian regime for human rights abuses or other excesses were undermined by constitutional and organic laws aimed at providing the military. While impositions do not carry the same level of consensus that pacts do, they have been somewhat successful insofar as they have provided authoritarian regimes with an incentive to step down and begin a broader process of transition. Some might even suggest that impositions, which were far more common during the third wave, may provide the most stable and enduring forms of democratic transition in the region (Karl 1990).

Where the masses play the most critical role in sparking and guiding the transition to democracy we can expect two outcomes: reform or revolution. When the masses serve as the spark for a transition but are able to forge compromise with other segments of society, including the elites, then we find transitions consistent with the reformist model (e.g. Chile 1970-73; Guatemala

1946-54). While this form of transition is less common than some of the elite-led processes, they have a number of benefits including the involvement of a broader cross section of society in the process. While this is certainly a benefit in the short and medium term, Karl notes that reformist transitions tend to include a number of features that may prove destabilizing in the long-run.

Finally, revolutions result where the masses can trigger a transition through the use of force. These are among the rarest of transitions (*see* Bolivia 1950; Mexico 1917). A revolutionary scenario is the most unstable of the four options for a number of reasons. It agitates the elite classes and provides very little probability of long-term compromise among sectors of society (which is often deemed essential to the building of democratic cultures). Implicit in the discussion of regime transitions is the understanding that while the masses are important, in many respects elite acceptance of the democratic ideal is essential. In other words, elite consent for this particular form of political change is absolutely necessary and, in some instances, sufficient for the long-term success of democracy. This assumption is certainly not the only means by which political scientists envision the process of democratization but this is certainly a prevailing view that deserves mention.

In the following section, we will adopt much of Karl's language and focus in discussing the probability of a transition in Cuba. We will address a range of potential political and economic changes that may occur in the short, medium, and long term. Naturally, these are simply a sample of a universe of possible and probable outcomes that we may see in Cuba's future. While these scenarios are suggestive of a range of outcomes it is not necessarily an exhaustive listing. More importantly, we aim to highlight how the masses and the elites could interact to produce different political and economic scenarios on the island.

### **II.(C)(1) The Short Term: Succession Under Raúl Castro**

The short-term scenario is one that has already played itself out: an apparently orderly succession from Fidel to Raúl Castro. As is well known, on July 31, 2006 the Cuban government announced that Fidel Castro had temporarily ceded power to his brother, Raúl Castro, for health reasons. While the line of succession was not a great mystery to most experts of the Cuban political scene, the timing of this succession was. Given the level of secrecy surrounding issues pertaining to Fidel Castro's health, the announcement took much of the academic and policy communities by surprise. Indeed, most have still been left guessing as to the exact nature and severity of the health crisis that precipitated the succession. While a succession of some form was inevitable, given Fidel Castro's advancing age, very few would have predicted the timing of the events that unfolded in the summer of 2006.

#### **II.(C)(1)(a) Possible & Probable Political & Economic Developments**

By most accounts, the succession has proceeded in an orderly and mostly predictable manner. Raúl Castro has had a major role in the day-to-day operations of the regime since its inception in 1959. After all, he has headed the Revolutionary Armed Forces (F.A.R.) for decades and has been formally and informally linked to a range of policy decisions since the 1960s. Raúl Castro's ascension to the position of acting President (which means he acts as both head of government and chief of state) progressed without any particular fanfare or tumult.

Now over a year later, it is clear that the succession has been largely successful in maintaining continuity in the government. The key players remain the same. Ricardo Alarcón remains the third most powerful figure in Cuban politics, heading the National Assembly and acting as one of the regime's chief spokespersons. Felipe Pérez Roque is still acting as foreign minister

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and remains in the powerful circle of figures that will likely lead a continuation of the regime. Carlos Lage, remains the island's top economic policy maker and acts as vice-president. In addition, no major changes have occurred in one of the country's key institutions: the F.A.R. The F.A.R.'s penetration in various economic sectors makes it one of the pre-eminent elite constituencies in Cuba. Without question, Raúl Castro's imprint on the F.A.R. will ensure continued support for the status quo, at least in the short term.

Given that the key players are still largely in place, with the possible exception of Fidel Castro, it is tempting to conclude that very little will change on the island both politically and economically. Obviously, Fidel Castro's absence from the governing apparatus may free up some actors to pursue variations on the same policies enacted thus far. There is hardly a mandate for radical change. Neither the key figures have changed nor have their commitments to Fidel's vision. Thus, as long as Fidel Castro remains alive, there is a low probability for radical economic restructuring or political re-engineering. This is due in part to the larger-than-life shadow of Fidel Castro. He has served as the regime's key focal point for over forty years. His charisma and importance to the revolution and the restructuring of Cuban society must not be underestimated. However, this is also due in part to the fact that there are existing constituencies in Cuba that will seek a continuation of the status quo: this is true for elites as well as important segments of the masses. For instance, the elites that have been brought up through the ranks thanks to Fidel or Raúl Castro see their fates tied to a continuity of policies that favor them. So, while we might see some small variations on the same set of policies, there is a low likelihood of radical change.

### **II.(C)(1)(b) Implications for Property Claims Settlement Issues**

Thus, the short-term scenario for the island suggests a continued consolidation of the succession that began nearly one year ago in Cuba. With Fidel Castro's health still a puzzle there is no strong reason to suspect that we will see anything other than the continued presence of Raúl Castro. Events over the last eight months have indicated that Raúl Castro has been making key decisions on policy and is effectively the unquestioned successor to Fidel. It is certainly possible that Raúl Castro may decide to find a resolution to outstanding property claims issues with U.S., Cuban-Americans and others. However, as stated earlier, it is hard to know if these issues will be resolved to the satisfaction of those who emigrated from Cuba during the Castro regime. Any efforts to try to resolve these outstanding issues would have to be negotiated directly with Raúl Castro's successor government and would require a substantial change in U.S. policy. While he may be able to ensure contracts and serve as a key component in protecting any property rights arrangements that may result, given the high level of autonomy that the Cuban government possesses, it is hard to gauge whether this is a priority for Raúl Castro's administration.

### **II.(C)(2) Medium & Long Term: Succession vs. Transition**

There are a number of questions regarding the long-term viability of Raúl Castro leadership. He is only a few years younger than Fidel and must eventually cede the leadership position to another individual or individuals in the medium or long term. Thus, in many respects, the medium and long-term scenarios are the most interesting to experts and policymakers, especially when it comes to property rights issues.

### **II.(C)(2)(a) Possible & Probable Political & Economic Developments**

Medium and long-term scenarios are myriad and include the possibility of a continued succession along with the possibility of a transition. First we will address the probability of a continued

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succession, as it represents a continuation of the existing regime but may also suggest some important changes that may be relevant to property rights issues. A succession suggests that the elites are largely content with the status quo and are likely to see a continuation of many, if not all, policies associated with Fidel and Raúl Castro. While many of the contours may vary, the basic regime type is likely to remain unchanged. The most notable change would be the permanent disappearance of Fidel Castro. In other words, some form of authoritarian government might remain in place if strategic elites continue to support the regime. Likely political succession scenarios in the medium and long term include, in order of most to least likely:

- Power transfer to Raúl Castro, who rules along with current political and military elites. Succession is orderly. (This is a continuation of the short-term scenario we have seen unfold.)
- Permanent power transfer to Raúl Castro, who rules along with other key military/political leader(s). Succession is orderly.
- Power transfer to Raúl Castro, with internal dissent from within the elite class. Succession is initially orderly, but deteriorates with increased dissent.
- Power transfer to Raúl Castro, followed by another succession by key military/political leader(s). Succession is orderly.
- Power transfer to Raúl Castro, followed by another succession by key military/political leader(s). Succession is less orderly than that which brought Raúl Castro to power in 2006.
- Power transfer to Raúl Castro, followed by another succession by key political elites. Succession is less orderly than that which brought Raúl Castro to power in 2006. Level of fractionalization among political elites reaches highest level following succession.

The level of conflict involved in the process largely determines whether these succession scenarios include a continuation of current political practices. Where conflict is highest among elites jockeying for control of the main governmental apparatus, some factions may pursue more radical political reforms (either more liberal or less liberal). In contrast, where the process of succession is less conflictual, one might expect a lower probability of any significant political change, as it suggests some level of consensus on the status quo.

Additionally, the following economic scenarios may emerge in the wake of a succession, in order of most to least likely:

- Continuation of current economic policies, which include an array of command and market features. No change in political practices.
- Increased gestures towards market-orientated transformations following the Chinese or Vietnamese models. No change in political practices.
- Increased gestures towards non-market transformations (status quo policies with the possibility of retrenchment of command economy features). No change in political practices.

The possibility of democratic transformation also exists in the medium and long term. The probability of such a change, however, is dependent on two related phenomena: the collapse of the existing regime and the acceptance of democratic forms of governance. The collapse of the existing regime may take place in a number of ways: dramatic collapses are reminiscent of those that occurred in Argentina in the late 1980s and the Soviet Union in the early 1990s. However, less chaotic and even bloodless collapses have also been recorded throughout parts of Eastern and Central Europe, as well as in parts of Latin America.

The factors that may trigger a collapse of the existing regime in Cuba may range from a wholesale challenge to the regime's legitimacy, stemming from the lack of a leadership (possibly

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resulting from a succession crisis), lack of results (economic or social), or other factors. Ultimately, the factors that precipitate a collapse of the regime could come from either a challenge from below or a challenge from the elite classes. In spite of years of outside pressure to precipitate an end to the regime, the most likely triggers for collapse will likely come from within the regime or society. Thus, it is most likely that severe challenges unmet by the existing power and economic structures may produce a reaction within Cuba for change. Under these circumstances the most important players in a regime collapse are likely to come from the elite classes, as they are better mobilized than the masses (Mesa-Lago and Perez-Lopez 2005). While the masses may play a role in provoking or exacerbating a crisis of legitimacy on the island, they are not as likely to play as important a role as members of the elite in dismantling of the current regime – primarily because of the general weakness of civil society in Cuba. There are many well organized groups both on the island and off that may play an important role in challenging the regime, including the Association of the Defenders of Political Rights, the Cuban Commission for Human Rights and National Reconciliation, the Harmony Movement, the Cuban Committee for Human Rights, the Cuban American National Foundation, *Cambio Cubano*, and the Cuban Democratic Platform, just to name a few (see Rivera 1994). However, it is not clear that those groups can translate those organizational skills and commitment to undermining the regime through the creation of a broad, mass movement.



*Taxi stand in front of Hotel El Nacional.*

Likewise, the chances of a sustained democratic transition are likely to come from above. As noted earlier, some of the most “successful” cases of transition in the region have come as a result of elite actions, either through pacted or imposed transitions. If Cuba experiences a transition, it is likely to be guided by an elite ascendant process. This is due largely to the fact that the masses have been so effectively demobilized over the course of the nearly fifty years of the Castro regime (Mesa-Lago and Perez-Lopez 2005). The triggering mechanism that would facilitate a democratic transition would obviously be the collapse of the existing regime. Beyond that, masses or elites must make a concerted effort to choose democracy. The reasons for selected democracy over another form of governance may rest on perceptions held by the masses or the elites that democracy is the only other alternative available. It may also reflect deeply held beliefs that democracy is somehow more compatible with other goals sought for the island-nation, including economic liberalization or concerns about the restricted political space in the current system. Unfortunately, given the nature of the Cuban regime and a lack of knowledge about the true preferences and desires of the Cuban public, it is nearly impossible to make any probabilistic statements regarding the likelihood that the masses or the elite harbor any strong commitment to democracy. However, if such a commitment does exist, the following transition scenarios come into play:

#### Elite Ascendant Scenarios:

- Continuation of current political policies with an emphasis on market-oriented reforms. Economic reforms spark an interest – among the elite – for political reforms. A select number of strategic elites craft rules for a forced, gradual transition to democracy. (Imposition)
- Continuation of current economic policies accompanied by a tightening of political restrictions. Frustration with the status quo sparks an interest – among the elite –

for political reforms. A select number of strategic elites craft draw up rules for a forced, gradual transition to democracy. (Imposition)

- Continuation of current economic policies accompanied by a tightening of political restrictions. Frustration with the status quo sparks an interest – among the elite – for political reforms. Strategic elites organize a gradual transition to democracy. (Pact)
- Continuation of current political policies with an emphasis on market-oriented reforms. Economic reforms spark an interest – among the elite – for political reforms. Strategic elites organize a gradual transition to democracy. (Pact)

Mass Ascendant Scenarios:

- Continuation of current political policies with an emphasis on market-oriented reforms. Economic reforms spark an interest – among the masses – for political reforms. Masses use force to spark a transition. (Revolution)
- Continuation of current economic policies accompanied by a tightening of political restrictions. Frustration with the status quo sparks an interest – among the masses – for political reforms. Masses use force to spark a transition. (Revolution)
- Continuation of current economic policies accompanied by a tightening of political restrictions. Frustration with the status quo sparks an interest – among the masses – for political reforms. Masses coalesce with strategic elites to begin a transition. (Reform)
- Continuation of current political policies with an emphasis on market-oriented reforms. Economic reforms spark an interest – among the masses – for political reforms. Masses coalesce with strategic elites to begin a transition. (Reform)

As is evident across the scenarios, the presence of a specific leader or leaders is not essential to the unfolding of a democratic transition. Castro may be in control of the governing apparatus or challenged by other actors (as in the case of a crisis over succession.). Democratic transition assumes that the existing regime has collapsed or is in the process of collapsing. Thus, whoever is in power is likely to face similar challenges to their legitimacy from members of the elite or the masses if they opt for a democratic transition.

Failed attempts at transition are also a possibility in the Cuban case. In contrast to the successful transition scenarios noted above, failed efforts at transition are likely to turn on the relative strength of the existing regime. This means that the authoritarian regime has not collapsed nor is it in the process of collapsing. On the contrary, it means that efforts to move towards democracy have been premature – possibly a sign that those actors have miscalculated their strength relative to the regime in power. It also suggests that the regime in power retains some level of legitimacy. Accordingly, crises – like those faced in the early 1990s in Cuba – do not trigger the downfall of the regime because it is still capable of delivering to society some basic goods (e.g. housing, medical services, etc.) to meet expectations of its citizens (Hawkins 2001; Nelson 1984). It also suggests that even a serious challenge, like that which could be sparked by a succession crisis, may not be enough to overcome the regime. Thus, failed efforts at transition could produce a new leader, a new government, and possibly a new set of policies without fundamentally altering the authoritarian character of the regime. A few possible scenarios are as follows:

- Succession crisis follows Raúl Castro's efforts to install a new leader(s). Masses trigger a revolt from below that is stymied by entrenched actors (e.g. F.A.R.) who establish a new authoritarian regime. (Attempted revolution)

- Succession crisis follows Raúl Castro's efforts to install a new leader(s). Masses trigger a peaceful effort at reform from below that is stymied by entrenched actors (e.g. F.A.R.) who establish a new authoritarian regime. (Attempted reform)
- Raúl Castro fails to transfer power. Societal crisis questions legitimacy of regime. Masses trigger a revolt from below that is stymied by entrenched actors (e.g. F.A.R.) who establish a new authoritarian regime. (Attempted revolution)
- Succession crisis follows Raúl Castro's efforts to install a new leader(s). Elites trigger a revolt against the state that is stymied by entrenched actors (e.g. F.A.R.) who establish a new authoritarian regime. (Failed imposition)
- Raúl Castro fails to transfer power. Societal crisis questions legitimacy of regime. Elites trigger a revolt against the state that is stymied by entrenched actors (e.g. F.A.R.) who establish a new authoritarian regime. (Failed imposition)

As with the other scenarios discussed here, these are not intended to be exhaustive, but rather illustrative of the kinds of forces that could work for and against the adoption of democracy. In the last set of scenarios, actors advocating change overestimate their abilities relative to those who stand to gain from the maintenance of an authoritarian government. In all cases, challenges to the regimes legitimacy are with overwhelming force by entrenched actors who succeed the current government and continue the practice of limited political activity and expression. Ultimately, if those new leaders are capable of delivering to the population above and beyond their expectations no major political change is likely. Rather, one might expect a change in leadership and, possibly, some degree of policy change without fundamentally altering the authoritarian character of the Cuban regime.

### **II.(C)(2)(b) Implications for Property Claims Settlement Issues**

The medium and long term scenarios for the island are quite varied and include consolidated succession, democratic transition, and authoritarian replacement. The medium and long term scenarios include, most prominently, the departure of Fidel Castro from the national political scene. This suggests that the reins of power would rest in the hands of Raúl Castro for some time. Whether a succession from Raúl Castro to other political and/or military elites is successful is an open question.

As was the case for the short-term scenarios, it is possible that Raúl Castro may decide to find a resolution to outstanding property claims issues with U.S., Cuban-Americans and others. His successors may also be willing to resolve these issues, especially if the F.A.R. plays a prominent role in the subsequent government, because it has many incentives to re-open market ties with Western powers. As noted earlier, the F.A.R.'s involvement in the Cuban economy and in its key industries suggests that it stands to gain a great deal if it can maintain stability and open up new commercial partnerships. If it sees resolution of property claims with U.S. citizens and expatriates, then it might be especially amenable to finding common ground. This, of course, depends largely on which segment of the F.A.R. gains control of the government. What is more, if the F.A.R. maintains its high level of autonomy and capacity, it may be able to ensure contracts and serve as a key component in protecting any property rights arrangements that may result. So, in some ways a peaceful succession (to Raúl or his hand-picked successors) or a strong authoritarian successor government that thwarts efforts to democratize may find strong incentives to achieve resolution of existing property claims. Efforts to resolve these issues will prove more successful in the long run if those authoritarian regimes are interested in 1) expand-

ing commercial partnerships with the West or 2) resolving some of the tensions with the U.S. and, simultaneously, have the power to enforce any decisions made. Any efforts to resolve these issues would have to balance the interests of the current elite class in confiscated properties with the desire for compensation or other forms of justice by members of the exile community. In part, those decisions will depend on a cost-benefit calculation made by Cuba's next generation of leaders, many of whom may currently be in important positions but are unable to break the current policy impasse with the U.S. It bears noting that for any of these options to be available to members of the Cuban political elite, substantial change to U.S. policy (including substantial amendments to or repeal of the Helms-Burton Act) is required.

Democratic transition may also facilitate dialogue on property rights issues. In part, this dialogue may result from a desire to restore relations with the neighbor to the North. Renewed dialogue may also result from a concern for restoring economic and commercial ties with the U.S.

Finally, concern that a more open political environment may invite future Cuban governments to resolve these issues rather than wait for these issues to be resolved on their own, say with an influx of Cubans living off the island demanding a return of their property. Ironically, the prolongation of an authoritarian setting may not prove as strong a lure for those who have outstanding claims to return to the island. Whereas the possibility of a democratic opening may heighten fears that members of the Cuban-American exile community may descend on the island demanding their properties be restored. This fear looms large in the public debate in Cuba and cannot be dismissed. Even though there is little data to support the contention that former exiles would return to the island to reclaim their properties (*see* Section IV), the fear that an open environment would solicit such a response is very real. Naturally, of course, any resolution of these issues would depend on a cost-benefit calculation made by new leaders who would have to respond to two constituencies, the exile communities and citizens residing on the island. Both constituencies have the potential to play a role in electing leaders and governments in the future and may serve as another incentive to resolve these issues.

Of course, it is also possible that a newly empowered government, whether democratic or authoritarian, would not be open to resolving these issues. The kinds of democratic or authoritarian leadership that can arise in Cuba are myriad. Moreover, the costs of providing restitution or compensation may simply outweigh the benefits of any such resolutions regardless of regime type.

Ultimately, there are bigger issues that may determine the likelihood of finding common ground on property issues. It is unreasonable to assume that democratic governments are more or less likely to want a resolution to outstanding claims than their authoritarian counterparts. What kind of regime follows Raúl Castro matters less than who takes the reins of power and what incentives they have for establishing commercial relations with the West and the U.S., in particular. It is entirely likely that resolution of property claims will come before any democratic transition takes place, if it ever does. As a result, it is more important to provide actors in either democratic or autocratic governments with significant incentives to negotiate a solution to these outstanding property issues. It is certainly possible that there are those who will see the benefit of doing so, regardless of the regime that emerges in the future.

Thus in Section V, we propose property resolution mechanisms that could work to the mutual benefit of the U.S. and a new Cuba, in whatever form that new Cuba might take. But the central point here is that this is a separate and independent question from the creation of a democratic Cuba, and the issues should not be conflated.

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## Section III Outline

# Comparison to Other Claims Tribunals/ Settlement Options

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### III. Comparison to Other Claims Tribunals/Settlement Options

#### A. International Tribunals

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a. Aspects of the Iran-U.S. Tribunal to Avoid

b. Structural Comparison to the Iran-U.S. Model

##### 2. Eritrea-Ethiopia Claims Commission

##### 3. U.N. Claims Commission

#### B. The Latin American Experience – Nicaragua

1. Disputes during the Early 20<sup>th</sup> Century

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a. Czech Republic

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2. Restitution & Compensation

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## Section III Outline

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-

# Comparison to Other Claims Tribunals/ Settlement Options

## **THE 20<sup>TH</sup> CENTURY WITNESSED A DRAMATIC INCREASE IN THE NUMBER OF NATION-STATES.**

Because of shifting ideological movements assuming governmental power, numerous destructive military conflicts around the globe, and the dislocation of millions of people, multiple private property confiscations took place on a variety of scales and in a variety of circumstances. International law vests claims in foreign governments and citizens whose property loss is uncompensated. Domestic political pressure usually provides settlement for claims of nationals whose property is taken. In the case of foreign property claims, economic realities typically dictate that these claims be settled both to carry on meaningful economic relations and to attract foreign investment. In the case of domestic property claims, some effort is historically made by a successor government to address those issues.

Various models have been utilized for the settlement of disputed claims, especially with regard to property claims following a domestic nationalization. Key aspects of several models were considered and incorporated in designing the instruments creating the Cuba-U.S. Tribunal (the “Tribunal”) and the Cuban Special Claims Court (the “Court”) – which are discussed in detail in Section V of this report. Some dispute resolution models were bilateral in nature, governed by applicable principles of international law, such as the Iran-U.S. Claims Tribunal and the Eritrea-Ethiopia Claims Tribunal. Others were purely internal in nature, such as the Nicaraguan, Eastern European and German efforts. Settlement options other than institutionalized dispute resolution, such as adequate lump sum compensation, remain a viable and, in some respects, preferable option.

This section summarizes the comparative analyses undertaken in the development of the Court and Tribunal instruments. Part A draws more connections to the proposed Tribunal, which is international in nature. Parts B through D draw more connections to the proposed Court, which is domestic in nature.

### **III.(A) International Tribunals**

The proposed Cuba-U.S. Tribunal is bilateral in nature and would constitute a court of limited jurisdiction with the degree of international legal personality necessary to accomplish its task of settling outstanding property claims between the two countries. The Iran-U.S. Tribunal presents a bilateral paradigm that has achieved a high degree of independent legal autonomy from its creating



*Hotel El Nacional as seen from the Malecón.*

parties. The Eritrea-Ethiopia forum presents a model that has remained in close consultation with its creating parties and exists within the Permanent Court of Arbitration structure. The United Nations Claims Commission is a body created as a subsidiary of an international organization (the U.N. Security Council) which processes claims only from Kuwait against Iraq; there are no Iraqi claims.

### **III.(A)(1) Iran-U.S. Claims Tribunal**

The Iran-U.S. Claims Tribunal presents one of the closest modern analogies to a potential Cuba-U.S. Claims Tribunal. Although this proposal recommends two bodies—one to resolve claims by nationals against the opposing government (the “Tribunal”) and one to resolve Cuban expatriate claims against the Cuban government (the “Court”)—it is instructive to examine the instrument on which the Iran-U.S. Tribunal is based (the “Algiers Declaration”) together with the instruments creating both Cuban tribunals.

Critical points of similarity and dissimilarity between these documents and the actual functioning of the Iran-U.S. Tribunal are important to note in a comparison to the Tribunal and Court. Such comparison is useful to avoid problems encountered by the Iran-U.S. Claims Tribunal and to improve upon and add to successful features of that Tribunal. Before comparing specific provisions, comparing the context of the underlying disputes demonstrates why the Iran-U.S. Tribunal and its founding documents merit examination.

In a broad sense, the need for the Iran-U.S. Tribunal and the need for the Court and Tribunal arose in similar circumstances. The need for a claims tribunal in the case of Iran was prompted by the Islamic Revolution of 1979. Forces acting in support of the Ayatollah seized not only the U.S. Embassy in Tehran, but also many privately held American assets. The U.S. government responded by seizing Iranian assets in U.S. banks. As a result, nationals of each country had claims to assert against the opposing government. Correspondingly, the necessity of claims tribunals in the case of Cuba was prompted by Castro’s revolution in 1959, and the still-uncompensated property seizures that went along with it. Again, the U.S. government responded by seizing Cuban assets in the U.S. Here too, nationals of each country are left with claims against the opposing government. The two situations thus present similarities in terms of the emotional and political aspects of the breakdown in relations.

In its twenty-five years of operation, the Iran-U.S. Tribunal heard nearly 4,000 claims. About 1,000 of these were large claims (over \$250,000) and about 2,800 were small claims. *See Background Information: Iran-United States Claims Tribunal* (available at: <http://www.iusct.org/background-english.html>). Because of claim volume, the Iran-U.S. Tribunal required an infrastructure much like that of a full-fledged court system. Even assuming a reasonable success rate in informal resolution of claims, the Court and Tribunal for Cuba are likely to experience a similar volume of claims and thus require a similar infrastructure to sustain expedient claim resolution.

Despite these similarities, important differences exist in part because the Cuban situation has been much longer in maturing and Cuba has very limited hard currency with which to pay claims. Some Cuban claims involve seizures that took place nearly a half-century ago. In the case of Iran, the claims tribunal was formed within three years of the property seizures. Further, in Iran’s case there were approximately \$12 billion in Iranian assets, which the U.S. froze, that were used in part as security for Tribunal award payments. In Cuba’s case, while the claims easily extend into the billions of dollars, Cuba’s access to hard currency is likely so limited that a lump sum payment would allow for recovery of only a few cents on the dollar. In addition, Cuban assets frozen in the U.S., which could potentially be used to satisfy awards against Cuba, are insignificant in comparison to the total value of potential claims.

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The impetus for creation of a claims settlement mechanism is also dissimilar. The creation by executive agreement of the Iran-U.S. Tribunal was a necessary because of the realities of the situation and the need to obtain release of the hostages as quickly as possible. The settlement of outstanding property claims between Cuba and the U.S., on the other hand, is required by U.S. law, specifically the Libertad Act, prior to a resumption of meaningful relations with Havana. Moreover, the circumstances surrounding the potential Tribunal and Court with respect to Cuba may allow for other options depending on how a transition or succession proceeds and on the willingness of the respective governments to settle claims quickly and conclusively through a strong bi-lateral commitment.

Nevertheless, the similarities between the Iran-U.S. situation and the Cuba-U.S. situation outweigh the differences. Both Iran and Cuba have legal systems and traditions much different from those of the U.S. In both cases, there was, and will be, a need for authentic “buy in” by key stakeholders in both countries alongside their respective governments to the method and substance of a comprehensive dispute resolution. In both cases, there was government seizure of assets presenting questions as to the legality and the mode of compensation for the seizures. Finally, in both cases there was, and will be, the need to have some mechanism for resolving actual or perceived claims against both governments.

### **III.(A)(1)(a) Aspects of the Iran-U.S. Tribunal to Avoid**

A consistent message from those associated with the Iran-U.S. Tribunal is that much can be done with informal structures and the good will of participants, and without that any process of claims settlement faces delays and perhaps defeat. Key advice to the investigators for this Report was that prior to setting up mechanisms of settlement both sides must understand the cultural boundaries and expectations of each group involved, understand the motivations of the claimants and the fact that these motivations will vary across groups, build solid relations of trust and good will, and be willing to deploy informal as well as formal mechanisms in settling claims. The instruments contained in this Report to establish the Court and the Tribunal reflect these concerns as far as possible, although they are in fact the formal structures that will only be brought to life through informal processes, discussions and understandings.

The instruments creating the models in this Report do not track the Iran-U.S. Tribunal template too closely for several reasons. The composition of benches at the Iran-U.S. Tribunal has been a difficult problem in two respects. First, to legitimize the tribunal, it was staffed with law professors who were in some instances inclined to use their position to develop international legal theory than to issue pragmatic decisions. For that reason, it is highly recommended that a Cuba-U.S. Tribunal be staffed with more emphasis on sitting judges and experts on contracts and private international law. Second, the division of the benches by nationality has stymied the ability of the benches to fully explore the issues as a group. For example, in a nine judge panel, the three Iranian judges always vote against the U.S. claims no matter what the merits are, so the U.S. agent always goes in three votes down in every hearing, but the U.S. judges sometimes vote either way. This is reflective of the fact that Iran is still controlled by the same hard-line theocratic regime that undertook the original property confiscations. In the case of Cuba, the U.S. will be dealing with a transitional regime moving away from the Castro-era government that effectuated property confiscations on the island.

Additionally, because the Iran-U.S. Tribunal was set up to be autonomous for the sake of fairness and to gain the confidence of both sides who, despite ongoing conflicts did indeed invest validity in this body, the Iran-U.S. Tribunal has taken on a life of its own, beyond what

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was ever intended by the two parties. Both parties believe they have lost control of this creation. Indeed, the Iran-U.S. Tribunal now determines its own salary structure, raises, benefits, and is even giving itself international institutional character to sign onto international agreements as a body with capacity to do so. With a budget of \$9 million per year over 25 years it has become very costly to operate. Both Iranian and American agents to the Tribunal believe it has gone its own way under the banner of complete organizational independence.

Consequently, the instrument creating the Cuba-U.S. Tribunal is written in such a way that the national governments retain greater control over the Tribunal, funds and time horizons for the life of the body are presumptively limited and control over the organization is maintainable without projecting undue influence. Nothing in the Cuba-U.S. Tribunal instrument reflects the “trappings of permanence” that could be said of the Algiers Declaration creating the Iran-U.S. tribunal.

Property claims were not subdivided into categories under the Iran-U.S. system; consequently, even the smaller claims are time-consuming and have led to lengthy procedural issues. The model for the Cuba-U.S. Tribunal breaks up claims into three groups based upon value of the claim and offers expedited informal processes of settlement as a way of specifically short-circuiting the very problems currently faced by the Iran-U.S. Tribunal. Thus, the Cuba-U.S. Tribunal will offer much more flexibility and less potential for procedural log-jams.

### III.(A)(1)(b) Structural Comparison to the Iran-U.S. Model

Both the Tribunal and the Court will be required to apply rules of private international law in some circumstances. While international law provides the general legal framework for the Tribunal, and the civil law provides it for the Court, there are several circumstances in which the Court and the Tribunal may have to look to other legal systems to provide the relevant legal rules. Such duality is not unique to this setting. In the context of the Iran-U.S. Claims Tribunal, with regard to some claims “[t]he substantive issues... can be governed either by municipal law or international law.” See Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years 1981-1991*, 107 (1993).

Article II of the Claims Settlement Declaration of the Algiers Declarations which established the Iran-U.S. Tribunal (the “Algiers Declaration”) granted the Iran-U.S. Claims Tribunal jurisdiction over claims that arose out of debts, contracts, expropriations, and “other measures affecting property rights.” Article 1.1 of the Court and Tribunal instruments allows for claims based on expropriation, wrongful interference with property, breach of contract, and unjust enrichment.

The addition of unjust enrichment is a significant variation from the Algiers Declaration. It is included in part to recognize civil law claims that might not otherwise be contemplated by the other express claims categories included in the instruments. Unjust enrichment is a term well-recognized in the civil law tradition. Neither the Algiers Declaration nor the Court or Tribunal instruments allow for jurisdiction over tort claims. For a fuller explanation of this concept and its inclusion as a mode of recovery, see Part V.C.4.c., *infra*.

In terms of the number and selection of arbitrators and judges, the Algiers Declaration provided for nine arbitrators with three each being appointed by the U.S. and Iran and the



*Pedestrians stroll through downtown Havana.*

remaining three being mutually agreed upon by the six already-appointed arbitrators. One of the mutually agreed upon arbitrators was required to be selected as President of the Tribunal. The Algiers Declaration also allowed for an increase in the size of the Iran-U.S. Tribunal by multiples of three upon mutual agreement, but the Tribunal was never enlarged and functioned with nine arbitrators throughout its life. Finally, Article III of the Algiers Declaration required all claims to be heard by three-member panels.

Article 2.1 of the Tribunal instrument requires the same number of arbitrators and the same appointment mechanism as the Algiers Declaration. Article 2.1 of the Court instrument, in contrast, requires that twelve judges be appointed, with no more than six having the same nationality. An important variation from the Algiers Declaration is that Articles 5.2 and 6.2 of the Court and Tribunal instruments allow small claims, as defined therein, to be heard by appointed hearing officers, if deemed necessary by the Court or Tribunal, and medium claims to be heard by a single judge or member of the Court or Tribunal. Only large claims, per Article 7.3 of the instruments, are required to be heard by three-member panels. The appointment of hearing officers and use of single-member or judge hearings is designed to mesh with the division of claim sizes set forth in the Court and Tribunal instruments and to expedite claim resolution. Finally, the Court and Tribunal instruments also provide conditions and procedures for removal of a member or judge in Article 2.3, something which the Algiers Declaration did not expressly provide for in creating the Iran-U.S. Tribunal.

Unlike the Algiers Declaration, the Court and Tribunal instruments divide claims into three groups to further accelerate the claims process and to provide for both just and efficient procedures with regard to remedies, presumptions, and burdens of proof in light of the claim amount. The only claim division provided for in the Algiers Declaration was that the governments, rather than the claimants themselves, were required to present claims for less than \$250,000. Article III (3) of the Algiers Declaration allowed claims of \$250,000 or more to be presented by the parties (generally through attorneys).

The Court and Tribunal instruments omit such a requirement and allow the Claimant to present its claim whether the claim is classified as large, medium, or small. A potential problem in the case of U.S. claims against Cuba is who will present claims where the claimant is deemed compensated in whole or in part by tax credits or deductions granted by the Internal Revenue Service as a result of the expropriations. One option would be to have the U.S. government present such claims on the theory that it is subrogated to the rights of such claimants. Another would be to have the claimants present the claims and require that the claimant reimburse the IRS for prior tax breaks. However, the preferable avenue would be for the holder of medium and large claims, who likely took advantage of the tax deduction, to present its tax records along with its claim and have the court reduce the award amount by the amount of gain achieved via prior tax break. In some cases, this may completely equal the entire amount of the claim. In any event, the recovery provisions in the proposed instruments are sufficiently flexible to avoid any double recovery.

Article I of the Algiers Declaration required the two governments to “promote the settlement” of covered claims for a period of six months before proceeding to binding arbitration. With respect to large claims, Article 7.2 of both the Court and Tribunal instruments provide for a similar period designed to encourage settlement. However, the Cuban instruments include more substantial provisions intended to further catalyze settlement by identifying a means for settlement (mediation) and a consequence for failure to adequately participate in settlement efforts. They specify that a mediator will facilitate pre-arbitration settlement efforts and require the parties to “engage

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in a good faith effort” to participate in mediation. If a party fails to comply in good faith, the instruments require the Court or Tribunal to strike that party’s statement of claim or defense and preclude that party from participating in further proceedings with respect to its claim.

This compulsory provision is designed to diminish problems encountered in an analogous situation in the Iran-U.S. Tribunal where claimants faced costly delays because the effectiveness of voluntary discovery procedures was undermined by lack of enforcement mechanisms. *See, e.g.,* Monica Petraglia McCabe, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience*, 20 Int’l Law. 499, 519 (1986). The “good faith” requirement of the Court and Tribunal instruments appears to be a term that is relatively well-understood internationally in the context of commercial disputes. *See* David J.A. Cairns, *Mediating International Commercial Disputes: Differences in U.S. and European Approaches*, 60-OCT Disp. Resol. J. 62, 68 (2005).

In addition to limiting jurisdiction over specific types of claims, the Algiers Declaration also limited jurisdiction to certain categories of claimants. Article II of the Algiers Declaration created what was described as “an international arbitral tribunal” with jurisdiction over the aforementioned claims brought by U.S. nationals against Iran and Iranian nationals against the U.S. It was also prescribed jurisdiction over “official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.”

Similarly, Article 1.1 of the Tribunal instrument allows for claims by nationals of either Cuba or the U.S. against the opposing nation and for claims by the two governments against one another. Therefore, the Tribunal would sit as an international arbitral tribunal similar to the Iran-U.S. Tribunal. In contrast, Article 1.1 of the Court instrument provides for jurisdiction over relevant claims between Cuban expatriate parties as defined in that instrument. The Court would be part of the Cuban judiciary rather than sitting as an international tribunal. No such internal court was established to hear claims of Iranian-Americans against Iran.

Similar to the Iran-U.S. Tribunal, issues of nationality under the continuous nationality rule will be determined by the Court and Tribunal in light of the definitional provisions included in the respective instruments. The jurisdictional limitation in Article II of the Algiers Declaration, which only recognized claims against the opposing government held continuously by nationals of each nation (or of the governments against each other), was not a source of controversy in the context of the Iran-U.S. Tribunal. The Algiers Declaration is silent, however, with regard to the question of partnerships and joint ventures. Customary international law dictated that if one partner were ineligible because of nationality, then the partnership itself was ineligible to proceed. The Iran-U.S. Tribunal adopted a percentage basis solution to this problem in the *Housing Urban Services Claim*, holding that ineligible partners were to be removed from the claim and the remaining percentage of partners could then recover a similar percentage of the claim. *See* *Housing and Urban Services International (HAUS), Inc. and Islamic Republic of Iran*, 9 C.T.R. 313 (1985 II), and David Bederman, *Establishing Procedure and Jurisdiction, Concepts of Nationality and Evidentiary Practices*, presented March 29, 2006 at the Institute for Transnational Arbitration Conference: The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration (Washington D.C.).

Unlike the Iran-U.S. situation, there will be multiple classes of claimants desiring to assert claims against Cuba and the U.S. because of the proximity of the U.S. and Cuba and the time elapsed since expropriation and the freezing of Cuban assets. These classes include (1) U.S. national claimants who have continuously held their claims since the claims arose, (2) Cuban expatriate claimants who came to the U.S. after their claims arose, and (3) Cuban claimants

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who remained on the island after their claims arose. As a matter of fundamental justice, all three classes of claimants are entitled to equal protection, which is why separate bodies are recommended to concurrently resolve the claims of at least the first two claimant classes to allow for just distribution of limited resources to satisfy judgments and awards. Claims of U.S. nationals are cognizable under international law and fall within the jurisdiction of the Tribunal. However, expatriate Cuban claims and claims of Cubans still on the island are cognizable under Cuban law rather than international law. Because of this situation, the combined claimant-based jurisdiction of the Court and Tribunal will be significantly beyond the scope of the Iran-U.S. Tribunal jurisdiction.

Despite this expanded jurisdiction, the Algiers Declaration and the Court and Tribunal instruments include similar definitions of the terms “nationals” and “claims of nationals.” Both the Tribunal and Court instruments allow claims by corporate and other non-corporate entities as defined in Article 8.5 of the Tribunal instrument and Article 8.6 of the Court instrument. Such claims were also cognizable under the Algiers Declaration. The Court and Tribunal instruments expand slightly on the provisions that allow for claims by non-corporate entities, which should emulate the unwritten procedural rules implemented by the Iran-U.S. Tribunal regarding similar claims.

Another important jurisdictional difference between the Algiers Declaration and the provisions of the Court and Tribunal instruments is that the Court and Tribunal instruments will not allow parties to derogate from or prorogate to the jurisdiction of the Court or Tribunal through forum-selection clauses or otherwise. The Iran-U.S. Tribunal allowed parties to derogate from the jurisdiction of the Tribunal under some circumstances. This derogation was problematic for numerous reasons and occurred because such derogation was not precluded by the Algiers Declaration. The inclusion of a provision prohibiting this outcome in Article 3.1 of the Court and Tribunal instruments is designed to avoid claim splitting and conflicting judgments and to reduce transactional costs. The provision is further justified by the fact that forum-selection clauses in contractual claims will be rare and those that are present will be decades old with little expectation of enforcement.

The Court and Tribunal instruments also differ from the Algiers Declaration in terms of finality provisions. Article 3.1 of both the Court and Tribunal instruments is designed to avoid review in alternative forums. This Article gives the Court and Tribunal the power to “finally and conclusively resolve all claims.” In contrast, Article IV of the Algiers Declaration states that Tribunal awards are “final and binding.” This language caused some needless and undesirable complications when awards were reviewed by U.S. domestic courts under the rather broad and malleable defenses set forth in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”). Problems encountered by the Iran-U.S. Tribunal as a result of review under the Convention are discussed in Section V.E.1.

Though in most cases completely insulating awards from collateral attack might be undesirable, the political history between Cuba and the U.S., and the need for conclusive resolution of the stale dispute, caution against allowing any such review. At least in the case of the Court, a form of *en banc* review provided for in Articles 6.5 and 7.6 will allow for appeal of important issues of law or fact in the case of medium and large claims. A provision allowing this type of review was absent from the Algiers Declaration. In any event, the “final and binding” language of Article 3.1 and an additional prohibition against collateral attack of awards in Article 9.6 of the Court and Tribunal instruments should avoid the finality problems faced in the Iran-U.S. situation.

Enforcement will also be improved upon by the Court and Tribunal instruments. The

Iran-U.S. Tribunal rules that awards were essentially arbitration awards covered by the New York Convention of 1957 on the Enforcement of Arbitral Awards. Rather than bringing the New York Convention into play, which offers many defenses, *see infra* Section V.E.1., or allowing other avenues of appeal or collateral challenges, the better route is to make clear that the Tribunal and Court awards are final and to be given equal dignity with domestic court judgments in each system.

In terms of procedure, Article III (2) of the Algiers Declaration employed the UNCITRAL arbitration rules except to the extent modified by the Algiers Declaration. Article 2.2 of the Tribunal and Court instruments includes a nearly identical provision. The choice of the UNCITRAL rules is sensible given the extensive international experience with them. Additionally, Article 3.3 of the Court and Tribunal instruments allows each body to promulgate rules of procedure to implement the instrument's provisions. This is similar to Article II (3) of the Algiers Declaration. Related to procedure, Article 3.2 of the Court and Tribunal instruments grant the Court and Tribunal authority to interpret the provisions of the applicable instrument (with the notable exception of Article 9.7), similar to Article VI (4) of the Algiers Declaration.

With respect to evidentiary issues, the Rules of the Iran-U.S. Claims Tribunal basically follow the UNCITRAL Arbitration Rules. There is no express provision outlining a uniform standard of proof under which to review evidence. That is left to the discretion of each arbitral tribunal on a case by case basis, pursuant to the power granted to it to "conduct the arbitration in such matter as it considers appropriate." As Judge Howard Holtzmann notes, "The Iran-U.S. Claims Tribunal has exercised its discretion to find facts on the traditional basis of preponderance of the evidence." *See* Howard M. Holtzmann, *Report: Mass Claims Processes*, 13 *American Review of International Arbitration* 69, 71 (2002).

Unlike the Algiers Declaration, Articles 6.4 and 7.5 of the Tribunal and Court instruments direct hearings to be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules") in the case of medium and large claims (in addition to the already applicable UNCITRAL rules). The IBA Rules are employed in large part because they were drafted by lawyers experienced in both the common and civil law traditions and will provide a fair compromise in evidentiary proceedings in light of marked variations between the civil and common law systems. A good deal of the evidence before the Court and Tribunal will be documentary as it was in the case of most claims before the Iran-U.S. Tribunal. In fact, Article 5.5 of both the Court and Tribunal instruments instructs the Court and Tribunal to resolve small claims on the basis of documentary evidence alone whenever possible.

In addition, neither government is required to oppose small claims; rather, the Claimant will be required to meet its burden regardless of whether the government appears to defend. Similar provisions were not included in the Algiers Declaration. Finally, both the Court and Tribunal instruments require the respective governments (only Cuba in the case of the Court) to designate an Agent to receive notices and other communications in order to facilitate administrative efficiency. Article 9.5. These provisions necessarily go beyond those of the Algiers Declaration because of the additional complications present due to the time elapsed in the Cuba-U.S. situation.

Regarding the law applicable to disputes before the Iran-U.S. Tribunal, the Algiers Declaration included an express provision. Article V of the Algiers Declaration provides that "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account the relevant usages of the trade, contract provisions and changed

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circumstances.” Article 4 of both the Tribunal and Court instruments expands significantly on the applicable law. This is so in part because of the alternative remedies that will be necessary in the Cuban context, the comparative difficulty of proving claims that are nearing 50 years old, the necessity of using two parallel bodies to decide claims, and the need to improve on the discovery procedures used in the Iran-U.S. Tribunal.

One example of a difference in applicable law provisions is that the Algiers Declaration did not provide for specific remedies to be awarded by the Iran-U.S. Tribunal. Such provision was unimportant because of the availability of funds to pay claims. Unlike the Algiers Declaration, the Court and Tribunal instruments employ terms dividing claims by size, identifying available remedies for each category of claim (i.e. small claims can be paid only in U.S. dollars), and providing for interim relief measures to avoid conflicting judgments and to facilitate evidence gathering. For medium and large claims under the Court and Tribunal instruments, the defendant governments can propose a remedy other than cash compensation which will be awarded if deemed the fair equivalent of what the claimant would be entitled to under principles of international law.

This is an important variation from the Iran-U.S. Tribunal due to the scarcity of liquid assets available to the Cuban government. Additionally, because claims by Cubans and Cuban expatriates are not cognizable under international law, Article 4.1 of the Court instrument provides that civil law apply to claims with due respect for international principles of fair compensation and fundamental fairness.

As to interim measures, Article 26 of UNCITRAL provides for interim measures, and the Algiers Declaration incorporated UNCITRAL, but the Tribunal declared that it possessed inherent power in this area and so did not need to avail itself of that Article. Interim measures were considered binding on the parties, but had to be requested by one of the parties. To effectuate interim measures, the Iran-U.S. Tribunal had to first satisfy itself that it possessed jurisdiction over the underlying case before issuing the interim measures; thus, a party request triggered an automatic jurisdictional review – the two most important questions of which were (1) whether there was a plausible basis for jurisdiction; and (2) whether there was a sufficient nexus between the case and the actions for which interim measures were requested.

Similarly, Article 4.5 for the Court and 4.6 for the Tribunal contain interim measures language: “The Courts of each Government shall aid in the enforcement of and comply with all orders of interim measures of relief, including the staying of closely related proceedings regardless of which of the proceedings was first filed.” In a departure from the Iran-U.S. system, courts may take their own steps to preserve the *status quo* ante pending resolution of a case before the Court or Tribunal.

Article VI (3) of the Algiers Declaration required that the Tribunal expenses be borne equally by the U.S. and Iran. Similarly, Article 9.4 of the Tribunal would impose equal costs on each government, while the cost of the Court would be borne solely by the Cuban government under Article 9.4. However, Article 9.7 of both the Court and Tribunal instrument recommends that the U.S. facilitate loans to Cuba on favorable terms to assist in award payment. This is a necessary provision based on economic realities in Cuba.

Similar to Article III (4) of the Algiers Declaration, which required claims to be filed within the later of one year after entry into force of the agreement or six months after the appointment of a President, claims before the Court and Tribunal must be filed within one year of the entry into force of the relevant instrument according to Article 9.1 of both instruments. This time period appears to have been deemed reasonable and fair in other international tribunals as well.

Contrary to the Algiers Declaration, the Cuban instruments do not specify a neutral seat for

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the Tribunal. Rather, Article 9.2 of the Tribunal and Court instruments directs the President to choose the Tribunal's seat (or the Chief Judge in the case of the Court) and also allows hearings at locations outside the seat to accommodate the claimant parties. Since even small claims before the Tribunal and Court will likely be presented by the claimant rather than the government, it is important to include this flexibility in the instruments. The dramatic improvement in communications since the early 1980s should make it more feasible to have the Tribunal and Court have administrative support in one location but have panels conducting hearings in another location.

A final important departure from the Algiers Declaration is that Article 9.9 of both the Court and Tribunal instruments will cause the Tribunal and Court to cease operation either on completion of hearing claims or five years from entry into force of the agreements, whichever is earlier, unless one of the governments for good cause decides to extend their operation. These provisions will avoid creation of a self-perpetuating international body (in the case of the Tribunal) and limit the cost of both the Court and Tribunal. In the absence of such a provision in the Algiers Declaration, the Iran-U.S. Tribunal continued to issue a significant volume of decisions through the mid-1990s, this after commencing operation in 1982, and its official website notes several written decisions as late as 2004.

As demonstrated in the above evaluation, the Algiers Declaration was given significant weight during the drafting process of the Court and Tribunal instruments. Such weight is justified based on the generally agreed upon success of the Iran-U.S. Tribunal in facilitating resolution of a significant international dispute. However, the above referenced differences also show significant departures from the Algiers Declaration based upon the different factual and political circumstances underlying the two systems as well as what amount to perceived and admitted weaknesses in the Iran-U.S. system. The Court and Tribunal instruments are designed to prudently exploit and improve upon the more successful aspects of the Algiers Declaration while avoiding problems faced by the Iran-U.S. Tribunal. In addition, each provision of the Court and Tribunal instrument is intended to recognize and adjust to the distinctive political, economic, and cultural realities of the dispute between the U.S. and Cuba.

Following is the text of the January 19, 1981 Algiers Declaration between the U.S. and Iran:

**DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC  
AND POPULAR REPUBLIC OF ALGERIA CONCERNING  
THE SETTLEMENT OF CLAIMS BY  
THE GOVERNMENT OF THE UNITED STATES OF AMERICA  
AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN**

**(Claims Settlement Declaration), 19 January 1981**

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

**Article I**

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not

settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

#### **Article II**

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.
2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.
3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

#### **Article III**

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.
2. Members of the Tribunal shall be appointed and the Tribunal shall conduct

its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply mutatis mutandis to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than \$250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

#### **Article IV**

1. All decisions and awards of the Tribunal shall be final and binding.
2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.
3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

#### **Article V**

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

#### **Article VI**

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.
2. Each government shall designate an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.
3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

#### **Article VII**

For the purpose of this Agreement:

1. A “national” of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. “Claims of nationals” of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. “Iran” means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The “United States” means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

#### **Article VIII**

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

### **III.(A)(2) Eritrea-Ethiopia Claims Commission**

Another example of a bilateral treaty creating a claims commission is the one between Eritrea and Ethiopia. The Eritrean-Ethiopian Claims Commission (the “Commission”) was created along with the Eritrea-Ethiopia Boundary Commission as part of comprehensive peace

effort to end the 1998-2000 border war between those two countries. The Agreements were entered into in Algiers at the end of 2000.

Under Article 5, the Claims Commission was given rather broad jurisdiction. Its mandate was to “decide by binding arbitration all claims for loss, damage or injury by each Government against the other, and by nationals (including all natural and juridical persons) of one party against the Government of the other party or entities controlled or owned by the other party that are...related to the conflict...and...result from violations or international humanitarian law, including the 1949 Geneva Convention, or other violations of international law.” Thus, the Claims Commission was given not only “contract” and “property” jurisdiction but “tort” jurisdiction as well. Since the focus of this Report responds to a mandate involving only property claims, the instruments proposed herein are necessarily more limited and do not establish subject matter jurisdiction over tort, delictual, and quasi-delictual claims.

While the Commission’s subject-matter mandate was larger than the Iran-U.S. Tribunal or either of the Cuban models, its physical operation is significantly smaller. The Commission consisted of one panel of five arbitrators: two each picked by the parties, although the parties were forbidden from choosing their own nationals. In this sense, this differs considerably from the model of the Iran-U.S. Tribunal, in which the nine party-selected arbitrators were all nationals of the parties with only one neutral. The “non national” nature of the Commission is innovative and was designed with an eye toward making the Commission more “neutral” in terms of its operations. In the Iran-U.S. situation, the national arbitrators could be very partisan, including an unfortunate incident in which two of the Iranian arbitrators physically attacked another arbitrator (from a neutral country). The Iran-U.S. Tribunal did produce a large number of decisions with dissenting opinions.

The significant downside to the “non national” approach for the Tribunal model is that it would void the Cuba-U.S. Tribunal of the expertise of the two nations’ judicial, arbitral and dispute-resolution communities. In the Eritrea-Ethiopia situation this probably was not a significant issue as the internal expertise in the area of claims settlement was not as deep. The Commissioners all came from western nations.

The applicable law reference was very simple, even more so than the Iran-U.S. Tribunal. Article 13 states simply that “[i]n considering claims, the Commission shall apply relevant rules of international law. The Commission shall not have the power to make decisions *ex aequo et bono*.” The Iran-U.S. Algiers Declaration referred to applicable conflicts principles. Another interesting aspect of the agreement was that it gave the Commission the power to “adopt its own rule of procedure based on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States” instead of mandating UNCITRAL as the basis for operation.

The decisions of the Commission may make some lasting contributions to international law. In a 2004 Partial Award issued at The Hague, the Commission noted that it was specifically authorized to hear some claims not involving nationals in a strict sense. *See* Partial Award Civilian Claims, Eritrea’s Claims 15, 16, 23 & 27-32 ¶ 17 (Dec. 17, 2004), *available at*: <http://www.pca-cpa.org/ENGLISH/RPC/EECC/ER%20Partial%20Award%20Dec%202004.pdf>. While the Commission noted that this departed from international norms, it provides some guidance on handling the claims of the Cuban-American exile community.

Probably, however, the most lasting contribution is the Commission’s analysis (summarized in paragraph 151) of the “cumulative impact” of Ethiopia’s measures aimed at limiting property rights. While some of the actions could be justified under international law, the Commission reasoned: “the Commission believes that the measures’ collective impact must be considered... [A] belligerent is bound to ensure insofar as possible that the property of protected persons is

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not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement." *Id.* at ¶ 151.

While the U.S. and Cuba have not been at war, and the way in which Cuba has treated property has varied (e.g., the long-term leases, etc.), this language still speaks to the measures necessary under international law. Consequently, case law stemming from the Commission may yet prove instructive as the Court and Tribunal design rules of operation.

The Commission also noted that assessing the credibility of evidence was especially problematic given the starkly conflicting accounts amongst hundreds of sworn statements submitted by both states. To bolster the reliability of the evidence, the parties also submitted the reports of neutral third-party observers such as the Red Cross, NGO's and the U.S. State Department; however, the Commission noted that while it took such reports into account, it had to be remembered that such reports were not prepared as evidence before the Commission to be used in legal proceedings and they may reflect a particular agenda of the third party involved. *Id.* at ¶ 34.

Concerning the physical location of the Commission, it is housed in The Hague at the Permanent Court of Arbitration (PCA), which also serves as the Commission's registry and functions as its bureaucracy. Both Eritrea and Ethiopia participated heavily in the Commission's creation as opposed to the Iran-U.S. Tribunal, which largely created itself by action of the judges. The Commission held informal meetings on organizational matters with representatives of the parties at the PCA's premises in early 2001, and held hearing in the summer of 2001 on its jurisdiction, procedures and remedies. By August 2001, the Commission had issued decisions addressing jurisdictional and procedural issues bearing on preparation and presentation of claims and had engaged in informal discussions with both parties and several claims experts from the International Organization on Migration on technical issues related to the creation of mass claims filing system. Such a system could find a parallel in the Tribunal and Court procedures for dispensing with the small claims portion of their caseload.

The Commission also consulted with the parties prior to adopting its rules of procedure in October 2001. As required by Article 5(7) of the Agreement, the Commission's Rules are based on the PCA's Optional Rules for Arbitrating Disputes Between States. In December 2001, both parties filed their claims in compliance with the filing deadline established by Article 5(8) of the Agreement. Neither party utilized the mass claims procedures. Ethiopia filed only government-to-government claims, while Eritrea filed claims on its own behalf as well as on behalf of individuals.

After the claims were filed, the Commission continued its informal consultations with the parties regarding prioritization and sequencing of its work. Thus, the parties remained actively engaged in the Commission's operation – again, a significant departure from the Iran-U.S. Tribunal which vigorously asserted its judicial independence from the parties. Taking into account the parties' views, the Commission scheduled the filing of statements of defense in all claims for February 2002. The Commission also decided to divide its work into two phases: phase one dealt with issues of liability and phase two dealt with issues of damages. Depending upon the level of claims activity undertaken by the Tribunal or the Court, either body may



*A classic 1956 Chevrolet, typical of automobiles still found in Havana.*

similarly decide in its rules of procedure to undertake such a bifurcation if it appears that judicial efficiency can be greatly achieved.

In the Spring of 2002, the Commission then identified three sets of claims to hear based upon subject matter. First, were claims alleging mistreatment prisoners of war; second, were claims of misconduct related to the armed conflict in the Central Front; and third, were claims concerning mistreatment of civilians. The Iran-U.S. Tribunal has not sub-divided its docket by subject matter; however the Court or Tribunal for Cuba might wish to do so. For example, within the large and medium claims dockets, separate chambers could hear all the trademark cases together (employing judges who are experts in intellectual property rights), all the sugar mill cases together, all the financial assets cases together, and all the residential property cases together – each chamber comprising expert judges in the relevant areas of subject-matter.

The Commission has now embarked on the damages phase of its work.

Following is the text of the June 18, 2000 Algiers Agreement between Ethiopia and Eritrea:

**AGREEMENT BETWEEN THE GOVERNMENT OF THE  
FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA  
AND THE GOVERNMENT OF THE STATE OF ERITREA**

The Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (the “parties”),

Reaffirming their acceptance of the Organization of African Unity (“OAU”) Framework Agreement and the Modalities for its Implementation, which have been endorsed by the 35<sup>th</sup> ordinary session of the Assembly of Heads of State and Government, held in Algiers, Algeria, from 12 to 14 July 1999,

Recommitting themselves to the Agreement on Cessation of Hostilities, signed in Algiers on 18 June 2000,

Welcoming the commitment of the OAU and United Nations, through their endorsement of the Framework Agreement and Agreement on Cessation of Hostilities, to work closely with the international community to mobilize resources for the resettlement of displaced persons, as well as rehabilitation and peace building in both countries,

Have agreed as follows:

**Article 1**

1. The parties shall permanently terminate military hostilities between themselves. Each party shall refrain from the threat or use of force against the other.

2. The parties shall respect and fully implement the provisions of the Agreement on Cessation of Hostilities.

**Article 2**

1. In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions relative to the protection of victims of armed conflict (“1949 Geneva Conventions”), and in cooperation with the International Committee of the Red Cross, the parties shall without delay release and repatriate all prisoners of war.

2. In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions, and in cooperation with the International Committee of the Red Cross, the parties shall without delay, release and repatriate or return to their last place of residence all other persons detained as a result of the armed conflict.
3. The parties shall afford humane treatment to each other's nationals and persons of each other's national origin within their respective territories.

#### **Article 3**

1. In order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997.
2. The investigation will be carried out by an independent, impartial body appointed by the Secretary General of the OAU, in consultation with the Secretary General of the United Nations and the two parties.
3. The independent body will endeavor to submit its report to the Secretary General of the OAU in a timely fashion.
4. The parties shall cooperate fully with the independent body.
5. The Secretary General of the OAU will communicate a copy of the report to each of the two parties, which shall consider it in accordance with the letter and spirit of the Framework Agreement and the Modalities.

#### **Article 4**

1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.
2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.
3. The Commission shall be located in the Hague.
4. Each party shall, by written notice to the United Nations Secretary General, appoint two commissioners within 45 days from the effective

date of this Agreement, neither of whom shall be nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed commissioners within the specified time, the Secretary-General of the United Nations shall make the appointment.

5. The president of the Commission shall be selected by the party-appointed commissioners or, failing their agreement within 30 days of the date of appointment of the latest party-appointed commissioner, by the Secretary-General of the United Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.

6. In the event of the death or resignation of a commissioner in the course of the proceedings, a substitute commissioner shall be appointed or chosen pursuant to the procedure set forth in this paragraph that was applicable to the appointment or choice of the commissioner being replaced.

7. The UN Cartographer shall serve as Secretary to the Commission and undertake such tasks as assigned to him by the Commission, making use of the technical expertise of the UN Cartographic Unit. The Commission may also engage the services of additional experts as it deems necessary.

8. Within 45 days after the effective date of this Agreement, each party shall provide to the Secretary its claims and evidence relevant to the mandate of the Commission. These shall be provided to the other party by the Secretary.

9. After reviewing such evidence and within 45 days of its receipt, but not earlier than 15 days after the Commission is constituted, the Secretary shall transmit to the Commission and the parties any materials relevant to the mandate of the Commission as well as his findings identifying those portions of the border as to which there appears to be no dispute between the parties. The Secretary shall also transmit to the Commission all the claims and evidence presented by the parties.

10. With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures.

11. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. Filing deadlines for the parties' written

submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.

12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to make its decision concerning delimitation of the border within six months of its first meeting. The Commission shall take this objective into consideration when establishing its schedule. At its discretion, the Commission may extend this deadline.

13. Upon reaching a final decision regarding delimitation of the borders, the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation.

14. The parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control. Each party shall accord to the Commission and its employees the same privileges and immunities as are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as territorial integrity and sovereignty of the other party.

16. Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory.

17. The expenses of the Commission shall be borne equally by the two parties. To defray its expenses, the Commission may accept donations from the United Nations Trust Fund established under paragraph 8 of Security Council Resolution 1177 of 26 June 1998.

#### **Article 5**

1. Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled

by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

2. The Commission shall consist of five arbitrators. Each party shall, by written notice to the United Nations Secretary General, appoint two members within 45 days from the effective date of this agreement, neither of whom shall be nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed arbitrators within the specified time, the Secretary-General of the United Nations shall make the appointment.

3. The president of the Commission shall be selected by the party-appointed arbitrators or failing their agreement within 30 days of the date of appointment of the latest party-appointed arbitrator, by the Secretary-General of the United Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.

4. In the event of the death or resignation of a member of the Commission in the course of the proceedings, a substitute member shall be appointed or chosen pursuant to the procedure set forth in this paragraph that was applicable to the appointment or choice of the arbitrator being replaced.

5. The Commission shall be located in The Hague. At its discretion it may hold hearings and conduct investigations in the territory of either party, or at such other location as it deems expedient.

6. The Commission shall be empowered to employ such professional, administrative and clerical staff as it deems necessary to accomplish its work, including establishment of a Registry. The Commission may also retain consultants and experts to facilitate the expeditious completion of its work.

7. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. All decisions of the Commission shall be made by a majority of the commissioners.

8. Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural

and juridical persons. All claims submitted to the Commission shall be filed no later than one year from the effective date of this agreement. Except for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this agreement, the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this Article, and any such claims which could have been and were not submitted by that deadline shall be extinguished, in accordance with international law.

9. In appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals.

10. In order to facilitate the expeditious resolution of these disputes, the Commission shall be authorized to adopt such methods of efficient case management and mass claims processing as it deems appropriate, such as expedited procedures for processing claims and checking claims on a sample basis for further verification only if circumstances warrant.

11. Upon application of either of the parties, the Commission may decide to consider specific claims, or categories of claims, on a priority basis.

12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to complete its work within three years of the date when the period for filing claims closes pursuant to paragraph 8.

13. In considering claims, the Commission shall apply relevant rules of international law. The Commission shall not have the power to make decisions *ex aequo et bono*.

14. Interest, costs and fees may be awarded.

15. The expenses of the Commission shall be borne equally by the parties. Each party shall pay any invoice from the Commission within 30 days of its receipt.

16. The parties may agree at any time to settle outstanding claims, individually or by categories, through direct negotiation or by reference to another mutually agreed settlement mechanism.

17. Decisions and awards of the commission shall be final and binding. The parties agree to honor all decisions and to pay any monetary awards rendered against them promptly.

18. Each party shall accord to members of the Commission and its employees the privileges and immunities that are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

#### Article 6

1. This agreement shall enter into force on the date of signature.
2. The parties authorize the Secretary General of the OAU to register this agreement with the Secretariat of the United Nations in accordance with article 102(1) of the Charter of the United Nations.

### III.(A)(3) U.N. Claims Commission

The United Nations Claims Commission (the “UNCC”) was established by the U.N. Security Council in 1991 to process claims arising from losses suffered during Iraq’s invasion and occupation of Kuwait. The UNCC is a subsidiary *ad hoc* organ of the U.N. Security Council that was created by Resolution 687, which concluded the Gulf War, and that states in relevant part: “Iraq... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.” See UNSC Res. 687 (April 3, 1991).

Section E of Resolution 687 creates a fund to pay damages awards to successful claimants. The fund receives revenue from a percentage of proceeds from the sale of Iraqi oil. UNSC Resolution 692 established the UNCC itself, which is housed at U.N. offices in Geneva. The UNCC is comprised of a Governing Council, panels of Commissioners and a secretariat. Unlike the UNCC, the model establishing the Cuba-U.S. Tribunal does not establish artificial branch divisions within the judicial apparatus.

The UNCC’s Governing Council is comprised of representatives of the fifteen member states of the UNSC (Britain, France, China, Russia and the U.S. are permanent members). The Governing Council sets the policy of the UNCC via UNSC resolutions, appoints Commissioners on the recommendation of the Secretary-General, establishes criteria for compensability of claims, rules of procedure, guidelines for administration of the UNCC and financing of the Fund, and procedures for payment of compensation. The Governing Council selects its own president and two vice-presidents that serve for two-year terms. Although the Governing Council may take decisions by majority vote of at least nine members (the veto of permanent members is specifically excluded from use), all decisions to date have been taken by consensus. The Governing Council meets four times per year in formal session and also meets occasionally to deal with specific issues as they arise.

The Commissioners serve in panels of three and each panel is established to review a different category of claim. The Executive Secretary of the secretariat assigns the commissioners to their respective review panels and selects which commissioner will serve as chair. The UNCC system of operation is unique. In most international tribunals, it is the judges who set the policies of the tribunal and the rules of procedure and evidence as well as the modes of judicial administration. Such is the case with the proposed Cuba-U.S. Tribunal.

Unlike the Cuba-U.S. Tribunal model, where claims are divided into three categories based upon value only, claims before the UNCC are divided into six categories A through F, that tend to blend value and subject-matter as follows:

**Category “A” claims are claims submitted by individuals who had to depart from Kuwait or Iraq between the date of Iraq’s invasion of Kuwait on 2 August 1990 and the date of the cease-fire, 2 March 1991.** Compensation for successful claims in this category was set by the Governing Council at the fixed sum of U.S.\$2,500 for individual claimants and U.S.\$5,000 for families. However, where a claimant who had filed claims in category “A” only, he or she was eligible to receive a maximum category “A” payment of U.S.\$4,000 for individuals and U.S.\$8,000 for families. The Commission received approximately 920,000 category “A” claims submitted by seventy-seven Governments and thirteen offices of three international organizations, seeking a total of approximately U.S.\$3.6 billion in compensation.

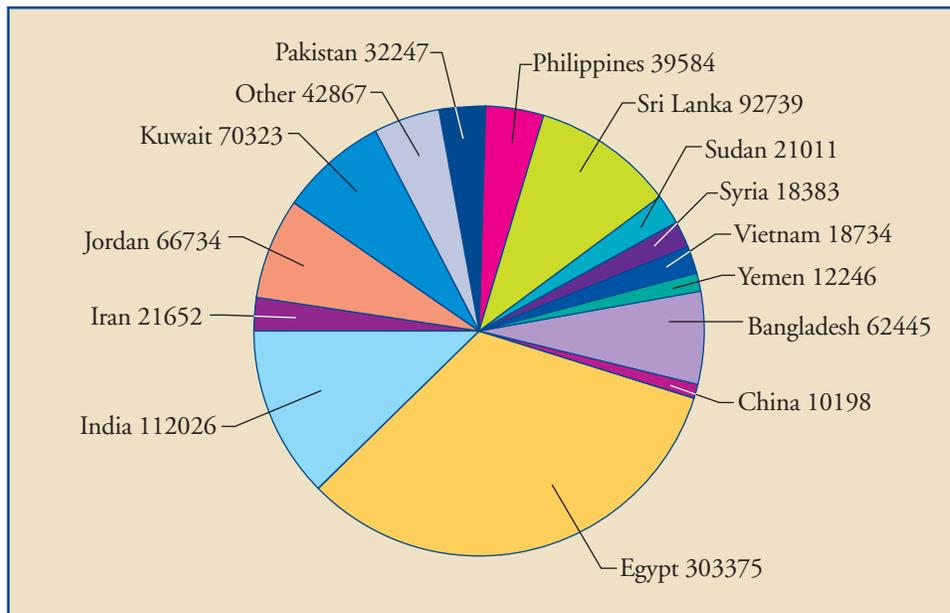


Figure 1: Category “A” UNCC Claims filed by Governments

Category “B” claims are claims submitted by individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq’s invasion and occupation of Kuwait. Compensation for successful claims in this category was set at U.S.\$2,500 for individuals and up to U.S.\$10,000 for families. The Commission received approximately 6,000 category “B” claims submitted by forty-seven Governments and seven offices of three international organisations, seeking a total of approximately U.S.\$21 million in compensation (*see figure 2 on page 60*).

Category “C” claims are individual claims for damages up to U.S.\$100,000 each. Category “C” claims can be made for twenty-one different types of losses, including those relating to departure from Kuwait or Iraq; personal injury; mental pain and anguish; loss of personal property; loss of bank accounts, stocks and other securities; loss of income; loss of real property; and individual business losses. The Commission received approximately 420,000 category “C” claims submitted by eighty-five Governments and eight offices of three international organisations, seeking a total of approximately U.S.\$9 billion in compensation. In addition, the Central Bank of the Government of Egypt submitted a consolidated category “C” claim on behalf of

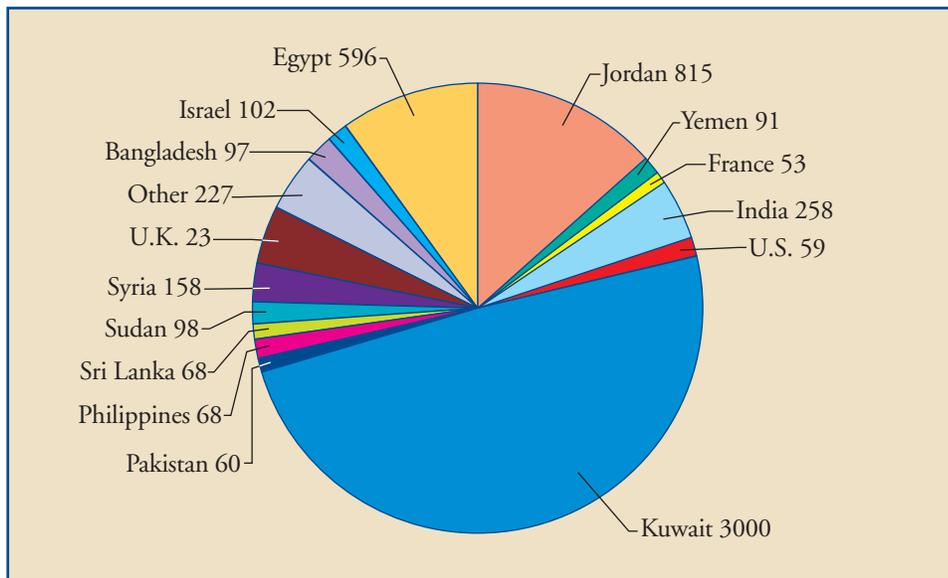


Figure 2: Category "B" UNCC Claims filed by Governments

over 800,000 workers in Iraq for the non-transfer of remittances by Iraqi banks to beneficiaries in Egypt. This consolidated Egyptian category "C" claim comprised 1,240,000 individual claims with an asserted value of approximately U.S.\$491 million.

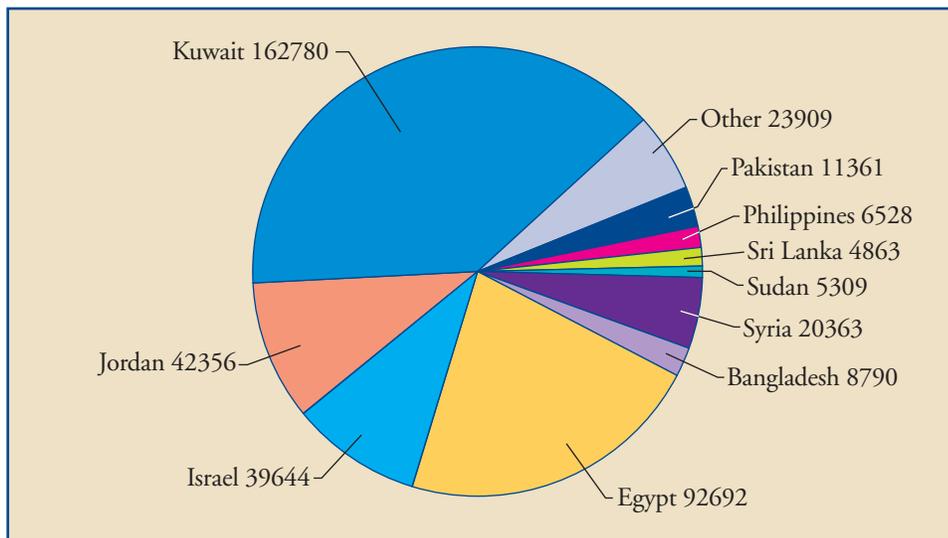


Figure 3: Category "C" UNCC Claims filed by Governments

Category "D" claims are individual claims for damages above U.S.\$100,000 each. The types of losses that can be claimed under category "D" are similar to those under category "C", with the most frequent being the loss of personal property; the loss of real property; the loss of income and business-related losses. The Commission received approximately 10,500 category "D" claims submitted by fifty Governments and eight offices of three international organisations, seeking a total of approximately U.S.\$10 billion in compensation.

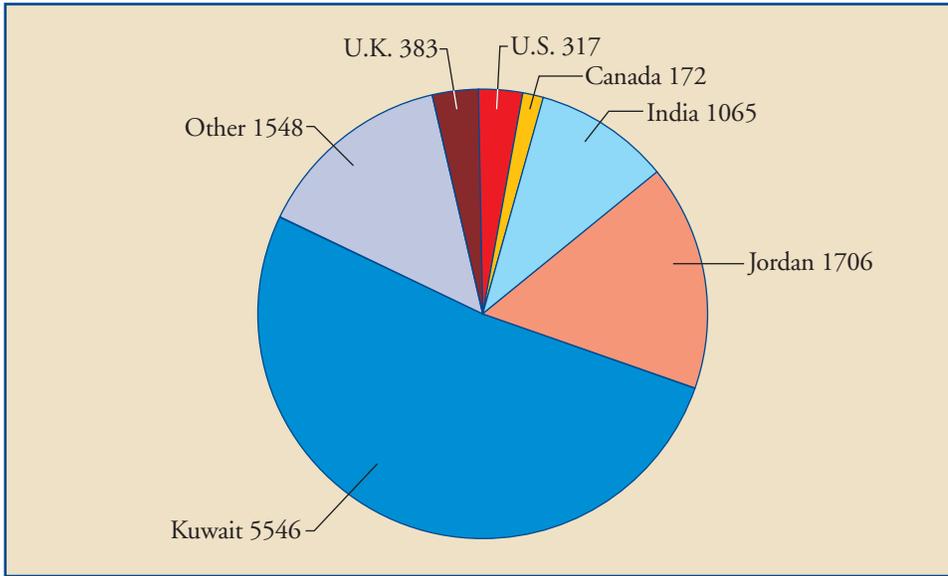


Figure 4: Category “D” UNCC Claims filed by Governments

Category “E” claims are claims of corporations, other private legal entities and public sector enterprises. They include claims for: construction or other contract losses; losses from the non-payment for goods or services; losses relating to the destruction or seizure of business assets; loss of profits; and oil sector losses. The Commission received approximately 5,800 category “E” claims submitted by seventy Governments seeking a total of approximately U.S.\$80 billion in compensation. The category “E” claims range from asserted losses of a few thousand U.S. dollars to those for several billion U.S. dollars. The Commission has established four subcategories of category “E” claims.

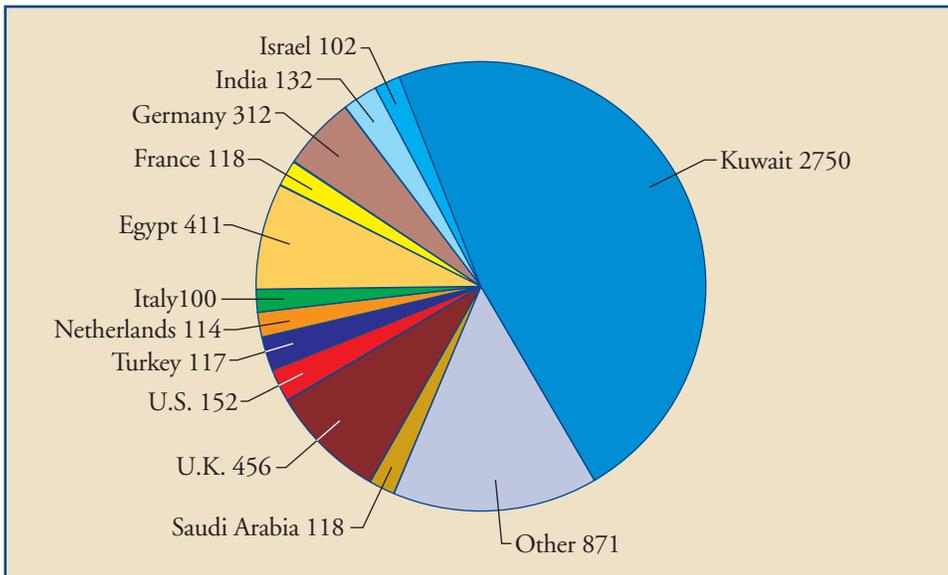
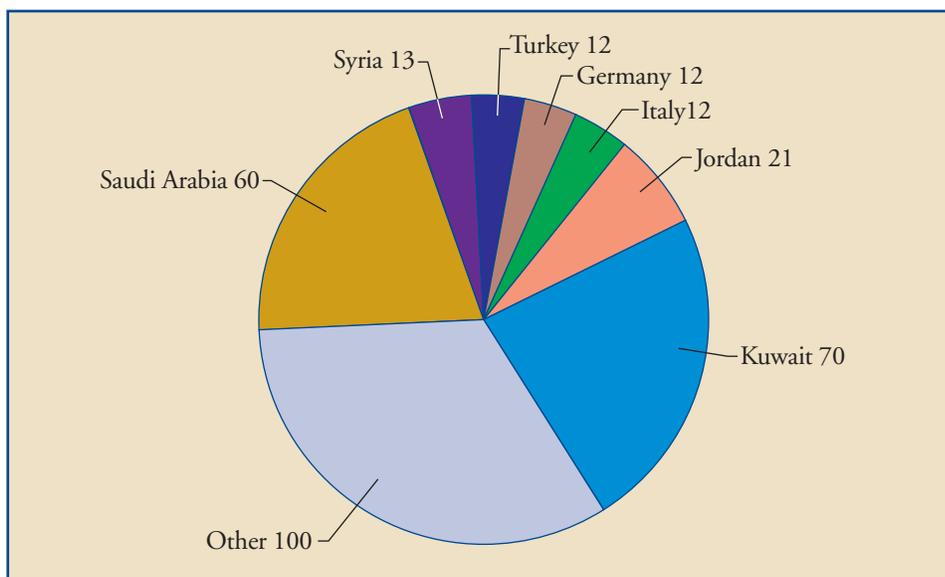


Figure 5: Category “E” UNCC Claims filed by Governments

Category “F” claims are claims filed by Governments and international organizations for losses incurred in evacuating citizens; providing relief to citizens; damage to diplomatic premises

and loss of, and damage to, other government property; and damage to the environment. The Commission has received approximately 300 category “F” claims, submitted by forty-three Governments and six international organisations, seeking a total of approximately U.S.\$210 billion in compensation. The category “F” claims have been organised into four subcategories. In addition, the “E/F” category covers export guarantee and insurance claims.



Source: The United Nations Compensation Commission Secretariat, available at: <http://www2.unog.ch/uncc/>.

Figure 6: Category “F” UNCC Claims filed by Governments

The UNCC received a total of 2.7 million claims seeking approximately \$352.5 billion in compensation. The UNCC wrapped up its operations in the summer of 2005 – a significantly shorter life-span than that of the Iran-U.S. Tribunal. The UNCC approved 1.55 million claims and awards of approximately \$52.4 billion have been approved. The UNCC process has generally been seen as a success and has been well-regarded with respect to the speed of processing. Of course, with a renewing fund derived from Iraqi petroleum sales, the UNCC’s situation is vastly different than that which the Cuba-U.S. Tribunal will face. Cuba presumably has few assets to create a compensation fund.

Similar to what the Cuba-U.S. Tribunal model allows for small claims, the UNCC allowed a lower standard of proof in the mass claims process than the normal standard applied in traditional arbitration. Article 35 in the Rules states simply that “each claimant is responsible for submitting... evidence which demonstrates satisfactorily that a particular claim or group of claims is eligible for compensation....” This is a much lower standard than “proving the facts” as established in Article 24 of UNCITRAL.

Concerning the differentiation in approaches that the panels were allowed to take, the principal legal advisor for the Category F Panel of Commissioners noted, “Unlike the mass claims-processing approach applied by earlier UNCC panels to resolve the category “A,” “B” and “C” claims, the [category “F”] panel undertook an individualized review of the claims before it, making “determinations of law and fact for every claim.” Describing its detailed investigative role, the panel stated: “In view of the fact that Iraq had limited opportunities to comment on or object to the Claims, the Panel considered that it was under a stringent duty to determine with respect to each Claim whether the alleged loss had occurred, whether it was directly caused by Iraq’s invasion and occupation of Kuwait and whether the amount

of loss was adequately established.” See Veijo Heiskanen & Robert O’Brien, *UN Compensation Commission Panel Sets Precedents on Government Claims*, 92 Am. J. Int’l L. 339, 341 (1998).

Similarly, the Cuba-U.S. Tribunal may sub-divide into chambers (as well as the Court), to hear categories of claims, and the evidentiary standard should vary from the lowest to the highest categories, with the standard raising as one moves upward. Those with large claims should be better equipped to meet the higher burdens than those with the smaller claims.

Following is the text of UNSC Resolution 692 (1991) creating the UNCC:

**S/RES/692 (1991)**

**20 May 1991**

**RESOLUTION 692 (1991)**

Adopted by the Security Council at its 2987<sup>th</sup> meeting on  
20 May 1991

The Security Council,

Recalling its resolutions 694 (1990) of 29 October 1990, 686 (1991) of 2 March 1991 and 687 (1991) of 3 April 1991, concerning the liability of Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait,

Taking note of the Secretary-General’s report of 2 May 1991 (S/22559), submitted in accordance with paragraph 19 of resolution 687 (1991),

Acting under Chapter VII of the Charter of the United Nations,

1. Expresses its appreciation to the Secretary-General for his report of 2 May 1991;
2. Welcomes the fact that the Secretary-General will now undertake the appropriate consultations requested by paragraph 19 of resolution 687 (1991) so that he will be in a position to recommend to the Security Council for decision as soon as possible the figure which the level of Iraq’s contribution to the Fund will not exceed;
3. Decides to establish the Fund and Commission referred to in paragraph 18 of resolution 687 (1991) in accordance with Part I of the Secretary-General’s report, and that the Governing Council will be located at the Offices of the United Nations at Geneva and that the Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere;
4. Requests the Secretary-General to take the actions necessary to implement paragraphs 2 and 3 above in consultation with the members of the Governing Council;

5. Directs the Governing Council to proceed in an expeditious manner to implement the provisions of Section E of resolution 687 (1991), taking into account the recommendations in section II of the Secretary-General's report;
6. Decides that the requirement for Iraqi contributions shall apply in the manner to be prescribed by the Governing Council with respect to all Iraqi petroleum and petroleum products exported from Iraq after 3 April 1991 as well as such petroleum and petroleum products exported earlier but not delivered or not paid for as a specific result of the prohibitions contained in resolution 661 (1990);
7. Requests the Governing Council to report as soon as possible on the actions it has taken with regard to the mechanisms for determining the appropriate level of Iraq's contribution to the Fund and the arrangements for ensuring that payments are made to the Fund, so that the Security Council can give its approval in accordance with paragraph 22 of resolution 687 (1991);
8. Requests that all States and international organizations cooperate with the decisions of the Governing Council taken pursuant to paragraph 5 of the present resolution, and also requests that the Governing Council keep the Security Council informed on this matter;
9. Decides that, if the Governing Council notifies the Security Council that Iraq has failed to carry out decisions of the Governing Council taken pursuant to paragraph 5 of this resolution, the Security Council intends to retain or to take action to reimpose the prohibition against the import of petroleum and petroleum products originating in Iraq and financial transactions related thereto;
10. Decides also to remain seized of this matter and that the Governing Council will submit periodic reports to the Secretary-General and the Security Council.

### **III.(B) The Latin American Experience – Nicaragua**

Nicaragua's land tenure system has been in disarray since the beginning of the 20<sup>th</sup> Century, and various models have been proposed by successive governments to settle property claims arising from nationalizations, wars, agrarian reforms, and other forms of deprivation.

#### **III.(B)(1) Disputes During the Early 20<sup>th</sup> Century**

The fall of the government in September 1910 generated the desire to develop a property claims commission in light of Nicaragua's heavy internal debt and a great number of pending claims. The claims were primarily war claims stemming from the recently ended conflict, but many involved the cancellation of what the prior government considered to be illegal concessions held by foreigners. Both Nicaraguan and American citizens were claimants. Nicaragua, with its treasury bankrupt, appealed to the United States to for advice on stabilizing the government and the country's finances.

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To provide full and fair guarantees to claimants, the commission that was proposed and that came into being by National Decree in March 1911 was composed of a president designated by the United States and two Nicaraguan citizens appointed by Nicaragua. Thus, this claims commission was simultaneously a Nicaraguan court as well as an international tribunal. The rules applied tracked applicable international law and its proceedings were conducted in Managua in Spanish. In contrast, the Cuba-U.S. Tribunal will handle claims of Americans and the Cuban Special Claims Court will handle claims of Cuban-Americans who were Cuban at the time of their property loss.

There were 7,911 claims filed before the mixed tribunal, and Nicaragua entered three of the suits against concessionaires who failed to comply with contracts. The remaining 7,908 suits were entered against the Nicaraguan government. The majority of claimants were Nicaraguan, however, American claim sums amounted to more than that of all other claimants combined. Judge Schoenrich provided the following data on claims by nationality:

| Nationality of claimant       | No. of claims | Total claimed          | Total awarded         |
|-------------------------------|---------------|------------------------|-----------------------|
| 1 Nicaraguan . . . . .        | 7,491         | CS5,491,533.13         | CS1,217,650.43        |
| 2 British . . . . .           | 149           | 152,540.56             | 24,426.82             |
| 3 American . . . . .          | 66            | 7,576,564.13           | 538,749.71            |
| 4 German . . . . .            | 34            | 49,173.92              | 16,692.99             |
| 5 Chinese . . . . .           | 28            | 37,796.93              | 5,565.52              |
| 6 Italian . . . . .           | 25            | 139,510.97             | 9,032.31              |
| 7 Spanish . . . . .           | 21            | 135,348.54             | 2,697.46              |
| 8 French . . . . .            | 20            | 34,834.13              | 5,958.80              |
| 9 Colombian . . . . .         | 17            | 38,553.52              | 3,160.00              |
| 10 Honduran . . . . .         | 13            | 12,916.42              | 682.40                |
| 11 Turkish . . . . .          | 9             | 6,417.83               | 1,312.83              |
| 12 Salvadorian . . . . .      | 7             | 4,116.14               | 497.00                |
| 13 Costa Rican . . . . .      | 5             | 42,078.80              | 1,576.00              |
| 14 Mexican . . . . .          | 4             | 2,736.88               | 257.00                |
| 15 Dutch . . . . .            | 4             | 844.52                 | 670.56                |
| 16 Austro-Hungarian . . . . . | 3             | 12,205.67              | 1,174.88              |
| 17 Panamanian . . . . .       | 3             | 10,173.80              | 8,109.60              |
| 18 Danish . . . . .           | 2             | 640.00                 | 150.00                |
| 19 Swiss . . . . .            | 1             | 35,000.00              | .....                 |
| 20 Guatemalan . . . . .       | 1             | 16,000.00              | .....                 |
| 21 Ecuadorian . . . . .       | 1             | 4,192.00               | 800.00                |
| 22 Belgian . . . . .          | 1             | 2,585.59               | 700.00                |
| 23 Cuban . . . . .            | 1             | 1,859.52               | 200.00                |
| 24 Egyptian . . . . .         | 1             | 290.00                 | 280.00                |
| 25 Venezuelan . . . . .       | 1             | 248.00                 | 88.00                 |
| <b>Total . . . . .</b>        | <b>7,908</b>  | <b>CS13,808,161.00</b> | <b>CS1,840,432.31</b> |

(NOTE—When a claim belongs to persons of different nationalities, it is classified according to the nationality of the largest owner.)

Many claims were based on losses and damages suffered during various wars in Nicaragua. The Commission conferred jurisdiction over claims which originated between July 25, 1893,

the beginning of President Zelaya's administration, and the termination of the Commission in 1915. These included new claims that arose during the War of 1912, which occurred while the Commission was in session in Managua.

Upon studying the filed claims, the Commission observed that numerous cases were based on losses of which the Nicaraguan government should not be responsible according to international law. The Commission then adopted fundamental rules concerning the responsibility of the government under international law:

1. The Government is not responsible for damages suffered during as a direct consequence of military operations.
2. The Government is not responsible for damages suffered in business as a result of a warring nation.
3. The Government is not responsible for thefts committed by individuals of the military without knowledge of their chief officers. Some exceptions allowed.
4. In cases of taking of effects useful to the military, it is required to present receipts of competent officials or chiefs, or prove the effects were taken by the order of a civil authority or military chief in order to make the Government responsible. Or, damages may be awarded without proof the War Department or a Board of Exaction admits responsibility.
5. Claim values were accepted which were stated in the receipts given by military providing boards and military chiefs. In cases of no stated value, a price list was adopted by the War Department.
6. The Government is not responsible to soldiers for arms and effects taken in cases of capture.
7. The Government is not responsible for the taking of arms of private persons unless claimant proved entitled to bear them.
8. The Government is not responsible for property damage or property confiscated by insurgent in unsuccessful revolutionary uprisings.

Operating under these rules, the Commission was able to render its judgments by unanimity. The Nicaraguan government accepted the decisions of the Commission as binding judgments. The outcomes of the Commission's work appear in the following table:

| <b>NATURE OF CLAIMS FILED WITH THE NICARAGUAN MIXED CLAIMS COMMISSION</b> |               |                         |                        |
|---|---------------|-------------------------|------------------------|
| Nature of claim   | No. of claims | Total claimed           | Total awarded          |
| War claims of 1893 to 1909 . . .  | 181           | C\$755,019.62           | C\$73,194.65           |
| War claims of 1909 to 1910 . . .  | 5,379         | 1,495,776.32            | 495,705.17             |
| War claims of 1912. . . . .   | 2,257         | 2,050,523.11            | 405,766.61             |
| Cancellation or violation of concessions and contracts. . . . .           | 18            | 8,813,927.71            | 813,275.00             |
| Denial of justice. . . . .  | 3             | 99,712.32               | 250.00                 |
| Miscellaneous. . . . .  | 70            | 593,201.92              | 52,240.88              |
| <b>Total. . . . .</b>   | <b>7,908</b>  | <b>C\$13,808,161.00</b> | <b>C\$1,840,432.31</b> |

(NOTE—When a claim comprises several items, it is classified according to the nature of the most important item.)

Unfortunately, no adequate loan was made possible and numerous payments on the awards were not made. As a result, many claims filed by U.S. citizens were never resolved. Otto Schoenrich, *The Nicaraguan Mixed Claims Commission*, 9 *Am. J. Int'l L.* 858 (1915).

The Cuban situation is similar to this early Nicaraguan one in that both countries presumably lack assets to satisfy awards. Moreover, both internal and external claimants present the issue of disparate treatment. The mixed tribunal of the Nicaraguan structure attempted to ameliorate such disparity. It is possible that there may be some disparate treatment with regard to claims handled by the Cuba-U.S. Tribunal as opposed to those handled by the Court, but the broad outlines of the underlying instruments establishing both were designed to track each other very closely to avoid large departures in treatment.

### III.(B)(2) The Modern Context: Resolving Post-Sandinista Disputes

After the Sandinista Revolution of 1979 and the ouster of A. Somoza, land tenure structures were altered by a series of laws and decrees that expropriated the bulk of Somoza family-owned land as well as numerous foreign owned properties. The Sandinista Agrarian reform law was central in the expropriation and re-distribution of land. According to the Ministry of Housing and Public Credit, the land tenure system was restructured as follows:

| Sector/Property               | 1978                              | 1988                              |
|-------------------------------|-----------------------------------|-----------------------------------|
| Private sector (subtotal)     | 8,072,600<br>(100%)               | 5,292,000<br>(65.6%)              |
| • Large properties            | 4,230,600<br>(52.4%)              | 1,653,000<br>(20.5%)              |
| • Small and medium properties | 3,842,000<br>(47.6%)              | 3,639,000<br>(45.1%)              |
| Reformed sector (subtotal)    | 0<br>(0%)                         | 2,780,600<br>(34.4%)              |
| • Allocated to individuals    | 0<br>(0%)                         | 716,700<br>(8.9%)                 |
| • Allocated to cooperatives   | 0<br>(0%)                         | 1,115,700<br>(13.8%)              |
| • State owned enterprises     |                                   | 948,200<br>(11.7%)                |
| <b>Total</b>                  | <b>8,072,600</b><br><b>(100%)</b> | <b>8,072,600</b><br><b>(100%)</b> |

Source: Ministry of Housing and Public Credit, Rural Titling Office, as cited in 20 Años despues: que pasó con la reforma agraria?, in *El Observador Económico*. 1999. No 89, p. 19.

Table 1: Distribution of Lands, Before and After Implementation of the Sandinista Agrarian Reform Law (land totals are measured in manzanas).

One of the key voices in the Nicaraguan claims process, the Land Tenure Center at the University of Wisconsin, Madison calculated that the bulk of the lands expropriated under the Sandinistas were done so under decrees 3, 38, and 329, which were issued shortly after the Sandinista take-over in 1979. The bulk of these efforts were directed mainly at the landholdings of the Somoza family, government, and armed forces. Approximately 2,000 properties were expropriated under decrees

3, 38, and 329, amounting to approximately 1,400,000 acres. Subsequent efforts to restructure the land tenure system were based on the passage of two laws: the Law of Agrarian Reform (1981) and the Law of Property Abandonment. These two legislative efforts netted about 1,200 more properties and added an additional 820,000 *manzanas* (or 468,548 acres) into the hands of the Sandinista government. The Sandinista government concluded efforts to reform the land tenure system through direct buyouts and other methods, including occupation by the government, which placed a total of 2,400 properties (584,951 *manzanas*, or 334,241 acres) in the control of the government.

While most of the expropriations by the Sandinistas were directed against Nicaraguan nationals, there were approximately 1350 cases of land confiscations against U.S. citizens, according to the U.S. State Department (USFRC, 1994). Only 20 U.S. Nationals claimed properties in 1990, at the time Violetta Chamorro was inaugurated. However, by 1994, 650 individuals claimed properties (totaling 1350 cases of property claims), with only a fraction of those resolved (USFRC 1994.) By March 2000, the number of claims had reached 1600, owing largely to filings by dual citizens and the progeny of former Nicaraguan claimants (La Nacion 2000). Everingham notes that the increase in claims filed after 1996 is due, at least in part, to continued assurances from the Aleman/Bolaños administration to make compensation more attractive (199, 78.)

In the late 1980s, Nicaragua undertook land reform again following a wartime insurrection specifically to address the problems related to the Contra veterans. The Sandinista land reformation provided land to former combatants to rehabilitate them into society and to avoid any organized protests by them. While the plan did rid the former combatants of their arms, overall the plan failed to achieve its objectives because of competing and mutually exclusive property claims between confiscated landowners wanting reparations and Sandinista land reform beneficiaries demanding protections. The plan also eroded prospects of long-term pacification and democratic consolidation in the late 1980s and early 1990s.

The impoverished civilian majority lost under these land reform policies. This in turn undermined credibility of democratization, discouraged civic consolidation, and attracted noncombatants to pursue armed protest. Moreover, the privatization of state-owned enterprises to appease demands of former combatants created a divide among the elite, which prolonged postwar conflicts.

Shortly after the Sandinistas lost the March 1990 elections, the Chamorro government immediately began the process of privatizing parastatals in the hope of fostering a new property rights regime that promoted the protection of individual property rights and undermined collective and state ownership. While there was a strong neoliberal ethos under Chamorro, it is equally important to note that there was a mobilized sector of the electorate that sought protection from reforms that threatened their stake in the Nicaraguan economy (Yashar 1998; Becker 1996.) Thus, the conflict between the desire to radically reform the property rights regime and uphold property rights and the role of a mobilized population that seeks protection from radical reform. However, in the case of Nicaragua, those who benefited from the property rights regime created by the Sandinistas were outflanked by the claimants, which were members of the elite (some of whom were members of successor governments, including Arnoldo Alemán.) The beneficiaries of the Sandinista regime, especially peasants, often lacked proper documentation in the form of titles which placed them in a less favored position relative to Nicaraguan elites. In sum, this group was organized but was only selectively attended to by vote-seeking politicians.

In addition to seeking a wholesale transformation of the land-tenure structure to accommodate market prerogatives, the Chamorro government sought to provide ex-Contrats with land across remote areas of Nicaragua as part of a larger pacification process. The Tocontin Accords were signed by the Nicaraguan government and Contra leadership proposing the disarmament of the Nicaraguan Resistance in return for security and “moral integrity.” The Accords did

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not actually mention land. Later, the Managua Declaration of May 4, 1990 provided land to former combatants through the establishment of “development poles” or communal areas.

The communal areas were carelessly developed. They overlooked financial, physical, and ecological complications and impediments with promises of unrealistic amounts of land per combatant which effectively amount to all the land acquired under the Sandinista agrarian reformation. The plan was also designed without the consultation of the former combatants and their wishes. Consequently, the development plans became more focused on buying peace than rehabilitating the ex-Contras. Not surprisingly, the Chamorro regime was unable to carry out all promises it inherited from the Sandinistas and that spurred a rearming of thousands of ex-Contras. Further, pacification of the rearmed combatants undermined the credibility of democratic consolidation and encouraged violent means to achieve objectives.

The Chamorro government also created several bodies to deal with claims made by Nicaraguans and a contingent in Miami (U.S.-Nicaraguans, hereafter). At first, the government was able to successfully transfer lands in their entirety to non-Somocistas. The process involved the creation of normal legislation, which involved the participation of the executive and the legislature, as well as presidential decree. Although the balance of efforts to resolve the outstanding claims issues fell to two popularly elected branches of government, the President’s role has been seen as paramount in the process. Reliance on presidential decree to resolve these claims has meant that a select few have had inordinate control over who was awarded compensation for the loss of property under the Sandinista regime. What is more, several of the key players in the restitution/compensation process, most notably President Alemán (1997-2001), were accused of a litany of corruption charges during their time in office. As a result, the process has been seen as marred by arbitrary decisions that favored some individuals and claims over others. Table 2 (below) provides a summary of balance of laws and decrees issued after 1990 to address outstanding property issues.

| Form of Resolution              | Number of examples         |
|---------------------------------|----------------------------|
| Normal legislation <sup>1</sup> | 9<br>(42.86%)              |
| Executive Actions <sup>2</sup>  | 12<br>(57.14%)             |
| Presidential Decree             | 11<br>(52.38%)             |
| Presidential Accord             | 1<br>(4.76%)               |
| <b>Total</b>                    | <b>21</b><br><b>(100%)</b> |

Table 2: Balance of Laws and Presidential Decrees Addressing Property Rights Issues, 1990- 2000

1 Laws are defined as any non-organic law passed by the Nicaraguan legislature and approved by the executive.

2 Executive actions include presidential decrees, accords, and *decretosley* (legislation that was ultimately codified by the legislature after being submitted as a presidential decree.)

As the table demonstrates, the executive maintained a slightly higher share of the burden in making decisions regarding outstanding claims. Executive actions (decrees, etc.) taken during that period are summarized in table 3 (below). As is evident in the table, presidential decrees played an important role in the creation of institutions that had jurisdiction over several thorny

issues regarding titling, restitution, and compensation after the return to democracy in 1990. It is also evident that efforts to create these institutions required significant revision even after they were formed to clarify the rules for titling, restitution, and compensation—where applicable. This meant that the process of resolving these claims become increasingly complex, and often muddled, for those seeking resolution of their property concerns. This is evident in the way in which the Chamorro and Alemán administrations handled claims between 1990 and 2001.

| Decree Number                   | Subject  | Issued             |
|---------------------------------|--|--------------------|
| Decree/Law 11 of 1990           | Decree/Law on Confiscation review                                      | May 23, 1990       |
| Decree 23 of 1991               | Application of Decree-Law 11-1990                                      | June 3, 1991       |
| Decree 35 of 1991               | Establishment and Functioning of Land Use Management Office (OOT)      | August 19, 1991    |
| Decree 36 of 1991               | Taxes on Real Estate   | August 26, 1991    |
| Decree 47 of 1992               | Re-Establishment of the National Confiscation Review Commission (CNRC) | September 10, 1992 |
| Decree 48 of 1992               | Expansion of functions of the Land-Use Management Office (OOT)         | September 10, 1992 |
| Presidential Accord 248 of 1992 |  | September 9, 1992  |
| Decree 51 of 1992               | Establishment of the Indemnities Office (OCI)                          | September 30, 1992 |
| Decree 56 of 1992               | Compensation System  | October 16, 1992   |
| Decree 31 of 1993               | Regulation of the State Attorney's Office for Property                 | May 27, 1993       |
| Decree 39 of 1994               | Establishment and Functioning of the Urban Titling Office              | September 13, 1994 |
| Decree 14 of 1998               | Regulation of Law 278 on Urban & Agrarian Property Reform              | February 13, 1998  |

Source: *Ministerio de Finanzas. 1996. Compendio de leyes y decretos en material de propiedad, 1979-1995. Managua: Gobierno de Nicaragua.*

*Table 3: Presidential Decrees Directed at Resolving Outstanding Property Claims in Nicaragua, 1990-present*

Under the Chamorro administration, claimants were required to submit documentation for any disputed properties or produce five witnesses to testify before the National Confiscation Review Committee (Comisión Nacional de Revisión, CNRC). The CNRC would then decide, by simple majority, the validity of the claim and the resolution. Any claims denied by the CNRC could be appealed through the normal legal channels through an appeals process.

CNRC issued numerous decisions for land to be returned to private ownership, beginning with state-owned farms. Social unrest was anticipated, but protest from state farm workers was not. In June 1990, two strikes paralyzed the country's economy and hundreds of farms were taken over by farm workers. A compromise, known as the Concertación, was reached among former landowners, the ex-Contras, farm workers of state-owned enterprises and retired

members of the Nicaraguan Army. It was understood that distribution of land would be roughly equal. However, former owners were returned larger portions of land than land to be privatized to the other three groups. The government determined which groups would receive what land and how much land, with an eye toward satisfying claims of its strongest supporters.

This process, however, proved unsatisfactory to many actors, including the Nicaraguan Supreme Court, which ultimately found the CNRC unconstitutional. Claims were then sent to a separate office (the Information Updating Office, or *Oficina de Actualización de Datos*) and processed by a small team of lawyers (Carter Center 1995). In 1991, following very vocal demonstrations of claimants across Nicaragua, Chamorro issued decrees creating the OOT (Land Use Management Office), which made determinations regarding the legality of land transfers made under the Sandinista regime. Transfers deemed illegal were referred back to the Attorney General's office (*Procuraduría General*) for further investigation and possible sanctioning (COHRE 2004). In 1992, the CNRC was re-established to address outstanding property claims. It responded directly to the Attorney General's Office and the newly created Attorney General for Property Rights (*Procuraduría de la Propiedad*) as well as two other members appointed directly by the President. Later that year, Chamorro issued the creation of the OCI (Indemnities Office) and created a compensation mechanism, consisting of dollar-pegged government bonds, for those negatively affected by the actions of the Sandinista government under Decrees 51 and 56 of 1992 (COHRE 2004).

Over time, and at the urging of the U.S. State Department, the Chamorro government began to address the very vocal demands of the U.S.-Nicaraguans. An international conference was convened in 1995 with the hopes of finding a definitive solution for large land claims through bond compensation. After dispensing approximately \$650 million in bond compensation and dispute mediation the state quickly became overwhelmed by the outstanding claims (Harding Lacayo 1998; *Ministerio de Finanzas* 1996). The cost of handling outstanding claims quickly outpaced the government's ability to provide pay-outs to claimants. As a result, the Inter-American Development Bank briefly stepped in with some assistance to offset the potentially disastrous effects on the Nicaraguan economy.

Nicaragua's attempts at rationalizing its property rights mess were doomed to failure. Due to the complex environment, poor design, favoritism, emphasis on political support and nontransparent procedures, the process of reconstruction of property rights largely remains unresolved. *See* Deena I. Abu-Lughod, *Failed Buyout: Land Rights for Contra Veterans in Postwar Nicaragua*, 27:3 *Latin American Perspectives* 32-62 (May 2000). *See also* Forrest D. Colburn, *Post-Revolutionary Nicaragua: State, Class and the Dilemmas of Agrarian Policy* (Univ. of California Press 1986).

The Cuban situation is quite different from the Nicaraguan one of the 1980s and 1990s. A single regime has retained power in Havana since 1959, unlike the successive and disruptive regime changes that occurred throughout Nicaragua's political history which sparked many of the property claims issues. Consequently, competing claimant groups generated by each regime change do not exist in Cuba as they do in Nicaragua. Moreover, the CNRC does not resemble the proposed Court in any significant manner. Restitution and actual land assignment were more emphasized by the CNRC, whereas restitution will be only one avenue of settlement in the Court system, with much more emphasis placed upon monetary compensation or economic participation and cooperation.

Another major difference is that claimants before the Court will not be Cubans in Cuba, they will be Cuban-Americans located in the U.S. Consequently, the Court will not attempt to use the property claim settlement process outlined in the instrument creating the Court to manage its internal domestic population and drive democratization on the island as the Nicaraguan government attempted to do. The transitional government in Havana may in fact

decide to establish another separate claims process for its domestic population, and this Report encourages them to do so, but that is a matter outside the scope of this Report's mandate.

This attempt failed in Nicaragua. Democratic consolidation in Nicaragua rested largely on the issue of property rights. Formerly, the Nicaraguan agenda on property claims was used primarily to accommodate kinship-based factions of the industrial and agricultural elite, core constituents of the Sandinista regime, rural labor groups, and peasant combatants. Short-term negotiations over property rights and claims generated a weak institutional order and legal ambiguity. Thus, persisting conflicts became rooted within official efforts to structure and design a strong property regime.

While careful, concise institutional design of property rights can enhance the democratization process, property right reformations are conditional on the interaction among capitalist, labor, agricultural, and governmental groups and agencies. Asymmetrical bargaining generates distribution problems in the privatization of state assets. The Chamorro government (1990-1997) was guided by international financial institutions in privatizing agricultural lands and affiliated assets that were nationalized between the years of 1979 and 1988. Accountability and transparency mechanisms were created to ensure privatization was actualized and complete through transaction auditing and certifications, and creation of the CNRC, which reviewed all property claims and the National Corporations of Public Administration (CORNAP), which was in charge of state corporation liquidation.

In 1994, the Nicaraguan National Assembly composed Law 209 guaranteeing the legality of titles to peasants under agrarian reform initiated in 1990. This law furthered the notion that private ownership of property is an integral right. On the question of outstanding foreign claims, initially, democratic reformation of the Nicaraguan constitution did not address many of the confiscated property and assets of Nicaraguan Americans and other U.S. citizens, who together pursued a dual litigation and compensation approach. However, under pressure from the United States, the Chamorro government assembled an international conference to create more definitive solutions in regards to disputes over large property assets and amounts.

Privatization complicated matters even more. Contradictory, complex administrative procedures, the presence of bureaucratic loyalties, and a burdensome process required by recipients compromised the titling phase as CORNAP attempted to dispense state assets. During the years of 1991-1993, political turmoil over privatization inhibited gross domestic product growth and repressed performance of agricultural export sectors and businesses.

The 1996 national election of Alemán and the Liberal Alliance produced a positive turn for claimants disappointed with Chamorro's willingness to accommodate Sandista interests. The transition team under Alemán indicated steadfast review, return, and compensation of the more than 1,500 U.S. citizen claims against Nicaragua. Some of these claims created complications due to inadequate and inconsistent titling and registration systems inherited from former regimes. New property legislation was produced to address problems of inadequacy, favoritism, and inconsistency. The Reformed Agricultural Urban Property Law (Law 278) was initiated in 1998 to replace Law 209 to allow for the mediation and compensation of more than one hundred thousand title disputes.

By March 2000, the number of pending U.S. claims reached nearly 1,600. Due to the burgeoning workload, Nicaraguan courts and administrations became overwhelmed; the U.S. Congress provided further assistance to Nicaragua to speed decisions and remedies of the property claims. But, Nicaragua remained financially strapped.

In April 1998, at the Second Summit of the Americas, it was concluded that the insecurity of property rights and indemnification directly contributed to the severity of poverty in Latin America and the lack of foreign investment. Nicaragua's plight was a case in point. See Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, 43:3 Latin American

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Politics and Society 61-93 (Autumn 2001); Tania C. Mastrapa, *Real Property Restitution: Risks for Claimants and Investors*, 15 *Cuba in Transition* 133 (ASCE 2005).

The general assessment of the claim resolution process in Nicaragua, at least in the most recent period, has been largely negative. In part, this has much to do with the general perception of efforts undertaken by Arnoldo Alemán's administration, which was rife with corruption scandals. While the legislation that guided the restitution process under his administration relied on several pieces of normal legislation, notably Laws 278 and 288 of 1997 and Law 309 of 1998, the administration of those laws has been seriously questioned. What is more, assurances made by the Alemán administration served to rapidly increase the number of claims filed between 1997 and 2000. These claims quickly outstripped the government's ability to provide compensation or resolution. It is also worth noting that Alemán's tenure in office was cut short when he was placed under house arrest resulting from charges of illicit enrichment that included the questionable accumulation of disputed lands in his own hands and those of his close associates. Thus, in addition to the many layers of complexity, which included outdated titling procedures, inconsistent legal regimes and processes, the Nicaraguan process has also been marred by poor administration and corruption.

### III.(C) Eastern Europe

After the fall of communism many Eastern European states instituted property-claim compensation systems, although in many cases, the original confiscations occurred under Nazi occupation. During the Second World War, the Nazi government seized real and personal property throughout Nazi-occupied Europe from organizations and individuals. Immediately following the war, in areas occupied by the Western allies, property was either returned or its loss was compensated quickly. However, in Eastern Europe, new communist governments dominated by the Soviets took over the property originally seized by the Nazis and confiscated additional property.

Thus, for instance, an original "taking" can be said to have occurred by the Nazi government, then perpetuated by the local Communist government which followed, and now the new democratic governments must deal with the claims issue, which are valued at over \$50 billion. See Stephen A. Denburg, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 *B.C. Third World L.J.* 233 (1998); Anna Gelpert, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 *U. Pa. Int'l Bus. L.J.* 315 (1993).

The comparisons in this section deal primarily with the second group of Cuban claimants – those in the Cuban-American exile community. The systems developed by the Eastern European states to settle outstanding property claims of both foreigners and nationals were internal, domestic systems, not international tribunals. Many of the processes undertaken by the Eastern European states could also be utilized by a transitional Cuban government to address the claims of Cubans who are still living in Cuba.

Beyond compensation, restitution was allowed as a property claim remedy in these Eastern European states, mainly because many of the states were cash poor. Restitution was used as a remedy primarily for undeveloped property, personal property and especially artworks. This was accomplished fairly easily, because much of the artwork was still held by state-controlled museums; consequently, no private individuals or subsequent purchasers were negatively affected. It is unclear how many of the Cuban claims involve personal property or artworks, but restitution as a practical matter might similarly be limited to those areas.

As for compensation, a paradigm that appeared often was the state essentially paying a lump sum to itself based on some percentage of the overall estimated total value of the claims, and then paying out in the form of benefits to its citizen claimants. This could work for the third

group of Cuban claimants (Cubans still in Cuba), and Cuba's preference for settling claims via the lump sum method has been demonstrated time and again with various European states. The Hungarians, however, combined their compensation scheme with a privatization scheme so that vouchers (instead of cash) could be used to purchase shares in the large state-owned enterprises that were being privatized (thereby creating an investor class), as well as to purchase land at state

auctions. This system might be a possible for the second or third group of Cuban claimants (Cuban-Americans and Cubans still in Cuba) if privatization is coupled with property settlement as a policy of a transitional government in Havana.

Hierarchical preference for remedies might be another option. The Czech Republic preferred restitution to compensation (there was a presumption in favor of restitution), but allowed compensation when restitution was not possible – as in the case of the property being substantially altered, destroyed, or where current holders were exempt from claims – foreign investors/foreign states, or the property was otherwise used for public purposes – parks, etc. *See Gelpert, supra.* Either the Tribunal or the Court could incorporate hierarchical preferences for remedies in their rules of procedure. The instruments are flexible enough to allow for this.

When Eastern European states began turning seriously to the question of property claims, the U.S. State Department issued a

short list of 12 general recommendations for those governments to follow, recognizing that each claim system was likely to differ in significant ways:

- Restitution laws should govern both communal property owned by religious and community organizations, and private property owned by individuals and corporate entities.
- To document claims, access to archival records, frequently requiring government facilitation, is necessary. Reasonable alternative evidence must be permitted if archives have been destroyed.
- Uniform enforcement of laws is necessary throughout a country.
- The restitution process must be non-discriminatory. There should be no residence or citizenship requirement.
- Legal procedures should be clear and simple.
- Privatization programs should include protections for claimants.
- Governments need to make provisions for current occupants of restituted property.
- When restitution of property is not possible, adequate compensation should be paid.
- Restitution should result in clear title to the property, not merely the right to use the property.
- Communal property should be eligible for restitution or compensation without regard to whether it had a religious or secular use. Some limits on large forest or agricultural holdings may be needed.
- Foundations managed jointly by local communities and international groups may be appropriate to aid in the preparation of claims and to administer restituted property.
- Cemeteries and other religious sites should be protected from desecration or misuse before and during the restitution process. (State Dep. Overview)

Following is a more detailed discussion of how each of the larger states dealt with the problem of property claims from a structural and legal perspective:



*In the distance, El Museo de la Revolución, once served as the Presidential Palace.*

### III.(C)(1) Czechoslovakia III.(C)(1)(a) Czech Republic

The Czech Republic passed a series of property claims laws, beginning in 1991 with a statute covering confiscations from communist era (1948-1989) concerned primarily with private property, agricultural land, artwork and property belonging to religious groups and sports associations. The 1991 law was amended three years later by Act 116/1994 providing for Nazi confiscations (1938-1945). Both frameworks required that private property claimants be current Czech citizens, which excluded those who had fled during either period. Because a 1928 treaty between the U.S. and Czechoslovakia banned dual citizenship, Americans of Czech descent who had a claim were frozen out. By 1999, the U.S. had renounced the treaty and the Czech government had lifted the ban, but the filing period for restitution claims had passed. Prague insists that 97% of all private property claims have been resolved (much of the property claimed by Czech-Americans was compensated to other family members who had remained Czech citizens). *See* Ambassador Randolph M. Bell, U.S. Department of State, Summary of Property Restitution in Central and Eastern Europe (Sept. 10, 2003), available at: <http://www.state.gov/p/eur/rls/or/2003/31415.htm> (State Dep't Summary).

One danger is that a transitional Cuban government may seek to emulate the early Czech response and disallow the claims of Cuban-Americans based on citizenship – essentially using their American citizenship against them. The government could then turn to the third group of claimants (Cubans still in Cuba) and address their claims as a method of shoring up domestic political support: compensating them over the Cuban-American claimants. The problem that arose with regard to Czechs in America being frozen out was a direct extension of the fact that they had no access to the property claim tribunal in question. That is a potential problem with Cuba as well, if Cuba decides to emulate the Czech position, since the instrument creating the Cuba-U.S. Tribunal does not confer jurisdiction over claims of the Cuban-American exile community.

Holocaust victims were treated specially. In 1998, the Czech Republic created a “Commission for Mitigating Some of the Injustice Caused to Holocaust Victims” to deal with property confiscated during that time, mainly in the form of real estate, artwork, and precious metals. Claimants were divided into two groups: former owners of agricultural land and claimants without Czech citizenship.

As to the first group, Prague passed a law in 2000 enabling former agricultural owners to file their claims. If they also possessed Czech citizenship they were allowed to approach current owners of the property to seek settlement. If the current owners were not willing to return the property, then action could be pursued in Czech courts. The second group faced a deadline of Dec. 31, 2001 to file their claims and an endowment fund was created (Endowment Fund for Victims of the Holocaust) that operates as a buffer between the government and the claimants. The fund distributes “benefits” based upon a point system assigned to various claims on a fact-by-fact basis. This program concluded business in December 2005. *See* The Claims Conference on Jewish Material Claims (2005-06), available at: [http://www.claimscon.org/index.asp?url=cc\\_programs/overview](http://www.claimscon.org/index.asp?url=cc_programs/overview) (Claimscon).

Here are the relevant provisions for benefit analysis and distribution:

#### **Article I Mission of Endowment Benefits Provision**

1. The Endowment Fund shall provide endowment benefits (hereinafter the “Benefits”) to alleviate some property injustice suffered by the Holocaust victims.
2. The Endowment Fund shall provide the Benefits in accordance with Act No. 227/1997 of Coll. on Foundations and Endowment Funds, in accordance with amendments to other related legislation, in accordance with

the Statute of the Endowment Fund and in accordance with these principles (hereinafter the "Principles").

3. There is no legal title to receive the Benefits.

#### **Article II Amount of the Benefits**

1. The Benefits shall be provided to all individuals holding a rightful claim in accordance with Article III hereinbelow, whose applications meet all criteria set forth in these Principles.
2. The amount of the Benefits shall be set forth as follows: According to the resulting amount of received applications, each shall be allocated a certain number of points. The overall amount of funds allocated to alleviate some property injustice suffered by the Holocaust victims shall be divided by the total number of points, thus stipulating the monetary value of one (1) point in Czech Crowns. Entitled individuals shall be provided the Benefits at the amount set by multiplying one (1) point in Czech Crowns by the number of points allocated to each application on the basis of the value of the specific confiscated property.

#### **Article III Entitled Individuals**

1. Individuals entitled to file an application shall include any and all individuals who were deprived of their ownership title to immovable property located on the territory of the Czech Republic due to racial persecution between September 29, 1938 and May 8, 1945 by an ownership title transfer, subsequently declared invalid by the Decree of the President of the Czechoslovak Republic No. 5/1945 of Coll. or by the Act No. 128/1946 of Coll., this ownership title never having been restored nor compensated in another manner (for instance on the basis of international treaties) and no legal title to the restitution thereof ensuing in accordance with Restitution Regulations issued after 1989 (hereinafter the "Original Owner").
2. Should the Original Owner have died, the application may be filed by his or her surviving spouse.
3. Should the spouse of the Original Owner have died, the application may be filed by his or her children.
4. Should children of the Original Owner have died, the application may be filed by his or her descendants.
5. Should the application be filed by more children of the Original Owner, the Benefits shall be equally divided among them.
6. Should the application be filed by more descendants of the Original Owner in stead of his or her children, the share allocated to the deceased child of the Original Owner shall be equally divided among them.

#### **Article IV Application**

1. A written application must be delivered to the Endowment Fund no

- later than six (6) months after having made these Principles publicly available in accordance with Article VI hereinbelow.
2. The application must contain officially authenticated documentation attesting to the compliance with conditions set forth in these Principles, in particular the following:
    - a. An official proof of identity of the applicant;
    - b. Should the application not be filed by the Original Owner, an official death certificate of the Original Owner and/or of other individuals whose application would precede that of the applicant in accordance with Article III hereinabove;
    - c. Official documents attesting to family relations of the applicant in accordance with Article III hereinabove (marriage certificates, birth certificates);
    - d. A proof of the Original Owner's title to immovable property during the period of time specified hereinabove and of the confiscation thereof in a manner set out in Article III, Section 1. hereinabove (Land Register Records);
    - e. A declaration of the applicant that nor the Original Owner, nor his or her legal successor have been restored the property, nor granted compensation in any form or extent. Should this declaration turn out to be faulty after the payment of the Benefits to the applicant, the applicant shall be obliged to return the received payment.
  3. Applications not delivered on time and/or not containing required data and documentation in accordance with Article IV, Section 2. hereinabove, even following an appeal to specify the submitted application, shall be disregarded. Exempted are applications not containing documentation in accordance with Section 2. b), c) and d), but containing other documentation, implying the compliance with the conditions set by these "Principles."

#### **Article V Payment of the Benefits**

1. After the deadline published in Article IV, Section 1. hereinabove, the Endowment Fund shall gather all applications and those meeting all requirements in accordance with Article IV, Section 2 hereinabove shall constitute an application list to be further evaluated in accordance with Article II, Section 2. hereinabove, or in accordance with Article IV, Section 3, second sentence".
2. In evaluating the applications, the Endowment Fund shall also take into account legal principles set forth in Act No. 87/1991 of Coll. on Out-of-court Rehabilitation and later amendments thereto.
3. The Endowment Fund shall decide on providing the Benefits no later than twelve (12) months from the date of publication in accordance with Article VI hereinbelow.
4. The Endowment Fund shall provide the Benefits in the amount set forth in accordance with Article II, Section 2. hereinabove to the entitled individual.

**Article VI Conclusive Provisions**

1. These principles shall be published simultaneously in at least two national daily newspapers.
2. The Endowment Fund shall ensure that these Principles be published in the bulletin of Jewish communities Rosh Chodesh and in other suitable ways to become available to all entitled individuals, including those living abroad.

*See* The Foundation for Holocaust Victims (2005), available at <http://www.fondholocaust.cz/indexEN.htm>.

Czech law also provided for the restitution of artworks to their original owners. Several interesting features of this aspect of property claims settlement in the Czech Republic are that the taking had to have occurred within a fixed time horizon (November 29, 1938 to May 4, 1945), artwork claims were to be addressed to individual institutions holding the items, there was no requirement of Czech citizenship for claimants, and the deadline to file claims was December 31, 2006. The law also restituted 70 works of art from the National Gallery and provided for the return of 7,500 artworks in Czech government museums. *See* State Dep't. Summary; Claimscon, *supra*.

Communal property is also a special category, and one that remains largely unresolved due to the refusal of the Catholic Church to provide a definitive list of properties to which it is entitled and the government's refusal to continue processing claims until its gets a clearer picture from the Church. Local authorities hold most of the 700 buildings and 175,000 hectares of land sought by the Catholic Church. Protestant churches claim a smaller percentage. Notably, the Czech compensation system does not require municipalities to return communal property.

**III.(C)(1)(b) Slovakia**

In 1993, Slovakia enacted a property restitution law that covered both private and communal religious property. Because the new Slovak government lacked financial resources to pay compensation, restitution was encouraged where property was not subsequently occupied or developed. Consequently, the Orthodox Church received six of its seven claimed properties and the Catholic Church received 60% of its claimed properties. *See supra* State Dep't. Summary.

A transitional government in Havana, likewise, is not liable to have access to adequate financial resources to pay compensation. Thus, if it is unable to secure a favorable loan from the U.S. or international financial institutions, restitution may be the preferred option – although with the caveat that current occupiers of residential property cannot be summarily dispossessed. To allow that, would be to allow the worst case scenarios described by Fidel Castro to his people to come true.

In Slovakia, Holocaust victims, like in the Czech Republic, were treated specially. In 2000, Bratislava created a fund which amounts to a lump sum payment to itself to cover Jewish losses during the Nazi era. A joint commission of Jewish and government experts valued the size of "heirless" property and real estates (excluding agricultural land) at \$185 million. Ten percent of this (\$18.5 million) was set aside to provide compensation for un-restituted property in the form of healthcare coverage for the 1,450 Holocaust survivors in Slovakia and to renovate some Jewish historical sites. The Council for the Compensation of Holocaust Victims (composed of four Jewish and three government representatives) administers the fund. The Council also accepts private property claims for partial compensation on real estate losses incurred during the Holocaust. Those had to be filed by December 31, 2003. *See supra* Claimscon.

The showing required for such a claim, which can be made by original owners as well as “rightful successors,” includes the following:

Persons who, as a result of racial persecution, lost title to real estate in those regions which now make up the Slovak Republic between 2<sup>nd</sup> November 1938 to 8<sup>th</sup> May 1945, as a result of the transfer or transition of such title, declared as invalid by the President of the Republic in Decree no. 5/1945 Coll., or Act no. 128/1946 Coll., where such title was not restored to them nor compensated in any other manner – e.g. on the basis of international compensation agreements closed between Czechoslovakia, respectively CSSR, CSFR and a number of countries (for example, with Great Britain in 1949 and 1982, with Italy in 1966, Canada in 1973, Austria in 1974, the USA in 1982) – and who were not legally entitled to the restitution of such title or financial compensation on the basis of restitution legislation after 1989 in Czechoslovakia or the Slovak Republic. See Council for the Compensation of Holocaust Victims, available at <http://www.holocaustslovakia.sk/>.

### III.(C)(2) Hungary

Hungary implemented a voucher component for property compensation. Hungary’s 1991 property claim law enabled private parties and religious organizations to file claims for property seized after January 1, 1946. Regarding private property, Hungary coupled its claim process with its post-communism privatization process. Successful private property claimants could receive up to \$21,000 in compensation – which was paid in the form of a voucher. The voucher could then be used to purchase shares in privatized companies or to buy land at state land auctions.

According to Budapest, there were 1,431,740 claims, of which 1,263,033 were approved for compensation. Payments in vouchers approached approximately \$385 million (HUF 81.02 billion), in addition to the \$14.5 million (HUF 3.77 billion) in payments for the purchase of agricultural land. *See supra* State Dep’t Summary.

A voucher scheme like Hungary’s could have some utility in post-communist Cuba, depending upon how quickly a transitional government wants to move into the privatization process – much of the economy and capital is currently controlled by the Cuban military apparatus. Demilitarizing state control over the economic sector is likely to be a key requirement attached to financial assistance from the World Bank, Inter-American Development Bank, or the International Monetary Fund. Thus, a transitional government in Havana may have little choice but to privatize. However, privatization on the Russian model that created or perpetuated oligarchic monopolies would be a further impediment to economic development on the island.

Regarding communal property in Hungary, 12 major religious groups submitted 8,026 restitution claims, 1,383 claimants received property, 2,670 claims were denied, 1,731 claimants received \$271.3 million (HUF 67.843 billion) in cash payments, and 968 cases were settled without government intervention. As of December 31, 2001, there were 1274 claims valued at \$187 million (HUF 46.770 billion), awaiting adjudication. The final adjudication deadline is in 2011.

In 1997, the law was amended to allow religious groups to apply for a government-funded annuity as compensation for unreturned properties. Between 1997 and 1998, Budapest signed compensation agreements with several religious organizations (Catholic, Jewish, Protestant and Orthodox) in order to implement fully the 1991 law and the 1997 amendment. The compensation agreements determined the monetary value of unreturned properties and

specified the amount of the government-funded annuity for each group. Following is the breakdown according to religious group:

| Organization               | Amount of Annuity |               | Properties Wived | Value of Waived Properties |               |
|----------------------------|-------------------|---------------|------------------|----------------------------|---------------|
|                            | U.S. \$           | Hungarian HUF |                  | U.S. \$                    | Hungarian HUF |
| Catholic Church            | 9.2 million       | 2.3 billion   | 1150             | 168 million                | 42 billion    |
| Jewish Community           | 2.4 million       | 608 million   | 152              | 54 million                 | 13.5 billion  |
| Calvinist Church           | 5.2 million       | 1.3 billion   | 392              | 26.6 million               | 6.65 billion  |
| Lutheran Church            | 2.8 million       | 700 million   | 74               | 17 million                 | 4.27 billion  |
| Budai Serb Orthodox Church | 179,000           | 44.9 million  | 2                | 3.4 million                | 848 million   |
| Hungarian Baptist Church   | 80,000            | 20 million    | 2                | 484,000                    | 121 million   |

In 2003, the government concluded a separate agreement with the Jewish community providing for payments of about \$1,750 to Hungarian survivors of the Holocaust, or their heirs. The number of beneficiaries is expected to be around 150,000. *See* State Dep. Summary. Hungary also made special provision for compensation to Jewish survivors of the Holocaust, establishing a fund and then administering benefits to local Jewish communities. *See supra* Denburg.

### III.(C)(3) Poland

Property claims legislation in Poland has been attempted and defeated repeatedly. Currently, there is no statutory framework allowing private claimants to proceed with their claims. Because of this lack of process, claimants are seeking relief in Polish, American and international courts. Polish courts have heard individual cases with some positive results, and a case was filed in a U.S. federal court (*Garb v. Poland*, 207 F. Supp.2d 15 (E.D.N.Y. 2002)), in which a motion to dismiss on sovereign immunity grounds was granted and appealed to the Second Circuit Court of Appeals.

Under the Foreign Sovereign Immunities Act, foreign states enjoy immunity from suit as a general rule unless an exception applies to the circumstances of that individual state – such as the state appearing on the U.S. Government’s list of state sponsors of terrorism or the state engages in commercial activity in the marketplace as any other actor would.

The Second Circuit agreed with the lower court, essentially foreclosing U.S. courts as a forum to bring property claims against Eastern European countries that have not addressed the issue. The Court’s ruling concluded with this summation:

[W]e hold that: (1) *Altmann* requires us to apply the FSIA, and its exceptions, to claims based on conduct that predates the 1976 enactment of the FSIA, (2) plaintiffs have not satisfied the “commercial activity” exception of the FSIA, 28 U.S.C. § 1605(a)(2), because (a) a state’s confiscation of property within its borders is not a “commercial” act, (b) the subsequent commercial treatment of expropriated property is not sufficiently

“in connection with” the prior expropriation to satisfy the “commercial activity” exception, and (c) we decline to credit plaintiffs’ recharacterization of what are in essence “takings” claims as “commercial activity” claims, and (3) plaintiffs have not satisfied the “takings” exception of the FSIA, 28 U.S.C. § 1605(a)(3), because (a) plaintiffs seek to recover property that is not “present in the United States,” (b) under such circumstances, plaintiffs must show that the property “is owned or operated by an agency or instrumentality of the foreign state” within the meaning of the FSIA, (c) plaintiffs allege that the property is “owned by” the Ministry of the Treasury of Poland, Appellants’ Br. at 15, and (d) the Ministry of the Treasury of Poland is not an “agency or instrumentality” of the Republic of Poland under the FSIA because its “core function” is governmental rather than commercial. See *Garb v. Poland*, 440 F.3d 579 (2<sup>nd</sup> Cir. 2006)

There is also a case pending in the European Court of Human Rights brought by a Holocaust Survivor, Henryk Pikielny, demanding compensation for the seizure of his family’s manufacturing company by the Nazi government and then subsequently taken over by the Polish communist government. The New York Legal Assistance Group (NYLAG) is bringing the case, which can be accessed at <http://www.polishrestitution.com/>. Also, the United Restitution Organization in Israel has offered legal assistance to Jewish claimants seeking relief in Polish courts. See *Claimscon*, *supra*.

Clearly, the lesson from Poland’s experience is that if an accessible property claims system is not put in place, claimants with resources will not be deterred – they will seek alternative legal forums to obtain relief – within Cuban courts, American courts, or international tribunals that may have some limited jurisdiction. Consequently, this is yet another point to make for building out the proposed Tribunal and the proposed Court – avoiding a messy process, avoiding unmanaged litigation, and avoiding uncertain outcomes.

As for communal property, Poland has made much better progress, but the method of claims processing has been uneven. Warsaw’s restitution legislation established five separate commissions – one for each of the major religious groups (Catholic, Jewish, Orthodox, Lutheran, and “other” – which includes Baptist, Pentecostal, Methodist and Muslim). Each commission went their own way procedurally, so anomalous results ensued.

For instance, the Orthodox Church had only a three-month filing period, compared to the Catholic Church, which had two years, and the Jewish community, which had five years. Consequently, the number of Orthodox claims is artificially low as that is Poland’s second largest denomination; this is reflected in the comparative numbers below:

| Religious Organization | Claims       | Resolved     | Settlements  | Denied       |
|------------------------|--------------|--------------|--------------|--------------|
| Catholic               | 3,054        | 2,780        | 1,325        | 532          |
| Orthodox               | 120          | 57           | 49           | 4            |
| Lutheran               | 1,200        | 709          | 233          | 370          |
| Jewish                 | 5,236        | 414          | 153          | 159          |
| Other                  | 110          | 10           | 0            | 10           |
| <b>Total</b>           | <b>9,720</b> | <b>3,960</b> | <b>1,760</b> | <b>1,075</b> |

As with most other Eastern European states, the Jewish community has special legislation. In Poland, many of the properties to be restituted are old Jewish cemeteries, known as “heritage properties.” Because the maintenance and cost of these properties are relatively high, a Jewish heritage foundation was established to press claims and manage the results. *See* Denburg; State Dep. Summary, *supra*.

In 1960 and 1975, Switzerland escheated to Poland dormant bank accounts and insurance policies belonging to Polish citizens from the Holocaust era. The Polish Ministry of Finance has made available a dormant bank account list for owners and their heirs to claim with exact sums in each account. The list is accessible at: [http://www.claimsinfo.org/article.asp?article\\_id=336](http://www.claimsinfo.org/article.asp?article_id=336).

In discussions with Ambassador Wojciech Kowalski, professor of law at the University of Silesia and attorney in the Legal Affairs and Treaty Department at the Polish Foreign Ministry, Andrzej Rudlicki, Deputy Director of the Legal Department at the Polish Interior Ministry (the state agent in charge of restituting religious properties, Jewish and Christian, or otherwise settling those claims), the investigators for this Report received confirmation of the complicated nature of Polish property claims. Poland’s poor performance with respect to addressing the property claims issue stems from circumstances unique to its situation: (1) the geographic problem of moving one-third of its territory from East to West after the war (the Eastern part to the U.S.S.R. and taking the Western part from Germany), which clouded the situation considerably; (2) the complete devastation and subsequent rapid reconstruction of Warsaw such that no restitution can really occur there; (3) the poor documentation of religious properties; and (4) the difficulty associated with restituting religious properties to groups that no longer exist in any significant numbers.

That said, Poland has had some success with communal property assessments although it has not begun the private property process. Of the Jewish claims, by 2006, the Interior Ministry stated that about 20% have been settled. They also confirmed that each religious group’s individual commission is equally divided between representatives of the state and the particular religious community. This system does not lead to speedy resolution of disputes. However, because it is only quasi-legal (it was adopted before the 1997 constitution and is not part of the judicial branch), there is room for administrative accommodation and maneuver. Deputy Director Rudlicki pointed out that the strength of personal relations and the good will and flexibility of each side is essential for successful resolution of each case.

This last point dovetails with what was told to the investigators by agents of the Iran-U.S. Tribunal in The Hague and the Secretary General of the Hague Conference on Private International Law. Namely, that the informal relationships among the leaders and functionaries within and around the property claims settlement institution are key to making it work – whether the structure used is a bilateral international tribunal or a closed domestic judicial model. This is important to remember in the context of both the Tribunal and the Court that the instruments proposed in this Report seek to create.

The investigators also met with Magda Falkowska, head of the privatization unit at the Treasury Ministry, who explained that the nature of Poland’s claimants, and the situation of the country after the war and after communism, made it impossible to work on the private claims in a way that would compensate claimants appropriately. They are looking at about 3 million claims and are targeting 20% return on the value of each claim for each claimant. This is a sizeable amount of money and it will be adjudicated within the state administrative system, not the court system, unless the claimants are not satisfied with the outcome and wish to bring the matter before the judicial system. Each of the 16 regional representatives of the state will process the claims within their region and make equitable adjustments accordingly with a right of appeal only up the administrative chain. The draft legislation is ready to establish this system, but no one knows when it will be presented.

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There is potential symmetry between what Poland is doing with its communal property claims (mostly restitution) in front of what it will do later with private claims and what a transitional government in Cuba might wish to achieve. The symbolic and moral importance of settling the communal property claims of religious groups is undeniable and, to the extent Cuba seeks to restore key properties that have powerful symbolism rather than economic value, those resolutions would bring little monetary gain but help create a healing of disrupted cultural lives. For Poland, this has involved the return of churches, monasteries, synagogues and cemeteries. Cuba did not undertake mass appropriation of communal property; thus, restitution of these properties would be a relatively easy step as a political matter for the transitional government.

### III.(C)(4) Bulgaria

Bulgaria's situation is different from other East European states in that it did not seize actual land, but rather nationalized the businesses using the land, while the owners retained title to the land. The Bulgarian scheme does, like other Eastern European property claims systems, differentiate between private and communal property claims. Like the preference in the Czech system for citizen claimants, Bulgaria's law is preferential. Even though Bulgarian and non-Bulgarian citizens can claim, a successful claimant who is not a current citizen must sell the property. Moreover, only Bulgarian citizens can receive restituted forest and agricultural land. *See supra* State Dep. Survey.

Communal property restitution has been sporadic. A significant hurdle for claimants to clear is making the showing that they are the very organization (or its legitimate successor) that owned the seized property prior to September 9, 1944. Of the various religious groups pressing claims, the Jewish community has been the most successful. The Muslim community claims 17 properties, the Catholic Church claims over a dozen buildings and monasteries and Protestant groups claim several others.

Broader restitution rights in Bulgaria depended upon the circumstances of the taking. As Dr. Mastrapa observes: "It is interesting to note certain stipulations of restitution legislation in Bulgaria. If a property was taken legally (some form of compensation paid) as opposed to illegally (no compensation, no advance notice), the former owner was eligible for restitution. Those properties acquired by the State illegally were not eligible for restitution because the new government recognized adverse possession." *See* Tania C. Mastrapa, *Real Property Restitution: Risks for Claimants and Investors*, 15 *Cuba in Transition* 133 (ASCE 2005).

As to agricultural land, Bulgaria passed specific legislation in 1991 allowing claims for land that was incorporated into cooperatives or state farms after 1946. The Land Commission, which was set up to control the claims process, found that often the sole basis for claims were oral histories from elderly individuals who testified as to who owned what prior to 1946. Twelve million acres are expected to be returned, the vast majority of it to private individuals. Most claimants preferred restitution to compensation (only 0.5 percent elected compensation), but claims exceed the supply of land in 40% of the country due to urbanization. This has resulted in a pro rata reduction in land returned under a re-allotment scheme (91% of the parcels returned were under 2.5 acres). As of 2001, 98.8% of land has been restituted and the liquidation of collective farms has been completed. *See* Ann Louise Strong, *Restitution of Farm Land in Bulgaria* (1995); Raúl de Arriba Bueno, *Restitution and Market in the Bulgarian Land Reform*, No. 5 *European Association for Comparative Economic Studies Working Paper* (Oct. 2005), available at: [http://euroest.economia.unitn.it/Eaces/Working%20Papers/WPRAB\\_5\\_05.pdf](http://euroest.economia.unitn.it/Eaces/Working%20Papers/WPRAB_5_05.pdf)

Cuban cooperative farms do not operate on the same basis as the collectivized agriculture of Bulgaria; nevertheless, a transitional Cuban government may want to look to Bulgarian reforms when it comes time to address the issue of restitution versus compensation in either the Tribunal or Court system in connection with how it will address the claims by the third claimant group (Cubans still living in Cuba).

### III.(C)(5) Romania

Romania did not begin seriously addressing the property claims issue until a decade after other Eastern European states. In 2001, Bucharest passed legislation, known as Law 10/2001, controlling restitution of property seized between March 6, 1945 and December 22, 1989. Some unique features of the Romanian legislation are that considerable burden is placed on the claimant with tight deadlines (which have had to be extended twice) and, unlike other East European schemes, the Romanian program does not provide for restitution of communal (religious) property. In fact, properties used for public purposes will not be returned; monetary compensation is the only remedy.

All claims had to be submitted to municipal authorities via the court system by July 1, 2003, which has made it difficult for claimants living outside Romania to file. Documents not submitted by July 1 cannot be used by former owners in subsequent lawsuits. Separate statutes, Law 18/1991 and Law 1/2000, govern restitution of agricultural and forested lands. See Claimscon; Anna Lawrence & Alina Szabo, *Forest Restitution in Romania: Challenging the Value Systems of Foresters and Farmers*, Environmental Change Institute, University of Oxford (2005), available at: [http://www.eci.ox.ac.uk/pdfdownload/human\\_ecology/romania.pdf](http://www.eci.ox.ac.uk/pdfdownload/human_ecology/romania.pdf).

The government has made available a guide to restitution through its U.S. embassy at: <http://bucharest.usembassy.gov/InfoA/new05.htm>. An interesting aspect of the Romanian system is that separate procedures are employed depending on the category of the claim filed: residential or business property; agricultural and forest property, and communal property. The embassy's handbook for U.S. citizens explains the process:

Each property category is subject to different regulations and procedures for restitution. Most property restitution cases fall under the category of dwellings and businesses, which generally consists of companies, buildings, factories, houses, apartments and hotels. This category also includes both existing and demolished buildings, as many dwellings and businesses were torn down under Ceasescu's "development plan" for Romania.

Agricultural land is defined as land that is worked for the production of crops, and forestland is land that is undeveloped. Religious properties are properties owned by religious denominations (e.g. Orthodox, Catholic, Jewish, Baptist, Greek Catholic, and Protestant) recognized by the state at the time of confiscation. This included properties such as agricultural or forest land, hospitals, buildings and especially schools. In some cases, properties were registered as being both religious and community property. Religious property is always owned by a religious organization, but either a religious or a non-religious group may own community property. Ethnic Germans and ethnic Hungarians, for example, have properties registered as both community properties and as religious properties.

There is, however, no specific law regarding the restitution of property that is registered as being both religious and community property. The term "community property" generally refers to properties that historically belonged to local communities, or properties belonging to different ethnic groups such as the Hungarian or the German communities. In the 1940's, the Jewish community registered a number of properties as community –

not religious – property in an attempt to protect Jewish properties from confiscation, first by the fascist regime and later by the communists.

A subgroup of community and religious properties consists of dwellings and undeveloped land which, after being nationalized, was used for public purposes by state organizations. Real estate in this category is designated as public property (despite the fact that individuals may have thereafter purchased pieces of it) and is subject to specific procedures for restitution. See Property Restitution in Romania, A Handbook for American Citizens, American Embassy Bucharest (Nov. 15, 2001).

About 210,000 claims were filed under this system (128,000 claimants requested restitution and 82,000 claimants requested monetary compensation). Only 38,400 claims were deemed completely documented, and as of 2003, 9,200 properties had been restituted. Because of Romania's poor effort at legislatively controlling this issue, over 25 property restitution cases have been heard at the European Court of Human Rights, which has ruled consistently in favor of the claimants, ordering Romania to pay large damages unless restitution ensued. See *supra* State Dept. Survey.

The government has made available the original 277-page list of thousands of properties seized in Bucharest in 1950, which is subdivided by property type. The list is available at: <http://www.claimsinfo.org/pdf/full.doc>

See U.S. Department of State, Property Restitution in Central and Eastern Europe, available at: <http://www.state.gov/p/eur/rt/hlcst/c12070.htm>.

The system envisioned by the instruments creating the Tribunal and the Court for Cuba do not subdivide claims by property type but, rather, by value of the claim. Also, the Romanian claims are run through the existing judicial system as domestic legal actions instead of through a specialized court within that system with specially trained judges.

The problems associated with implementation of Law 10/2001 were many, and were meant to be rectified by the government's adoption in July 2005 of new regulations that were passed pursuant to Article 114 of the Constitution to clean up the system of property claim settlement. These modifications mandated restitution in kind for all state-possessed buildings, protection of tenants in current occupation, and allocation of equitable compensation. In the case of properties currently in public use, restitution was still mandated, but after a delay of five years. As to alleviating the burden of proof for former owners, there is now a presumption in favor of former owners – shifting the burden to the state of proving the contrary.

While at the national level, there is a commitment to resolving the property claims issue, at the local level (where land registries are controlled), there is continued resistance, bureaucratic red-tape and undue delay. All claims for restitution were to be filed by November 2005. According to the National Authority for Property Restitution (ANRP), 750,000 claims remained unresolved at the end of 2005.

### **III.(D) Germany**

Under the Nazi regime, property confiscation became a way of life. Between 1933 and 1945, so-called enemies of the regime, such as Jews, lost vast quantities of private property. At the conclusion of the Second World War, areas of Germany occupied by the western Allies witnessed efforts to restore lost property; however, East Germany, occupied by the Soviet Union, only witnessed further expropriations. Massive amounts of land (3.3 million hectares), industry

and other properties were nationalized or appropriated to new owners under Soviet occupation period (1945-1949), and this was followed by further expropriations under the successor communist regime in East Germany, thus creating a second and third wave of property confiscations following the initial Nazi confiscations. See Dorothy Ames Jeffries, *Resolving Rival Claims on East German Property Upon German Unification*, 101 *Yale L.J.* 527 (1991).

At the end of the Cold War, East and West Germany were reunified. Article 41 of the August 31, 1990 Treaty of Unification incorporates the June 15, 1990 Joint Declaration on Open Property Issues which provided general legislative guidelines for the privatization process in the East Germany. The privatization process, undertaken by a federal trust agency known as the Treuhand, left many East Germans out of the game. The agency specifically sought western foreign investors, establishing offices in New York and Tokyo. See Heather M. Stack, *The Colonization of East Germany?: A Comparative Analysis of German Privatization*, 46 *Duke L.J.* 1211, 1241-43 (1997).

Restitution of expropriated property also left East Germans wanting. After World War II, West and East Germany pursued different paths in this area. West Germany, at the urging of the Allies, established a property claims tribunal to restore property removed under duress, indemnify personal injuries and settle claims by foreign governments. Western countries benefited from the foreign claim settlement provision, not East European countries. Also, a 1953 law offered indemnification for current or former Germans who suffered persecution between 1933 and 1945, changing their civil claims into public law claims, which effectively precluded private claims by the victims against the perpetrators.

By contrast, East Germany addressed Nazi-era confiscations only minimally. Most Jews and other affected people did not reside in East Germany after the war, so restitution was not pursued in any meaningful way; moreover, upon the socialization of property rights in the East, it was not generally permitted. The East German government considered any victims to have been reimbursed via its extensive social security system; this was adjusted in 1965, when a new law provided for restitutionary measures via increased pensions. Moreover, settlement of property claims with the West was not undertaken; instead, East Germany paid substantial sums to the U.S.S.R. and Poland as war reparations, considering its war debts satisfied.

The method of East German expropriation also differed significantly from the outright nationalizations and confiscations that occurred in other communist countries. From 1949 to 1989, "[t]he G.D.R. did not systematically expropriate firms as the Soviets had done; instead, the G.D.R. took over particular businesses by applying economic pressure to force businesses and/or landowners into bankruptcy." See Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 *Vand. J. Transnat'l L.* 809, 816 (1994). Other methods of expropriation included revocation of business licenses, denial of access to necessary resources for operation, cancellation of orders, criminal sentencing of individuals operating sectors targeted for expropriation and regulatory means such as collectivizing trade and agriculture.

When Germany reunified, the Trust Agency initially sought to provide restitution in the form of in-kind property awards; monetary compensation was seen as too expensive but was allowed in the case of good faith purchasers, property used for residential purposes that was currently occupied, property dedicated to the public interest, and property involving a joint commercial enterprise. Approximately 1.2 million claims were filed before the deadline of December 31, 1992. The rigidity of law had a negative economic outcome. Once a claim regarding a particular piece of property was filed, all activities with respect to that property were frozen; thus, no action could be taken on the property until the claim was resolved. Because of the waves of confiscation that occurred over time, numerous overlapping claims on the same piece of property were possible, deadlocking the

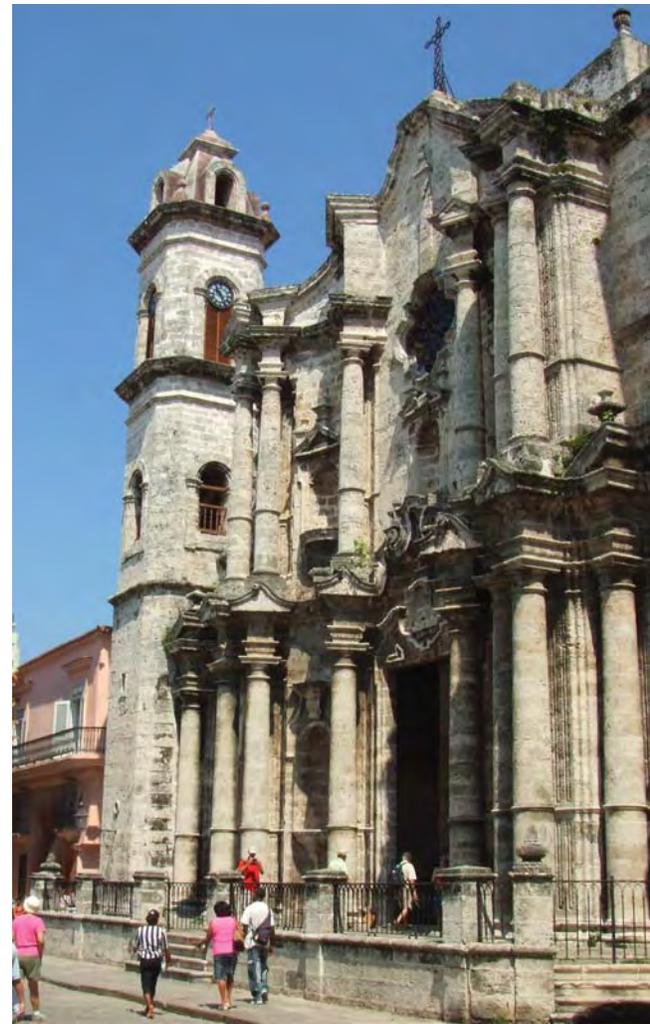
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system in some instances. See Hanri Mostert, *Lost Information and Competing Interests in Restoring Germany's Dispossessed Property – The Recent Decision of the German Federal Administrative Court*, 5:1 German L.J. (Jan. 2004), available at: <http://www.germanlawjournal.com/article.php?id=358>.

To rectify this unintended outcome, Germany passed the Investment Law, allowing for exceptions to the mandatory restitution rules and removing the “stay” on properties in question. This law created a preference for investment over restitution, allowed for economic development of properties, provided for monetary compensation to the claimant, and even permitted the government to sell the land even if a claim was pending if the sale would result in a public benefit. See David Southern, *Restitution or Compensation: The Property Question*, in *Transitional Justice* 643 (Neil J. Kritz, ed. 1995). The government amended the law again with the Impediments Removal Law, seeking to provide security for current and future property owners against restitution claims and clearly prefer compensation over restitution in an effort to spur further economic investment – which ultimately failed to materialize. By 1995, over half the claims had been settled.

The German experience offers important lessons for property claims settlement in Cuba, especially when compared to the Czech experience from the standpoint of public support. East Germans were not at all satisfied with the property claims settlement process that was undertaken in line with privatization because most ownership went to West Germans and the East Germans were left owning little. Restitution essentially created an elite landowning class and East Germans were not part of that class. Their expectations were high at Reunification, only to later be dashed when the realities of government economic policies in this area became apparent, despite being heavily subsidized by the West German government. By contrast, Czechs were told from the outset that the privatization and restitution policies it was undertaking would be difficult and they accepted this. Moreover, the Czech restitution policies explicitly favored the Czech citizens over claimants not residing in the country, including foreign claimants. The Czech public supported the government's efforts and very little dissatisfaction resulted. See Stack, *supra*, at 1241-43; M. Blacksell, K.M. Born & M. Bohlander, *Settlement of Property Claims in Former Eastern Germany*, 86:2 *Geographical Rev.* 198-215 (April 1996).

Like the West Germans, the Cuban-American exile community is seen by Cubans still in Cuba as a wealthy class of individuals who will come in and take all the best properties through their property claims and demand restitution. In other words, they are seen as a quite threatening group. The inequities of such an outcome would be obvious. Consequently, like the Czechs, Cubans still in Cuba must be made by the transitional government in Havana to feel secure and informed from the beginning exactly how these policies will affect them. Otherwise, public support will erode and thereby undermine the democratic support of the new government. It was no coincidence that resurgent communist and nationalist groups appeared in the formerly East German states as unrest spread throughout the period of privatization and restitution in the 1990s.



*Catedral de San Cristobal, Havana.*

### **III.(E) The East European Experience: Strategic Choices in Property Claims & Privatization**

As complex as the legal and procedural aspects of the Cuban-American property settlement issues are, they are embedded into a number of even more complex and broader strategic issues. These have implications for future Cuban-American relations, for Cuban economic revival and sustainable growth, and for the stability and success of any transition into more pluralistic, broadly accountable, and law-based governance (“democracy”) in Cuba. While scholarly and theoretically grounded knowledge of these issues is incomplete, the experiences of East and Central Europe in the post-Communist era provide a good foundation to understand what some of these issues might be.

#### **III.(E)(1) American Interests in Cuba**

While it is up to current and future American administrations to define specific U.S. policy toward Cuba, it is unlikely many would disagree that there are enduring American interests in Cuba. These are in a stable, free, democratic, lawful, and economically prosperous future for the island. Such a Cuba is one that is unlikely to pursue policies inconsistent with broader American and Western hemisphere interests in security, peace and prosperity. Insofar as these points are assumed, then the issue of property settlement between the two states is best understood not as a goal in itself but as a means for encouraging and sustaining the emergence of such patterns in Cuba. In this regard, the property settlement issue can be seen as an opportunity, not simply to appease American and Cuban-American claimants, but to dialogue, plan and cooperate to encourage and sustain democracy, law, and prosperity in Cuba. The way a claims tribunal deals with a multitude of settlement strategies and options can affect these outcomes. In so far as the claims settlement process is part of a broader process of privatization – as it was throughout East and Central Europe – it can also help set directions to avoid problems experienced in that broader process.

#### **III.(E)(2) Restitution & Compensation**

The most pressing issue for negotiations to resolve will be the balance between restitution and compensation in dealing with property claims settlement. As discussed in earlier sections of this chapter regarding East and Central Europe, there are many variations of each strategy, and those states pursued a mix of these. There are some fairly clear pros and cons and complications regarding each. In general, restitution strategies have the advantages of making a decisive break with a previous regime; clearly establishing the priority and validity of property rights; costing the state treasury less than paying compensation to previous owners would cost; providing a clear title for owners of restituted property, which may ease issues of property governance and encourage new investment; and stimulating markets in property and thereby leading to higher economic efficiency uses.

On the other hand, East and Central European experiences in restitution were that it rarely worked smoothly. States which were most committed to restitution, the Federal Republic of Germany in dealing with former East German property issues and the Czech and Slovak Republics, found themselves bogged down in far more complex claims than they could manage; dealing with dilapidated and run-down properties whose economic value was zero or negative; dealing with multiple claimants; dealing with properties that were serving broader social purposes than simple restitution would serve; dealing with more claims than there was property available (i.e. Bulgarian agricultural land claims exceeded available land substantially because of urbanization and other conversions of use); and dealing with issues of potential human dislocation (i.e. residential property) and social and political resistance (managers and workers likely dislocated from commercial and industrial properties: Germany and Poland).

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In these circumstances, simple restitution was difficult or impossible. Furthermore, the attempts to pursue it led to clouded titles, minimal or no maintenance in properties, and slowed reinvestment and thus sustained economic stagnation. These problems, as well as public fears of dislocation, in turn sapped public support for broad and sustained economic reform, and in some situations helped put former Communist leaders back in political power.

Compensation programs help avoid many of these problems. But, they are likely to be very costly, fail to make a decisive break from prior regimes and their policies and practices, open the question of who will eventually gain control of these properties (and thus the danger of former state-elites capturing them and/or their capture by worker-managerial coalitions with inadequate skills or incentives to manage efficiently), and generally are paid at only a small percentage of any value that might be placed on the property. Some argue that the last aspect of compensation strategies implicitly rewards expropriation and encourages it as a regime strategy in the future.

Nonetheless, compensation strategies are usually far easier to expedite than is restitution and can take into account the political interests of a transitional regime in avoiding alienating populations fearful of losing their homes or jobs. However, they probably slow economic rationalization and thus economic growth as well. Still, they also take into account the limited administrative and institutional skills usually available to transitional governments. For example, the German experiences here are instructive. The F.R.G. had immense administrative and institutional resources, but found itself unable to sustain the commitment it had made to restitution and had progressively to move toward compensation instead. It also alienated many former G.D.R. citizens as large numbers lost their jobs, and as noted above, what was perceived to be a largely West German property-owning class supplanted them.

Although voucher systems have been pursued largely in the context of privatization, the Czech experience with them is instructive in case Cuban property settlement is part of a larger privatization process, as it was throughout East and Central Europe. Ownership eventually became concentrated in a few large holding entities, owned in effect by a few banks and the Czech and Slovak governments. Scholars argue these were ineffective managerial entities, and that economic growth was slowed by this. In so far as property settlement in Cuba might be rolled into a larger privatization process, this is a problematic alternative.

Neither restitution nor compensation avoids serious problems. The lessons of the experiences of East and Central Europe suggest that a mix of the two is probably the least-bad alternative. Compensation will probably need to be paid for residential, small commercial, and agrarian properties to avoid social and political dislocation and discontent, and to avoid lengthy and costly legal deliberations. Large commercial or industrial enterprises, particularly where they are undercapitalized and in bad repair, may be better candidates for restitution. This could be in the economic interests of a transitional Cuban government seeking to avoid costly compensation obligations and to encourage increased capital in-flows. However, the interests of Cuba in refloating and reviving these enterprises (along with avoiding the costs of compensation) need to be balanced against the political costs of discharging redundant or unsuitable workers. These questions should be considered with the long-run goal of Cuba evolving into a stable democracy in mind, and the viability of any transitional regime in the interim. Nonetheless, one must not lose sight of the need for the Cuban economy to begin sustainable economic growth for a democratic regime to be viable over the long-run. In any event, the path we chart in Section V clearly prefers compensation and limits restitution to cases where it is requested by the claimant and will not negatively impact innocent third parties.

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### III.(E)(3) Policy & Institutional Issues

Insofar as simple compensation is paid for expropriated properties and Cuba does not undergo any broader privatization process, the question of broader policy, institutional, and legal changes does not arise. If, however, major American reinvestment is made in restored property or if Cuba begins the property settlement process as part of a broader privatization process which includes returning to the global economy and such institutions as the World Bank, the International Monetary Fund, the World Trade Organization, and the like, the broader questions of reforming the Cuban policy,

legal, and institutional structure will be on the table. For example, the willingness of American firms to accept restitution or to reinvest to make viable any such property is not clear unless a whole host of issues – such as revised macro- and micro-economic policy, and in particular property rights – are clarified. A broadened view of U.S. interests in a stable, democratic, and prosperous Cuba also brings up these issues, which are areas where the U.S. government may be able to offer assistance to a transitional Cuban government.

Economists generally agree that there are four general policy and institutional problems that must be dealt with before an economic transformation may be expected to succeed. First, macroeconomic stabilization is necessary. This entails strict budget and credit policy reformations to curb rising inflation, trade and payment deficits. Second, liberalization is essential. Liberalization refers to freeing up prices, interest rates and realistically devaluing currency price.

Initially a flexible managed float currency system is generally advised. Furthermore, barriers to trade, capital, services, technology, and idea flows must be eliminated along with opening up financial and labor markets. Third, privatization of the economy is required. This includes the development of a new private sector, reformation of management and ownership of the former state owned enterprises (SOEs) via methods of liquidation, restructuring, commercialization, and privatization of existing state owned enterprises, and establishment of clear property rights. Lastly, development of an institutional infrastructure that bolsters a market economy is imperative. This entails the generation of constitutional, legal, regulatory, banking, accounting, fiscal, and monetary frameworks and reforms. In addition, quick, successful economic transformation requires committed foreign aid such as finance, technology, skills, and knowledge. Specific foreign assistance can include provisions of debt relief, alleviation of drops in consumption, importing vital raw and industrial materials, humanitarian aid of food, clothing, medicine, and assistance with institutional and physical infrastructure. See Islam, Shafiqul and Mandelbaum, Michael. *Making Markets: Economic Transformation in Eastern Europe and the Post-Soviet States*. Council of Foreign Relations Press. New York (1993).

While economists are generally in agreement that these components are all necessary for successful economic transition, divergence occurs in the discussion of the dynamics of reform: the speed and pace a policy is implemented; sequencing, the order of implementation, and the intensity with which the policy is implemented; the extent to which the government interferes with market forces; and duration, the time it takes to implement reform policies. Some scholars suggest that when there is severe internal or external debt, macroeconomic stabilization must take first priority. See Stanley Fischer and Alan Gelb, “The Process of Socialist Economic Transformation.” *Journal of Economic Perspectives*, 5, 4, and Jeffery Sachs. “Western Financial Assistance and Russia’s Reforms.” *Making Markets: Economic Transformation in Eastern Europe and the Post-Soviet States*, 143-181, (Council of Foreign Relations Press, New York. 1993). Others suggest that privatization



*Antiquated buses serve as public transportation in Havana.*

of specific sectors, such as energy and agriculture, should take priority over stabilization, and privatization of large state enterprises should follow demonopolization and financial restructuring. See Begg, David and Portes, Richard *supra*, "Enterprise Debt and Economic Transformation." Centre for Economic Policy Research Discussion Paper, 695, London; Carlin, Wendy and Mayer, Collin. "Restructuring Enterprises in Eastern Europe." *Economic Policy*, 15 (October 1992).

Economists regard rapid and comprehensive change ("big bang") versus sequential and gradual change as the strategic alternatives for pursuing these tasks. Recent scholarship suggests in fact that the governments of emerging economies simply will not have the resources to pursue rapid and comprehensive change on all fronts. While this is still under debate, some scholars argue that there is no applicable method to privatize large SOEs, reform market structures, and certainly to develop new institutions as rapidly as macroeconomic stabilization and liberalization needs to occur. See Richard Portes *supra*, "From Central Planning to a Market Economy," in Islam Shafiqul, and Michael Mandelbaum. *Making Markets: Economic Transformation in Eastern Europe and the Post-Soviet States*, 16-49 (Council of Foreign Relations Press. New York. 1993). This view suggests that the gradualist method, in various forms, sizes, shapes, and speeds is the only realistic approach.

In Poland, a gradualist approach was used which resulted in speedy and forceful implementation of stabilization and liberalization, but little progress was made in the institutional and privatization components. Czechoslovakia pursued a "big-bang" model that implemented rapid and intense stabilization, liberalization, and privatization of small and large state assets. However, the privatization program has not been very 'big' or effective. See Islam and Mandelbaum *supra*. Martin Kramer states that proponents of shock therapy contend that the gradualist approach may be the safer route in the short term; however, gradualism will prove to be more costly in the long run when drastic measures are finally required for further reforms. See Mark Kramer, *Eastern Europe Goes to Market*. *Foreign Policy*, 86, 134-157 (Spring 1992).

Ideally, shock therapy would implement a full range of reforms including: macroeconomic stabilization, price liberalization, currency convertibility, trade and banking reformation, labor deregulation, privatization, and legal and social reformation, simultaneously and as quickly as possible. Nonetheless, with the experience of economic transition in Eastern Europe and Post-Soviet states, it is apparent a fully comprehensive package is nearly impossible to execute all at once and in a short period of time. For the most part, only in Eastern Germany has the aggressive approach worked, and there largely due to the special case of political and economic reunification with West Germany.

Thus, many East and Central European states have found it necessary to sequence reforms as opposed to pursuing all of them at once. Even accepting this strategy, it is often difficult to assess the proper sequencing before implementation must begin, especially when some measures require others in order to be fully effective. Authorities in Poland, Czechoslovakia, and Hungary, for example, began to concentrate on macroeconomic stabilization first and foremost. However, from the experiences of the transitioning economies, it can be seen that the austerity required of the initial stages of shock therapy can potentially produce mass public opposition and dissonance amongst the elite, complicating economic transition even more and possibly delaying further needed reforms. The longer the privatization process is delayed, furthermore, the harder it is to implement. This perspective argues that post-Communist states should pursue privatization early and rapidly. The obstacles Poland faced, with growing discontent of the public and wariness of further reforms, including privatization due to declines of living standards for the first two years of shock therapy, would argue for the need to undertake privatization immediately and quickly. See Kramer *supra*.

The importance of getting right the broader institutional dimension cannot be overstated. Political and economic systems are contingent on the institutional frameworks present in any

society. Institutions are the rules of a game for a society. They are designed by humans to integrate constraints which shape interactions among actors, thus constructing incentives in human exchange to lead by preferred outcomes. Institutions are highly beneficial because they reduce uncertainty by providing structure to interactions. They define and constrain the set of choices available. Thus, the institutions in place generate an incentive structure for a society. Political and economic institutions are the underlying determinants of the performance of an economic system.

The institutional and legal framework of the state-owned, central planned economy supported that system. They will not support a market-based, privately owned economy without institutions appropriate to it in place. Institutions affect the performance of an economy through their influence on the cost and benefits of exchange and production. The wrong institutions will destroy – or abort before it begins functioning – a market-oriented system.

One of the most significant problems with the recommendations of the neo-liberal paradigm for transitioning states was its lack of concern with the necessity to begin reforms of institutions, specifically the legal and regulatory systems, very early in the process. Optimal institutions do not spontaneously arise. They require construction and development. See Douglass C. North, *Institutions, Institutional Change and Economic Performance: Political Economy of Institutions and Decisions* (New York, Cambridge University Press 1990). Neoclassical theory, which was used in advising post-Soviet economic transition, with special attention to Russia, does not provide the tools necessary to prescribe policies to induce successful economic transitioning and development because the theory is concerned with how markets operate, not how they are created.

Since market economies are not self-forming mechanisms, but instead are set of constructed institutions and incentives, the challenge of the collapse of Communism, and thus the command market was to establish an effective set of institutions and incentives to produce a market economy while taking into account the preexisting conditions. Since each state's institutions are in some measure path-dependent and affected by norms, values, and understandings unique to it, a single "transfer" of institutions from one state to another is unlikely to work very well. Thus, a learning process unique to Cuba must be expected as economic institutions are reformed, regardless of whatever transitional scenario Cuba might experience.

A transitioning Cuban government will be in dire need of both symbolic and financial support from the West throughout these processes. From where this financial support should be derived remains a question. Some insist the United States should be the primary financial donor and facilitator of Cuba's transition due to the geopolitical relation of the two countries, the U.S. role in the Western Hemisphere, and the desirability of a close economic relationship between the two countries. Others state because of the past relationship of the U.S. and Cuba, the U.S. should not be a primary financial supporter or even involved in Cuba's economic transition whatsoever. Instead, the mass amount of aid and loans should come from international non-governmental organizations and through private foreign investment See S. Diaz-Briquets, "Role of the United States and International Lending Institutions in Cuba's Transition," *Studies in Comparative International Development*, 34: 73-86. Nonetheless, wherever funds and aid derive, a transitioning Cuban state will need massive amounts of resources to fully implement reforms on all levels.

### **III.(E)(4) Managing Elite Advantages in Transitional Economies**

Just as Cuba is now ruled by elites drawn from the military and the Communist Party, any economic and democratic transition will lead to the emergence of its own elite class. The strategic question to ponder is not whether there will be an elite class – there will be one – but whether those elites will be seen as legitimate to Cubans generally; if they will be owners

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and managers who will act to generate and sustain broadly based economic growth; and if they will act to encourage and sustain democracy in Cuba. The question is critical, complex, and the answers are incompletely understood. However, the post-Communist experiences of East and Central Europe offer some insights on key issues and situations to avoid.

Walder argues that during economic transitions, opportunities for elites are abundant. Who gets these opportunities and how extravagant they are depends on barriers to asset appropriation, which are affected by the magnitude, pace, and type of privatization, and concentration of assets. Movement towards a market economy profoundly affects mobility and stratification, generating an opening for elite enrichment. Since most, if not all, capital, real estate, and natural resources are under central command and since incumbent elites usually manage state assets at the outset of an economic transition, there is great advantage for these elites. See Walder, A., G. "Elite Opportunity in Transitional Economies," *American Sociological Review*, 68(6): 899-916 (December 2003).

Policy decisions and regulatory processes will affect asset acquisition by elites. The pace of privatization can play a key role in elite opportunism. Policies that defer privatization generally generate barriers to asset confiscation. Only if effective regulatory prohibitions are in place can privatization precede rapidly without major problems of asset appropriation. During extensive regime transformation, conspicuous and transparent rules are necessary to transfer assets and property into non-elite private hands. These circumstances can force incumbent elites out of their positions before they can appropriate state assets. Furthermore, a well regulated, organized, and monitored privatization process will help to prevent elite opportunities as well.

Restraints on asset acquisition are weak when a ruling Communist party remains largely intact and/or rules under a new front after abandoning its commitment to central planning and state ownership of property. Many of the newly independent post Soviet republics suffered from this, as they had little internal opposition or regime change when they broke from the Soviet Union. This allowed for the rampant transfer of state assets to regime officials, their associates, and families. Moreover, when a state lacks concrete barriers to prevent control by insiders and privatizes rapidly, extensive asset appropriation can occur. Incumbent managers and officials are able to retain their positions as they privatize state assets, emerging as the executives of newly privatized enterprises. Also, incumbent managers and officials may be able directly to assume ownership of massive amounts of privatized state assets, generating a private business oligarchy. The oligarchy has also tended to move its newly acquired assets abroad to prevent subsequent leaders from recovering them.

Concentration and asset form will affect asset appropriation as well. The greater the concentration of assets in an economy, the greater the opportunity for elite enrichment. At the inception of economic transition, incumbent elites are in control of state assets and the potential benefits and opportunities to them are extensive. However, an economy which has more dispersed public assets creates fewer chances for asset appropriation. Asset configuration can impact elite opportunities in a similar fashion. Liquid assets are much more readily acquired than tangible assets because the elite have vast and exclusive access to financial instruments, price manipulation, international negotiation, and information. Liquid asset transfers are difficult to monitor, while tangible asset transfers such as land, buildings, products are easier to constrain and therefore more difficult for elite to take advantage.

The extent of regime change and the policy and regulatory constraints of asset appropriation varied across the transitioning economies of Eastern Europe and post-Soviet states, and produced varying results. Walder breaks the transition economies of former Communist regimes into four types. See Walder *supra*.

In Type One economies, Communist regimes collapse at the beginning of a broad regime transition. Ruling elites lose power after their parties are defeated in early elections. The state

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asset privatization was highly regulated and monitored placing limits on asset appropriation by former Communist elite. The Czech Republic, Estonia, Hungary, and Poland fall into this economic type. Under these circumstances, there are high rates of elite leadership turnover in political and economic institutions.

Type Two economies have fairly high restraints on asset appropriation as well, but due to different rationale. These types of economies have very little regime change. Old Communist elites remain in their positions and economic regulations tend to be weak. Asset acquisition by elites does occur, but in a limited extent due to a very slow paced privatization process. Countries such as Belarus, Tajikistan, and Turkmenistan have experienced this type of economic transition. Under this system, there are low rates of elite turnover. Elites maintain positions and use them to amplify their incomes. But, limits on privatization delay the elite from procuring new property and assets.

In Type Three transition economies, extensive regime change was encountered when the Communist regime collapsed and competitive elections quickly commenced. Nevertheless, despite substantial political and institutional change, constraints on asset appropriation were lacking due to a period of regime instability and poorly regulated privatization. These circumstances allowed incumbent elites numerous opportunities to sustain their power over large concentrations of state assets and property as they are privatized. Russia is a prime example of this type. Under these circumstances, there are high rates of turnover of the political elite and vast opportunities for asset obtainment.

In Type Four economies there was relatively little regime alteration. Generally, the Communist regimes did not breakdown. While these elites did split from the former U.S.S.R., they continued to rule (usually as a dictatorship) while relinquishing commitments to state ownership and central command economies. Economic transition proceeded under the auspices of the former Communist elite, which was still in place. The elite were not restrained by effective regulations and asset acquisition was rampant among them. Kazakhstan, Kyrgyzstan, and Uzbekistan have experienced these circumstances. This transitional economy type allows for low rates of elite turnover. Furthermore, there was ample opportunity for the elite to acquire state assets and create a new propertied and corporate elite.

How a Cuban transition might occur cannot be known in advance, as Section II of this Report makes clear. However, in so far as it is an orderly one, and at the time this Report was prepared, the Fidel Castro – Raúl Castro succession process certainly suggested ample regime resiliency, this succession is one that leads to the greatest capture of resources by the elites of the regime.

### **III.(E)(5) Encouraging Effective Governance of Privatized Enterprises**

Corporate governance structure determines to whom the enterprise is accountable and the extent to which they can establish incentives and disincentives for its performance. If it is accepted that generating economic growth is the primary function of these enterprises, economists generally agree that several key governance issues dealing with the structure of ownership need to be addressed. Private v. State ownership: At its heart, the major economic rationale to privatize formerly state-held enterprises is to deal with problems of ineffective governance as well as poor market structures associated with state ownership. See Saul Estrin, “Competition and Corporate Governance in Transition,” *Journal of Economic Perspectives*, 16(1): 101-124 (Winter 2002). State ownership often has led to non-economic objectives, such as satisfying state leaders’ political objectives. These have included maintaining high employment, holding prices below average costs, locating enterprises in economically depressed regions, and the like. These all discourage economic efficiency. Also, state ownership has been found to be a poor way of resolving thorny principal-agent issues, such as the ability of owners to be sure managers and workers do not loaf on the job, appropriate profits, or consume capital. Because ownership and control are in effect separated in most large, modern corporations

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(including state-owned corporations), managers and workers have opportunities to pursue rents to satisfy their own priorities. These include job security, high pay, fringe benefits, perks, and the like.

Controlling such tendencies, which erode profits and efficiency, is a chronic challenge of enterprise governance. Economists generally agree that government ownership is less effective than private ownership in dealing with these issues, as government budget constraints are often soft because the taxpayers will ultimately foot the bill, and state-owned enterprises are often in monopoly/monophony situations. See Robert H. Bates, *Markets and States in Tropical Africa: The Political Basis of Agricultural Policies*, (University of California Press: Berkeley, CA 1981). Private ownership, which is seen as subject to the scrutiny of capital and equity markets and the hard budget constraints of potential bankruptcy, has stronger incentives and tools to control rent-seeking behavior by managers and workers. The scrutiny of these markets on management performance affects share prices, which helps owners evaluate and discipline managers See Estrin *supra*. However, not all private enterprise governance regimes are equally effective at this.

Privatization strategies among the transitioning economies of East and Central Europe varied in the extent to which new owners tended to be external or internal to a given enterprise, the latter through management and/or employee buy outs. Hungary, Germany, and the Czech and Slovak Republics pursued strategies that led generally to external ownership. Poland, Bulgaria, Russia, and Romania pursued policies that led to insider ownership See Estrin *supra*.

The importance of this distinction is that most of the literature on the subject argues that internal ownership raises new principal-agent issues for potential external funders, as well as broader issues of economic efficiency and performance. External funders – who are often needed to recapitalize these enterprises – are exposed to the dangers of opportunistic behavior by managers and/or employees, for example by diverting surplus from profits to wages and managerial compensation See Estrin, 1996. Also, high levels of insider ownership in emerging economies are usually ineffective due to their tendency for risk aversion and lack of free market experience. Manager and employee ownership can also potentially generate problems due to incompetence. Thus, in emerging economies, privatized firms with insider ownership structures will have poorer performance than privatized firms with outsider ownership structures. See R. Dharwadkar, G. George, P. Brandes, “Privatization in Emerging Economies: An Agency Theory Perspective,” *The Academy of Management Review*, 25(3): 650-669 (July 2000).

However, even external ownership is not always a solution. When, for example, in the Czech and Slovak Republics a voucher method was pursued to achieve mass privatization, control of “privatized” firms usually ended up under patterns of highly dispersed ownership, which were then organized into Investment Privatization Funds (IPFs), themselves owned by a few large banks and the state. These created highly fragmented ownership structures which, several scholars argue, has led to weak and ineffective governance. As a result the Czech and Slovak voucher system inadvertently slowed down the enterprise restructuring process. See Petr Pavlinek, “Domestic Privatisation and Its Effects on Industrial Enterprises in East-Central Europe: Evidence from the Czech Motor Component Industry,” *Europe-Asia Studies*, 54: 7, 1127-1150 (November 2002); M. A. Orenstein, *Out of the Red: Building Capitalism and Democracy in Postcommunist Europe*, (University of Michigan Press: Ann Arbor, MI 2001). Old enterprise managers, who usually remained in charge of the newly privatized firms, were not forced to implement any of the necessary restructuring successfully to compete in a market economy because of the lack of ownership consolidation. Of the enterprises where consolidation of ownership did occur, typically IPFs were supplanted by private industrial groups familiar to the specific industry and its operational process, and appointed new CEOs to carry out restructuring See Pavlinek, 2002.

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Supporting this analysis, Dharwadkar and Brandes argue that only a dominant, majority ownership structured enterprise can generate effective governance. First, as distribution of shareholders increases, collective action becomes increasingly more expensive and less attainable due to higher coordination costs. Moreover, availability of information is poor due to a scarcity of disclosure norms and the nonexistence of intermediaries to garner information regarding firm performance. Thus, in emerging economies privatized enterprises with prevailing outsider ownership will function superior to firms with distributed outsider ownership *See* Dharwadkar and Brandes *supra*.

Dharwadkar and Brandes argue, furthermore, that in emerging economies, privatized enterprises consisting of dominant foreign ownership structures will effectively curtail agency problems and attain higher performance standards better than privatized enterprises with principally local individual or local institutional ownership. The latter structures are more likely to produce reduced minority shareholder activities, effectively giving greater control to few owners through a highly pyramidal ownership arrangement, while the former will most likely introduce professional and effective management *See* Dharwadkar and Brandes *supra*.

While theory is relatively agreed on these questions, not a lot of empirical work has been done to test these propositions. Estrin and Stone, drawing on World Bank data, did a preliminary empirical assessment of these predictions in 1996, with ambiguous results. What he called “de novo” private firms exhibited the most innovation and economic dynamism. These were firms that were new operations or spin-offs from former SOEs. Overall, all forms of privatized firms operated better than did state owned firms, but there were no clear distinctions among “inside-” and “outside-owned” former SOEs, at least in data from the mid-1990s. These patterns could be because it was still early in the evolution of transitional markets, or because firms available for outsider purchases were often in far worse shape than those retained by insiders. *See* Saul Estrin and Robert Stone, “A Taxonomy of Mass Privatization in Transitioning Economies,” in Ira Lieberman, Nestor Stilson and Raj Desai, *Studies of Economic Transformation* (Washington D.C.: World Bank, 23: 173-176 1997). Subsequent empirical research has shown a strong positive association between private ownership and firm performance. *See* Manuella Angelucci, Saul Estrin, Jozef Konings and Zbigniew Zolkiewski, “The Effect of Ownership and Competitive Pressure on Firm Performance in Transition Countries: Micro Evidence from Bulgaria, Romania, and Poland,” (London: CEPR, Discussion paper 2985 2002). Furthermore, research by Frydman, Hessel and Rapaczynski found strong correlations between outside ownership and improved economic performance. *See* Roman Frydman, Mark Hessel and Andrej Rapaczynski, “Why Ownership Matters? Entrepreneurship and the Restructuring of Enterprises in Central Europe,” working paper, (New York University: Economic Department 2000).

These analyses expose a number of issues for a Cuban government beginning the process of privatization. They suggest that privatization strategies have important impacts on the governance of enterprises, and that these will affect the likelihood of their restructuring, operating efficiently, and returning Cuba to economic growth. Ownership that is concentrated enough to overcome fragmentation and collective action problems, and thereby deal with persistent principal-agent issues in corporate management, seems generally to be preferable. Similarly, outside ownership is more likely on theoretical grounds and emerging empirical evidence to be preferable to inside ownership. Finally, in a Cuba which is extremely poor, lacks the indigenous capital to privatize and recapitalize its major commercial and industrial enterprises, the example of Hungary which solved similar problems and avoided many governance issues by welcoming external capital, deserves serious attention *See* Estrin *supra*. Further research by Angelucci, et. al., has reinforced these findings regarding foreign ownership with data from Bulgaria and Poland *See* Angelucci, Estrin, Konings and Zolkiewski *supra*.

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Thus there are numerous strategic decisions which must be made if Cuba embarks on property resettlement negotiations with the United States. If these negotiations are part of and get wrapped-up in a broader movement shifting away from a socialist, centrally-planned economy, even more issues arise. The experiences of East and Central Europe are informative, though certainly less than conclusive for many of these questions.

### III.(F) Trends in Other States

Other states are engaged in various levels of policy orientation affecting private property rights that do not offer useful comparisons. Indeed, some of these schemes undertaken by states recently would create even more property claims in the future. Following is a short discussion of some trends involving private property rights in other states.

#### III.(F)(1) Libyan Nationalizations

Libya nationalized its oil concessions in the 1970s, as did many oil-producing states at that time, and required that its National Oil Corporation hold a majority stake in participation agreements with foreign corporations. The international dispute that offers some instruction for Cuban settlement concerned three different nationalizations involving non-Libyan oil companies that were parties to oil concession contracts with the Libyan government.

Libya had invited the companies to help it develop its oil resources and had made various “stabilization” promises designed to give the companies sufficient assurance that their investments would be protected. The concessions provided for international arbitration in the event of breach. The choice-of-law clause in paragraph 28(7) of the concessions provided: “This Concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such principles then by and in accordance with general principles of law as may have been applied by international tribunals.” This clause was the subject of some dispute in the arbitrations, but was interpreted to require primary resort to those portions of Libyan law that were in common with international law and only failing those to more general principles.

Under this formulation, it might be possible for the Court or Tribunal to dovetail international law with Cuban law and possibly allow for greater respect for Cuban law without running the risk of sacrificing the basic rights of claimants. When Libya unilaterally nationalized the concession rights of the foreign companies, both the U.S. and Great Britain protested that to do so discriminatorily (in both cases it was for political objectives of the Qaddafi government relative to the U.S. and the U.K.) and without compensation was a clear violation of international law.

Another issue of some significance was the choice of procedural law for the arbitration in terms of maximizing the chances of enforcement of the awards under the UN Convention. The choice of some “a-national procedural rules,” namely UNCITRAL, for the Cuba-U.S. Tribunal probably does the most to ensure fair treatment on both sides.

*Restitutio in Integrum* versus damages as a remedy was also available as a remedy in the Libyan situation. *Restitutio in integrum* is restoration of the claimant to the position he would have been in had there been no breach of the underlying obligation. In the common law, it



*A cart with produce heads to market.*

is either specific performance of the contract, or the alternative is damages. Two of the three arbitrators (each of the three arbitrations were sole arbitrator proceedings) shied away from restitution as a remedy, primarily on practical grounds. Restitution in that case would have been the preferred remedy, with damages being only secondary; to have ordered restitution would have forced Libya to commit another violation of international law had it decided not to honor the award. See R. von Mehren & N. Kourides, *International Arbitration between States and Private Parties: The Libyan Nationalization*, 75 Am. J. Int'l L. 476 (1981).

The arbitrations all settled for significant cash settlements once enforcement proceedings were begun; consequently, the lump sum settlement option came into play at the end, as it may do in the Cuban property claims settlement process. Restitution would be available in the Cuban context, but not as the preferred remedy. To require it where applicable in the real property situation, especially with regard to residential holding, would unwittingly prey on the worst fears of the Cubans. With respect to commercial properties, restitution may be proper.

### **III.(F)(2) Chinese Property Rights Evolution**

China's efforts to join the World Trade Organization, together with the liberalization of its economic policies during the 1990s have led to Beijing's abandonment of state-controlled property as a central policy pillar for the communist government. In 2004, the People's Congress voted to endorse private property for the first time since the 1949 revolution with the words, "a citizen's lawful private property is inviolable."

By 2007, China had enacted clearer, more enforceable property rights for its citizens, which has led to a Russian-style land grab. Many poor Chinese farmers have been left landless as their properties are expropriated for housing and factory construction. Chinese businessmen, who have grown rich under China's liberalized economic policies of the past decade, are now using that wealth to buy up more opportunities. The uneven distribution of privatization is following a path similar to that experienced during the Yeltsin years in post-Soviet Russia. Government officials, however, are chalking this up to the price of modernization. See *Property Rights in China – Caught Between Right and Left, Town and Country*, Economist (March 10, 2007), at 23.

The massive 40-page, 247-article law attempts to strike a balance between state and private interests by defining each and further defining private wealth – including income, houses, investments and personal assets. The modifier "lawful" is used to refer to property throughout the law, which could be the method of state regulation of property control in the implementation phase. See Joseph Kahn, *China Approves Property Law, Strengthening its Middle Class*, New York Times (March 16, 2007) at A1.

Re-investing the public with private property rights must eventually be undertaken by a post-Castro transitional government in Cuba if that country is going to compete in the globalized economy of the 21<sup>st</sup> Century. Even communist China has recognized this reality. How that is accomplished in an equitable way is an open question. The military control of Cuba's economy makes the matter quite problematic.

### **III.(F)(3) Venezuelan Collectivization**

Venezuela is actively going the opposite direction of China. Seeking to undermine what he considers to be capitalism's negative influence in his country, Venezuela's president, Hugo Chavez, announced in March 2007 that collectivization of some property rights would be included in his government's land reforms and state-supported cooperatives would include profit-sharing among workers. The president's goal is to replace capitalist ideas with socialist principles.

The legal framework for collectivization of property will be established under a forthcoming

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constitutional reform submitted by a committee appointed by the president to prepare a blueprint for the pending reforms, which will be put to a vote in a referendum. Chavez was granted decree authority by the Venezuelan legislature earlier in 2007. This would build upon the President's prior land reform plan, in which large ranches and farms spanning more than 740,000 acres are expropriated and the lands deemed idle are redistributed to the poor under a nationwide agrarian reform. Since that reform began five years ago, 4.6 million acres of land have been redistributed that were classified as "unproductive" or lacked property documents dating back to 1847.

Despite these reforms, the agricultural sector has not been revived and it continues to fall short of meeting the food demands of the country's population. See A.P., *Venezuela's Chavez Announces Plans for 'Collective Property' under Shift Towards Socialism*, International Herald-Tribune, March 25, 2007. Chavez also undertook nationalizations of the electricity companies and the telecommunications industry in Venezuela in 2007. These nationalizations, however, were in the form of purchases as opposed to uncompensated takings. The telecommunications deal involved an outright purchase of Verizon's 28.5% stake in CANTV for \$572 million and the electric companies deal involved a purchase of AES's 82% stake in Electricidad de Caracas for \$739 million. See Gregory Wilpert, *Venezuela Decrees Nationalization of Last Foreign Controlled Oil Fields*, Venezuela Analysis (Feb. 27, 2007), available at: <http://www.venezuelanalysis.com/news.php?newsno=2227>.

Venezuela nationalized its petroleum industry in 1975, only to begin re-opening it in the mid-1990s. However, this was reversed by Chavez, who demanded that the state retain a 60% stake in all oil concessions: "We are recovering property and management in these strategic areas. The privatization of oil is over in Venezuela. This was the last area that we hadn't recovered. This is the true nationalization of the oil. The oil belongs to all Venezuelans." Foreign oil companies had invested \$17 billion in developing the fields. See Wilpert; Neal Davis, *Latin American Petroleum Privatization: Venezuela* in U.S. Department of Energy, *Privatization and the Globalization of Energy Markets* (W. Calvin Kilgore, ed. 2000) available at: <http://www.eia.doe.gov/emeu/pgem/>.

To the extent that private property owners within Venezuela and outside the country feel that they were under-compensated or not compensated for the taking of their property, Venezuela will likely face a similar claims settlement situation down the road when Chavez is gone.

### **III.(F)(4) Zimbabwean Farm Confiscation**

In Zimbabwe, both under British rule as Rhodesia and later as an independent state, agriculture was the basis of the economy, supplying 60% of the inputs into manufacturing, feeding the population entirely, and exporting the rest. Yet the robust manufacturing sector also made textiles, cement, chemicals, steel and wood products, and a healthy tourism industry also supported an average GDP growth of 4.3%. However, the racial disparity in the farming sector was more than apparent. The productive white-owned commercial farms had engineered good relations with the banking community which, in turn, leveraged the building of thousands of dams to ensure against Africa's drought conditions. Mostly black communal farmers ran unproductive operations that were devastated when droughts occurred, breeding some resentment.

Robert Mugabe, president since 1980, made what he thought would be a politically popular move when he decided to seize the white-owned commercial farms for redistribution to black farmers in 2000. However, he misread the mood of the population, which was actually against up-ending the country's property rights scheme. As Professor Richardson notes:

In early 2000, Mugabe was handed a confidential memo from the Reserve Bank of Zimbabwe, the country's central bank. The memo predicted that

going forward with farmland seizures would result in a pullout of foreign investment, defaults on farm bank loans, and a massive decline in agricultural production. The memo would prove to be staggeringly prescient. Unfortunately, Mugabe ignored it. Between 2000 and 2003, his government went ahead and authorized the seizure of nearly all the 4,500 commercial farms. The official goal was to divide the farms into hundreds of thousands of small plots for traditional black farmers. In practice, most plots ended up in the hands of Mugabe's political supporters and government officials, whose knowledge of farming was meager. See Craig J. Richardson, *How the Loss of Property Rights Caused Zimbabwe's Collapse*, 4 CATO Institute Economic Development Bulletin (Nov. 4, 2005), available at: <http://www.cato.org/pubs/edb/edb4.html>.

The collapse of Zimbabwe's economy was swift. By 2003, inflation had jumped to 500% and the currency had lost 99% of its value. The government ceased enforcing titles to land, thereby eliminating collateral which caused the collapse of banks throughout the country and those that did not fold refused credit to farmers. The loss in commercial farmland value between 2000 and 2001 was \$5.3 billion.

Since most of the dispossessed were Zimbabwean white farmers, it remains to be seen whether a property claims settlement issue will emerge on Zimbabwe's political horizon after the departure of President Mugabe. If so, it will likely undertake an internal process similar to that undertaken by many Eastern European states after the fall of communism. For a discussion of the politics of land reform in Zimbabwe, see Blair Rutherford, *The Rough Contours of Land in Zimbabwe*, 29 Fletcher Forum of World Affairs 103 (Summer 2005).

### III.(G) Lump Sum Settlement Options

Settlement of foreign and domestic claims stemming from property confiscation by way to lump sum payment has a long history. Perhaps the most famous of these was undertaken by President Franklin D. Roosevelt by executive agreement with the foreign minister of the Soviet Union in 1933 – known as the Litvinov Assignment. In exchange for the U.S. dropping the claims of citizens whose Tsarist-era investment property had been confiscated by nationalizations of the communist regime in Moscow and political recognition of the U.S.S.R., the Soviets released funds in New York banks for distribution as monetary compensation. See Richard B. Lillich & Burns H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Univ. of Virginia Press; 2 vols. 1975).

Such agreements offer a possible solution to the claims faced by Cuba after a transitional democratic government assumes power. Cuba has settled claims by foreign government in the past and could conceivably settle certain segments of U.S. claims that will be lodged against it for Castro-era expropriations.

#### III.(G)(1) Past Agreements

Precise information about Cuba's property claim settlements with countries other than the United States is scarce. However, some information is available about Cuba's settlement of such claims with Canada, France, Spain, and Switzerland. All of these settlement agreements were reached in the 1960s and 1970s, although Cuba did not even begin to consider such action until seven years after the revolution. Some generalizations regarding the nature and form of the agreements are helpful to note. These claimant countries settled their property confiscation claims with Cuba for only a fraction of

the claims' actual value. See Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriations Claims Against Cuba*, 16 U. Pa. J. Int'l Bus. L. 217 (1995). That said, past negotiations with the Cuban government may have resulted in average settlement awards of between 15 and 20 cents on the dollar. See University of Florida, *Resolving Property Claims in a Post-Socialist Cuba*, n.25, available at: [http://www.law.ufl.edu/cgr/publications/resolving\\_property.pdf](http://www.law.ufl.edu/cgr/publications/resolving_property.pdf).

Aside from the fractional compensation amounts of past agreements, there are other general characteristics of these agreements. First, negotiations took place over a long period. Second, none of the agreements adhered to the "prompt, adequate and effective" standard of the Hull Formula for compensation of confiscated foreign investments. Third, payments by the Cuban government were in the form of installments rather than one-time payments. Fourth, Cuba made payments either in the currency of the country representing the claimants or in the form of trade goods. Finally, negotiations involved only the Cuban government and the foreign government representing the claimants (individual claimants could not participate). See Matias F. Travieso-Diaz, *Cuba Transition Project: Alternative Recommendations for Dealing With Confiscated Property in Post-Castro Cuba*, 62 (2002), available at: [http://ctp.iccas.miami.edu/Research\\_Studies/Expropriated%20Properties.pdf](http://ctp.iccas.miami.edu/Research_Studies/Expropriated%20Properties.pdf).

It is not possible to determine the exact percentage of the total value of claims each settlement represents. The agreements with Canada, Spain, Switzerland, and France almost certainly stemmed from the desire to develop or maintain trade relationships rather than recognition on the part of Cuba that a legal right to compensation existed. There are no indications that Cuba has not complied with the terms of the agreements it has entered. The relatively small sums involved and the better economic situation Cuba was in at the time the agreements were executed makes it likely Cuba was able to eventually meet its obligations.

### **III.(G)(1)(a) Canada**

Cuba did not begin negotiating a property claims settlement agreement with Canada until 1973. The delay in negotiations may have been because Canadian trade with Cuba did not decrease significantly after the revolution, and therefore Cuba did not have an incentive to negotiate an immediate settlement to maintain trade levels. Cuba's willingness to eventually enter negotiations was likely due to Canada's relatively small amount of investment in Cuba, which increased the feasibility of settlement with Canada as opposed to nations with greater investment levels.

Canada's total investment in Cuba was estimated at only \$9.4 million in 1956. Canadian Banks owned \$8.8 million of that total investment value. Two Canadian Banks, the Bank of Nova Scotia and the Royal Bank of Canada, concluded individual settlements with the Cuban government near the time their properties were confiscated and before the Canadian government negotiated any lump sum settlement. The eventual settlement amount and terms that resulted from the initiation of the 1973 negotiations could not be located. See Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations Other Than the United States*, 5 Law. Am. 457 (1973).

### **III.(G)(1)(b) France**

Cuba signed settlement agreements with Spain, Switzerland, and France in March of 1967 within a span of 14 days. France negotiated a lump sum payment in satisfaction of all French property confiscation claims. The agreement with France involved no supplemental trade agreement, as did the Swiss-Cuban settlement agreement. The two countries reached an agreement through a process that involved mutual examination of potential French claims.

Under the French-Cuban agreement, Cuba agreed to pay 10,861,532 francs over about five years

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in 12 relatively equal installments. (The 10,861,532 francs equaled about USD 2,170,000 at 1967 values). The agreement obligated the *Banco Nacional de Cuba* to make the payments “by transfer to the credit of a special account opened in the Bank of France.” France was to release Cuba completely from further claims on full payment. In addition, France was given exclusive jurisdiction to distribute the paid funds and was required to provide a guarantee against further “claims of French nationals.” Finally, future disagreements regarding the settlement process were to be resolved by free information exchange and mutual negotiations. In the year following the agreement, Cuba’s trade volume with France more than doubled the trade volume of the previous year. *See* Gordon, *supra*.

### III.(G)(1)(c) Spain

Cuba reached a property claims settlement agreement with Spain in 1967, but one of the conditions of the agreement was that the terms would remain confidential. One source speculates Cuba wanted to keep the agreement terms confidential because the settlement amount was larger than Cuban negotiators had hoped or anticipated. The relatively unfavorable terms were likely a result of Cuba’s lack of bargaining power against Spain—Spain was Cuba’s largest non-socialist trading partner in the years following the revolution. *See* Gordon, *supra*.

The terms of the Spanish-Cuban agreement may have been eventually released. One source has revealed that Spanish claims were settled for around \$40 million. The total value of Spanish claims was estimated at about \$350 million. Despite the fractional settlement amount, Cuba did not fulfill its payment obligations under the agreement until 1994. *See* Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriations Claims Against Cuba*, 16 U. Pa. J. Int’l Bus. L. 217, n.15 (1995).

### III.(G)(1)(d) Switzerland

The Swiss government negotiated a settlement agreement in satisfaction of the claims of three Swiss-owned food processing businesses in 1967. Under the agreement, Cuba agreed to pay Switzerland 18,039,000 Swiss francs (18,039,000 Swiss francs totaled about USD 4,140,000 at 1967 values). This settled claims for expropriation, unpaid fees owed to the companies, and illegal use of company brand names following confiscation.

Cuba’s obligation was to make quarterly payments to Switzerland over eight years. Total yearly payments of 1,752,360 Swiss francs were due for the first three years, with total yearly payments of 2,555,525 Swiss francs due each of the last five years of the agreement. Under the agreement terms, if Switzerland reached further settlements with Cuba encompassing other claims, the quarterly payments would increase to accommodate the additional amounts. As part of the settlement, Switzerland agreed to purchase 40,000 tons of sugar annually from Cuba for eight years. One-third of Swiss payments for the sugar could be used to satisfy Cuba’s payment obligations under the settlement. If Cuba delayed in delivery of the sugar, the contract obligations were to extend beyond eight years until all payments were completed.

Professor Gordon characterized the Swiss agreement as “realistic” based on the following assessment:

[The agreement] amounts essentially to a government negotiated settlement for three private firms based primarily on the capacity of those firms, rather than the Swiss government, to absorb Cuban sugar and other agricultural commodities of a sufficient quantity so that Cuba would be allowed to obtain needed foreign exchange, while returning only a portion of that exchange as indemnification. *See* Gordon, *supra*.

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Regarding the three food processing companies in question, the Swiss predetermined the value of their confiscation claims, and the Cuban government accepted the Swiss valuation without objection. For any later submitted claims, however, valuation amounts were to be determined mutually after submission of appropriate documents to the Cuban government. The Swiss claimants likely received a greater proportion of the total assessed claim value than if they had demanded only cash compensation. Swiss government officials referred to the negotiations “as ‘difficult’ and occasionally ‘bitter’ discussions.” See Gordon, *supra*.

### III.(G)(2) Options for United States Claims

Despite an apparent record of compliance with past lump-sum property claim settlement agreements with foreign governments, Cuba’s ability to engage in a similar arrangement with the United States is doubtful. In light of the large value of United States claims against Cuba and Cuba’s poor economic situation, no meaningful lump sum payment is feasible for United States claims as a whole.

Moreover, Cuba’s economic situation is not as robust as it was when it settled claims with other foreign governments. In fact, Cuba has not made any payments on debts to Western creditors since 1986—debts estimated at about \$7 billion. In addition, Cuba is not making payments on as much as \$20 billion owed to the Russian government. Cuba also owes about \$100 million to the Export-Import Bank. See Sarah C. Carey et al., *The Atlantic Council of the United States: A Road Map for Restructuring Future U.S. Relations with Cuba*, xxii, available at: [http://www.acus.org/docs/9506-Road\\_Map\\_Restructuring\\_Future\\_U.S.\\_Relations\\_Cuba.pdf](http://www.acus.org/docs/9506-Road_Map_Restructuring_Future_U.S._Relations_Cuba.pdf).

Under past property claims settlement agreements with foreign nations, the United States has often accepted payment of only a fraction of the total value of confiscated assets. For example, United States claims against China were settled for about 40 percent of their estimated worth of \$197 million. Although the United States may possess more bargaining power than any country that formerly settled property claims with Cuba, Cuba’s current economic problems may limit compensation to United States claimants to a fractional amount proportionally equal to or less than that received by other countries, regardless of the form of compensation. See Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, 16 U. Pa. J. Int’l Bus. L. 217, section 3 (1995).

Nevertheless, it might be possible for Cuba to effectuate lump sum settlements in a particular category of claim – for instance, the small claims that would be filed in the Tribunal or the Court. Medium and large claims could then be left to mediation or litigation for resolution. Alternatively, Cuba might try to effectuate a lump sum settlement of claims held by the Cuban-American exile community, thus by-passing the need for creation of a Cuban Special Claims Court entirely. This could be true of the Tribunal as well; however, given the known value of U.S. claims certified in the FCSC process, the award recovery for each dollar claimed would be far higher than that awarded for exile community claims that are still unascertained through a judicial process.

Although the Tribunal and Court processes outlined in this Report are responsible, efficient, and legitimate ones, the clearly preferred situation would be for a democratic transitional Cuban government to acknowledge the legal claims of the claimants and compensate them via a lump-sum payment if at all possible. A large returned loan on favorable terms from the United States government could make this possible if the political climate is right for such an arrangement to be struck.



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# Data Analysis

## IV.(A) Introduction

**IN THIS SECTION OF THE REPORT THE CLAIMANT CLASSES ARE IDENTIFIED, THE SOURCE** of available data is noted and analysis presented to provide a general understanding of the size of the claimant pool. Importantly, this section will only address the U.S. National Claimants.

Information on the Cuban Exile Community Claimants was not undertaken nor is information available on Cuban Claimants still in Cuba. Information on these two classes was to be part of the second year of the project.

Additionally, the Second Cuban Claims Program is not included in the following analysis as it resulted in only two claims, STARWOOD HOTELS & RESORTS WORLDWIDE, INC., Claim No. CU-2-001, Decision No. CU-2-001, in the total principal amount of \$51,128,926.95 and the Claim of IRAIDA R. MENDEZ, Claim No. CU-2-002, Decision No. CU-2-004, in the principal amount of \$16,000.00.



*El Morro fortress, stands guard over the Bay of Havana.*

## IV.(B) Property Claimants by Type

As noted in the executive summary above, the main universe of property claimants against the Cuban government consists largely of three groups:

1. U.S. National Claimants
2. Cuban Exile Community Claimants
3. Cuban Claimants Still in Cuba

### IV.(B)(1) U.S. National Claimants

The first set of property claims are by U.S. National Claimants. These are American individuals and corporations who were Americans at the time of the unlawful expropriation (mostly 1959 and the early 1960s). They have certified their claims through the Federal Claims Settlement Commission. According to FCSC estimates, their property claims with interest amount to approximately \$6 billion. Their claims have not been satisfied with frozen Cuban assets in the United States. However, their claims are protected legislatively and are linked directly with lifting the U.S. embargo against Cuba. §207(d) of the Libertad Act states:

It is the sense of the Congress that the satisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba.

International law generally recognizes the right of American claimants to be compensated. Consequently, a bilateral system to resolve property claims between foreign claimants and the government of Cuba would be supported by international law.

#### **IV.(B)(2) Cuban Exile Community Claimants**

The second group of property claims is that of Cuban expatriates living in the U.S. They were Cuban at the time of the expropriation of their property. The exile community claimants were not part of the certification process undertaken by the Federal Claims Settlement Commission.

Although the Libertad Act does provide some third-party rights to expatriate claimants, section 304 of the Act specifically excludes their property claims from legislative protection similar to U.S. claimants:

[N]either any national of the United States who was eligible to file a claim under section 503 but did not timely file such claim under that section, nor any national of the United States (on the date of the enactment of this section) who was not eligible to file a claim under that section, nor any national of Cuba, including any agency, instrumentality, subdivision, or enterprise of the Government of Cuba or any local government of Cuba in place on the date of the enactment of this section, nor any successor thereto, whether or not recognized by the United States, shall have a claim to, participate in, or otherwise have an interest in, the compensation proceeds or other nonmonetary compensation paid or allocated to a national of the United States by virtue of a claim certified by the Commission under section 507, nor shall any court of the United States or any State court have jurisdiction to adjudicate any such claim.

Because the members of this claimant group were nationals of Cuba when their property was expropriated, international law generally does not recognize right of recovery. Consequently, a bilateral system to resolve property claims between this group and the government of Cuba would not be supported by international law. Jurisdiction over their claims would reside within the Cuban judiciary, although, as we propose in Section V, a Special Cuban Court with procedural protections for the claimants would be created.

While claims by this group are not supported specifically by either domestic or international law, politically and economically their claims should not be ignored. Politically, the exile community's support among policy-makers in Washington and activism against the Cuban regime make them a group that cannot be ignored. Their influence in Washington brought about the Libertad Act (codifying the U.S.'s embargo against Cuba), achieved special immigration status for Cubans leaving the island, sustained Radio Martí programming, and leveraged millions of dollars in federal money to support democracy programming for Cuba.

Economically, this group will likely be among the first investors in an open Cuban market. Even before direct foreign investment by multinational corporations, which may prove more

cautious and wait to see how the markets emerge on the island, the Cuban-American community will help to jump-start the Cuban economy at the outset of regime change and could do much to spark the suppressed but ever-present entrepreneurial spirit of the Cuban people.

However, if the property claims of the Cuban-American exile community are left unresolved, their political and economic power could be turned against stabilizing a new government in Cuba, much to the detriment not only of the island, but also to potentially fruitful Cuba-U.S. relations. Thus, the positive aspects of including this group in a broader property claims settlement policy far outweigh the general lack of domestic or international legal justification for doing so.

### **IV.(B)(3) Cuban Claimants Still in Cuba**

The third group of property claims is that of Cubans against the Cuban government. These claims are wholly an internal matter for Cuba to resolve. There is no international dimension to them. Nevertheless, an important principle of any property claims settlement mechanism must be that the settlements do not negatively impact the Cuban population. If Cubans in Cuba, who may have their own claims against the government, view the settlement process as a venue for capital flight from the island, then they will not support it.

### **IV.(C) Available Data on U.S. National Claims**

Currently information on U.S. National claims is available from the Foreign Claims Settlement Commission of the United States (FCSC). Detailed information on the FCSC is available at <http://www.usdoj.gov/fcsc/>. Briefly, from the FCSC 2002 Annual Report Section 1:

The Foreign Claims Settlement Commission of the United States is an independent quasi-judicial federal agency organized administratively as a component of the U.S. Department of Justice. The Commission's primary mission is to determine the validity and valuation of claims of United States nationals for loss of property in foreign countries, as authorized by Congress or following government-to-government claims settlement agreements. (available at <http://www.usdoj.gov/fcsc/annrep02.htm#4>, accessed 4/6/07)

And more specifically regarding Cuba:

Title V of the Act also authorized the Commission to consider claims of nationals of the United States against the Government of Cuba, based upon: (1) losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property by that government; and (2) the disability or death of nationals of the United States resulting from actions taken by or under the authority of that government. Pub. L. 88-666, approved October 16, 1964, 73 Stat. 1110 (22 U.S.C. 1643). The program covered claims for losses which occurred between January 1, 1959, when the Castro regime took power, and October 16, 1964, the date the program was authorized.

When the program was authorized, there were no funds available with which to make payment on the claims, and the statute precluded

Congress' appropriation of funds for such payments. In this case as well, the statute provided only for the determination of the validity and amounts of such claims, and for the certification of the Commission's findings to the Secretary of State for use in the future negotiation of a claims settlement agreement with the Government of Cuba. The Cuban Claims Program was completed on July 6, 1972. (available at <http://www.usdoj.gov/fcsc/annrep02.htm#4>, accessed 4/6/07)

As part of the FCSC's mission, claims data was collected and a decision on each case was rendered regarding the legitimacy of the claim. Importantly, this provides insight into the size and extent of claims filed against the Government of Cuba. The Creighton team conducted site visits for four FCSC claims. The 1971 claim by the Anderson brothers is typical of the claims certified under the FCSC program. Among the multiple claims for real property, stock shares, and the wrongful death of their father (totaling \$1,612,309.21), the Andersons claimed the property and house at 1315 Calle 180, Biltmore, Havana, that is depicted below. The other three claims inspected are discussed in Section IV.L.



#### **IV.(D) Claimant Status**

All claims in the initial adjudication process were decided by July 6, 1972, the date that legal authority for the first commission to decide claims ended. As part of the decision-making process, claims fell into one of three categories regarding status: certified, denied and dismissed. A brief description of each follows. This reflects information received in personal conversation and email exchange (Email received July 18, 2006) with David Bradley, Chief Counsel, FCSC.

Certified claims are those that met the legal criteria established by law and were accepted by the claims tribunal. Information on this class of claims is reported below as it is likely to constitute a large share of the claims to be settled in any settlement process.

| Claims Classification     | Number                   |
|---------------------------|--------------------------|
| Certified                 | 7028                     |
| Denied                    | 3146                     |
| <b>Total Claims Filed</b> | <b>10175<sup>1</sup></b> |

*Table 1: Statistical Description of Foreign Claims Settlement Commission Data*

<sup>1</sup> One claim is labeled as “pending” according to FCSC. It is not included as certified or denied.

Denied claims were those that did not meet the statutory requirements for certification (i.e. non national, failure to establish loss within statutory period, etc.). Information on this class of claims is reported below as it is possible that depending on the basis for denial, some of these claims may be pursued before the Special Claims Court.

Dismissed claims were those that were opened by the commission on its own accord on behalf of U.S. citizens who were known to own property in Cuba. Those individuals were given notice of the proceedings, but when they failed to provide evidence or appear their claims were dismissed as part of closing the books for the Cuban Claims Program. Claims could also be dismissed at the claimants’ request or because they were duplicates. Information on dismissed claims is not reported below. This information was to be collected and analyzed in the second year of the project. It is possible that individuals and businesses (or their heirs) with dismissed claims will seek to reassert these claims as part of any settlement process.

#### **IV.(E) Data Analysis of U.S. National Claims as Reported by the Foreign Claims Settlement Commission**

In this section, information on the claims against the government of Cuba by U.S. National Claimants is reported. This includes general descriptive information as to the size of the claimant class, size of the claims individually and in the aggregate, and additional descriptive statistics regarding property claims. Note that denied claims are reported below. Dismissed claims are not reported.

The data reported below covers claims for losses which occurred between January 1, 1959, when the Castro regime took power, and October 16, 1964, the date the FCSC program was authorized. All claims were reported by July 6, 1972, the date the Cuban Claims Program was completed.

Data reported in Table 1 and in subsequent tables are from the Foreign Claims Settlement Commission database (accessed on August 8, 2006). Differences between numbers reported in this report and those of the FCSC are due to updates and data corrections made by the authors.

| Statistical Measure    | Value in Dollars                 |
|------------------------|----------------------------------|
| Range                  | 0 to 323,000,000.00 <sup>2</sup> |
| Mean                   | 319,693.50                       |
| Median                 | 0.00                             |
| Standard Error of Mean | 53,711.00                        |
| Standard Deviation     | 5,390,937.00                     |

*Table 2: Statistical Description of Foreign Claims Settlement Commission Data (All Claims)*

<sup>2</sup> 101 entries in the data set have missing data.

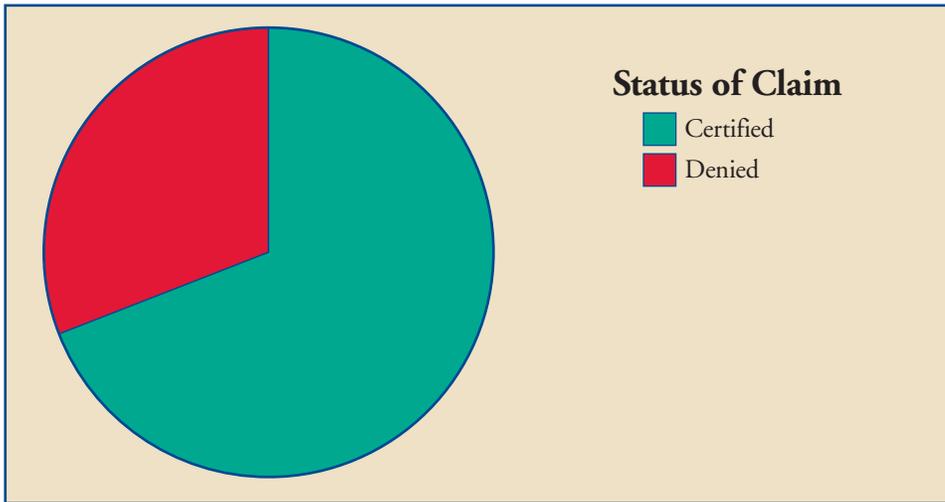


Figure 1: FCSC Filed Claims by Disposition

These corrections include on-site data checking with the written records of the FCSC. Dismissed claims are not included in any tables.

#### IV.(F) Statistical Description of Foreign Claims Settlement Commission (All Claims)

The claims filed as part of the FCSC process range in size from \$0 to \$323,000,000 with an average of \$31,969. These figures, and subsequent dollar amounts described herein, represent dollar amounts from the original FCSC filing with no adjustments made for accrued interest. Importantly, the median and mode are both \$0, with a standard deviation of \$5,390,937, which indicates that 95% of all claims lie between \$0 and \$10,781,874 (two times the standard deviation). Such a large standard deviation, a mode and median of \$0 also suggests the presence of both a number of large claims and a large number of claims at \$0 resulting in a large spread from the mean value. This is due to the observed frequency of 5,407 (52.9% of all claims) for the value of \$0 in the data. It will be necessary for any future process to determine in greater detail the value of claims listed as \$0 with the FCSC (see Table 2).

| Percentile | Value in Dollars |
|------------|------------------|
| 10         | 0.00             |
| 20         | 0.00             |
| 30         | 0.00             |
| 40         | 0.00             |
| 50         | 0.00             |
| 60         | 525.00           |
| 70         | 2405.33          |
| 80         | 14000.00         |
| 90         | 82488.87         |

Table 3: Percentile Distribution of Foreign Claims Settlement Commission's Data (All Claims)

| Claimant Type                      | Number of Claimants | Percent |
|------------------------------------|---------------------|---------|
| Individual                         | 8970                | 88.2    |
| Corporation: Bank                  | 45                  | .5      |
| Corporation: Export-Import Bank    | 2                   | .0      |
| Corporation: Cattle Ranches        | 1                   | .0      |
| Corporation: Mining                | 1                   | .0      |
| Corporation: Sugar                 | 11                  | .1      |
| Corporation: Insurance company     | 32                  | .3      |
| Corporation: other                 | 1101                | 10.8    |
| Joint tenants                      | 1                   | .0      |
| Partnership                        | 1                   | .0      |
| Other                              | 4                   | .0      |
| Total Identified Claimants by Type | 10169               | 99.9*   |
| Missing                            | 6                   |         |
| <b>Total</b>                       | <b>10175</b>        |         |

\* Percentage does not equal 100 due to rounding.

Table 4: Description of U.S. Claimant Class (All Claims) Type of Claimant

| Loss Type                       | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Land                            | 430                 | 4.7     |
| Debt/Mortgage                   | 789                 | 8.7     |
| Securities                      | 6488                | 71.2    |
| Improved Real Estate            | 747                 | 8.2     |
| Bank Account/Cash               | 108                 | 1.2     |
| Personal Property               | 263                 | 2.9     |
| Corporate Assets                | 153                 | 1.7     |
| Merchandise/Stock Inventory     | 26                  | .3      |
| Personal Injury/Death           | 5                   | .1      |
| Pension                         | 18                  | .2      |
| Buildings                       | 5                   | .1      |
| Other                           | 76                  | .8      |
| Total Identified Losses by Type | 9108                | 100.1*  |
| Missing                         | 1067                |         |
| <b>Total</b>                    | <b>10175</b>        |         |

\* Percentage does not equal 100 due to rounding.

Table 5: Description of U.S. Claimant Class (All Claims) Type of Loss

In reviewing the distribution of all claims, Table 3 presents information on the percentile distribution of all claims. Importantly, over 50% of all claims are for \$0 and over 70% of all claims are for less than \$2,500. Future policy decisions may also consider that 79% of all claims are for \$10,000 or less. As discussed in Section V, we suggest treating all claims \$10,000 and less at the time of loss as small claims to be handled under a streamlined process.

While aggregate data from the Foreign Claims Settlement Commission is a valuable source of specific information, three additional pieces of information may provide even more insight into the scope of any claims resolution process. First, the type of claimant identified in the data set is reported below in Table 4 (*see page 114*). Here the data set shows that 88.2% of all claimants are individuals with 11.7% representing various corporate claimants including banks, sugar concerns, insurance companies and mining and cattle ranches. Unfortunately the other category is the largest corporate claimant class and provides little information beyond the fact that nearly 12% of all claimants are a corporation of some type. It is likely, given a reading of the FCSC records, that many of the corporations in the other category would fit in the identified classes of corporate claimants. At present this information is not available in the data.

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 545                 | 54.8    |
| Oriente, Cuba                   | 73                  | 7.3     |
| Camaguaey, Cuba                 | 51                  | 5.1     |
| Isle of Pines, Cuba             | 244                 | 24.6    |
| Las Villas, Cuba                | 32                  | 3.2     |
| Pinar del Rio, Cuba             | 26                  | 2.6     |
| Matanzas, Cuba                  | 24                  | 2.4     |
| Total Identified Losses by Type | 995                 | 99.5*   |
| Missing                         | 9180                |         |
| <b>Total</b>                    | <b>10175</b>        |         |

\* Percentage does not equal 100 due to rounding.

Table 6: Description of U.S. Claimant Class (All Claims) Location of Property

Second, type of loss for all claims is reported in Table 5 (*see page 114*). Here the data set shows a more even distribution of type of loss with securities being the most common at 71.2% (6,488) of all claims followed by debt/mortgage at 8.7% (789) of all claims. While much of the discussion of property claims focuses on physical property, land at 4.7% (430), improved real estate at 8.2% (747) and buildings, one-tenth of one percent (5), occupy a relatively small percentage of total claims.

Third, location of property is available for a number of properties. Table 6 outlines the distribution of property locations as identified by the FCSC. While less than 10% of all property locations are defined in the data set and over 90% are coded as missing, it is possible to get a general feel for where properties are located. This is important as only 12% are identified as physical property in Table 5, thus it is likely that only a small percentage of physical property is missing from the data set. In Table 6 we see that 54.8% (545 of 994) of all claims that identify a location state Havana as the location of the property. This is followed by Isle of Pines at 24.5% (244 of 994), Oriente with 7.3% (73), Camaguaey with 5.1 (51) and the remaining three locations representing a much smaller percentage of property locations.

| Statistical Measure    | Value in Dollars    |
|------------------------|---------------------|
| Range                  | 0 to 323,000,000.00 |
| Mean                   | 299,507.30          |
| Median                 | 50.00               |
| Standard Error of Mean | 59,750.01           |
| Standard Deviation     | 4,979,367.00        |

Table 7: Statistical Description of U.S. Claimant Class (Certified Claims)

While an overview of all claims provides us insight into the overall size of claims considered by the FCSC, it is also important to consider the certified and denied claims. This may provide some insight into claims that met the established criteria for certification.

#### IV.(G) Statistical Description of U.S. Claimant Class (Certified Claims)

Information on the 7,028 claims certified as part of the FCSC process is reported in Table 7. In the table, claims range in size from \$0 to \$323,000,000 with an average of \$299,507 per claim. Importantly, the median is \$50 with a mode of \$0. Here the standard deviation is \$4,979,367, which indicates that 95% of all claims lie between \$0 and \$9,958,734. Such a large standard deviation, a mode of \$0 and median of \$50 also suggests the presence of both a number of large claims and a large number of claims at \$0 resulting in a large spread from the mean value. This is due to the observed frequency of 3,167 (45.1% of all claims) for the value of \$0 in the data. It will be necessary for any future process to determine in greater detail the value of certified claims listed as \$0 with the FCSC.

In reviewing the distribution of all claims, Table 8 presents information on the percentile distribution of all claims. Importantly, over 40% of all claims are for \$0 and over 70% of all claims are for less than \$5,000. Below, additional information on the distribution of claims is further examined using the \$10,000 threshold.

Additional information on certified claims may provide additional insight into the size of any future claims process. First, the type of claimant and distribution of claimant type is reported in Table 9 (see page 117). Clearly most of the certified claims were individual claims with 86.5% of

| Percentile | Value in Dollars |
|------------|------------------|
| 10         | 0.00             |
| 20         | 0.00             |
| 30         | 0.00             |
| 40         | 0.00             |
| 50         | 350.00           |
| 60         | 1284.66          |
| 70         | 4611.80          |
| 80         | 21692.41         |
| 90         | 109219.90        |

Table 8: Percentile Distribution of U.S. Claimant Class (Certified Claims)

| Claimant Type                      | Number of Claimants | Percent |
|------------------------------------|---------------------|---------|
| Individual                         | 6076                | 86.5    |
| Corporation: Bank                  | 28                  | .4      |
| Corporation: Export-Import Bank    | 2                   | .0      |
| Corporation: Cattle Ranches        | 1                   | .0      |
| Corporation: Mining                | 0                   | .0      |
| Corporation: Sugar                 | 8                   | .1      |
| Corporation: Insurance company     | 31                  | .4      |
| Corporation: other                 | 874                 | 12.4    |
| Joint tenants                      | 1                   | .0      |
| Partnership                        | 1                   | .0      |
| Other                              | 4                   | .0      |
| Total Identified Claimants by Type | 7026                | 99.8*   |
| Missing                            | 2                   |         |
| <b>Total</b>                       | <b>7028</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 9: Description of U.S. Claimant Class (Certified Claims) Type of Claimant

| Loss Type                       | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Land                            | 332                 | 4.7     |
| Debt/Mortgage                   | 680                 | 9.7     |
| Securities                      | 4924                | 70.1    |
| Improved Real Estate            | 603                 | 8.6     |
| Bank Account/Cash               | 93                  | 1.3     |
| Personal Property               | 204                 | 2.9     |
| Corporate Assets                | 131                 | 1.9     |
| Merchandise/Stock Inventory     | 17                  | .2      |
| Personal Injury/Death           | 4                   | .1      |
| Pension                         | 17                  | .2      |
| Buildings                       | 4                   | .1      |
| Other                           | 5                   | .1      |
| Total Identified Losses by Type | 7014                | 99.9*   |
| Missing                         | 14                  |         |
| <b>Total</b>                    | <b>7028</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 10: Description of U.S. Claimant Class (Certified Claims) Type of Loss

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 521                 | 55.0    |
| Oriente, Cuba                   | 68                  | 7.2     |
| Camaguaey, Cuba                 | 49                  | 5.2     |
| Isle of Pines, Cuba             | 232                 | 24.5    |
| Las Villas, Cuba                | 31                  | 3.3     |
| Pinar del Rio, Cuba             | 24                  | 2.5     |
| Matanzas, Cuba                  | 22                  | 2.3     |
| Total Identified Losses by Type | 947                 | 100.0   |
| Missing                         | 6081                |         |
| <b>Total</b>                    | <b>7028</b>         |         |

Table 11: Description of U.S. Claimant Class (Certified Claims) Location of Property

the claimants by individuals. The remainder is corporate with insurance companies, banks, and sugar interests representing the known type of corporations. Unfortunately 12.4% or 874 certified claims are for corporations described as “other”.

Additional information is also available on the type of loss suffered by certified claimants. In Table 10 (see page 117) the distribution of type of loss is similar to the distribution of type of loss for all claimants with securities representing the single largest type of loss at over 70% of all certified claims. The nearest two types of losses, debt/mortgage and improved real estate, do not reach the 10% threshold. Also as noted above, while much of the discussion of property claims focuses on physical property, land at 4.7% (332), improved real estate at 8.6% (603) and buildings, less than one-tenth of one percent (4) occupy a relatively small portion of total claims.

Table 11 resents information on certified claims by the location of the property. The 13.5% of the certified claims with a location identified in the data represent an important lens into seized property. As might be expected, Havana and the Isle of Pines are the primary location for certified claims with other areas giving rise to far fewer claims.

#### IV.(H) Statistical Description of Foreign Claims Settlement Commission: Denied Claims

The 3,146 denied claims filed as part of the FCSC range in size from \$0 to \$218,110,282.59 with

| Statistical Measure    | Value in Dollars                 |
|------------------------|----------------------------------|
| Range                  | 0 to 218,110,282.59 <sup>3</sup> |
| Mean                   | 364614.70                        |
| Median                 | 0.00                             |
| Standard Error of Mean | 111,022.70                       |
| Standard Deviation     | 6,209,334.00                     |

Table 12: Statistical Description of Foreign Claims Settlement Commission: Denied Claims

<sup>3</sup> 102-5508 amount entered is \$0; 101 entries in the data set have missing data.

| Percentile | Value in Dollars |
|------------|------------------|
| 10         | 0.00             |
| 20         | 0.00             |
| 30         | 0.00             |
| 40         | 0.00             |
| 50         | 0.00             |
| 60         | 0.00             |
| 70         | 0.00             |
| 80         | 1966.68          |
| 90         | 32439.77         |

Table 13: Percentile Distribution of Foreign Claims Settlement Commission: Denied Claims

an average of \$364,614.70. Importantly, the median and mode are each \$0, with a standard deviation of \$6,209,334 which suggests the presence of both a number of large claims and a large number of claims at \$0 resulting in a large spread from the mean value. This is due to the large frequency of denied claims with a value of \$0 in the data. Here 2,239 of 3,128 denied claims (71.2% of denied claims) have a value of \$0. It will be necessary for any future process to determine in greater detail the value of claims listed as \$0 with the FCSC should these claims be asserted as part of a property claims process.

In reviewing the distribution of denied claims, Table 13 presents information on the percentile distribution of denied claims. Importantly, over 70% of all denied claims are for \$0 and over 80% of all claims are for less than \$2,000.

| Claimant Type                                     | Number of Denials | Percent |
|---|-------------------|---------|
| Burden of Proof                                   | 877               | 29.0    |
| Combined or Superseded                            | 6                 | .2      |
| Dismissal: Americans in Cuba                      | 811               | 26.8    |
| Dismissal: Other                                  | 953               | 31.5    |
| Failure to establish loss within statutory period | 8                 | .3      |
| No loss established under Title V                 | 161               | 5.3     |
| Non U.S. National                                 | 113               | 3.7     |
| Order of withdrawal                               | 44                | 1.5     |
| Section 505(a) debt of U.S. National              | 31                | 1.0     |
| Stock interest in U.S. Corporation                | 20                | .7      |
| Total Denials                                     | 3024              | 100.0   |
| Denial Type Missing                               | 122               |         |
| <b>Total</b>                                      | <b>3146</b>       |         |

Table 14: Description of U.S. Claimant Class (Denied Claims) Type of Denial

| Claimant Type                      | Number of Claimants | Percent |
|------------------------------------|---------------------|---------|
| Individual                         | 2893                | 92.0    |
| Corporation: Bank                  | 17                  | .5      |
| Corporation: Export-Import Bank    | 0                   | .0      |
| Corporation: Cattle Ranches        | 0                   | .0      |
| Corporation: Mining                | 1                   | .0      |
| Corporation: Sugar                 | 3                   | .1      |
| Corporation: Insurance company     | 1                   | .0      |
| Corporation: other                 | 227                 | 7.2     |
| Joint tenants                      | 0                   | .0      |
| Partnership                        | 0                   | .0      |
| Other                              | 0                   | .0      |
| Total Identified Claimants by Type | 3142                | 99.8*   |
| Missing                            | 4                   |         |
| <b>Total</b>                       | <b>3146</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 15: Description of U.S. Claimant Class (Denied Claims) Type of Claimant

| Loss Type                       | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Land                            | 98                  | 4.7     |
| Debt/Mortgage                   | 109                 | 5.2     |
| Securities                      | 1563                | 74.7    |
| Improved Real Estate            | 144                 | 6.9     |
| Bank Account/Cash               | 15                  | .7      |
| Personal Property               | 59                  | 2.8     |
| Corporate Assets                | 22                  | 1.5     |
| Merchandise/Stock Inventory     | 9                   | .4      |
| Personal Injury/Death           | 1                   | .0      |
| Pension                         | 1                   | .0      |
| Buildings                       | 1                   | .0      |
| Other                           | 71                  | 3.4     |
| Total Identified Losses by Type | 2093                | 100.3*  |
| Missing                         | 1053                |         |
| <b>Total</b>                    | <b>3146</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 16: Description of U.S. Claimant Class (Certified Claims) Type of Loss

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 24                  | 50.0    |
| Oriente, Cuba                   | 5                   | 10.4    |
| Camaguaey, Cuba                 | 2                   | 4.2     |
| Isle of Pines, Cuba             | 12                  | 25.0    |
| Las Villas, Cuba                | 1                   | 2.1     |
| Pinar del Rio, Cuba             | 2                   | 4.2     |
| Matanzas, Cuba                  | 2                   | 4.2     |
| Total Identified Losses by Type | 48                  | 100.0   |
| Missing                         | 3098                |         |
| <b>Total</b>                    | <b>3146</b>         |         |

Table 17: Description of U.S. Claimant Class (Certified Claims) Location of Property

In reviewing denied claims the reasons for denial may provide insight into how many FCSC claims may resurface in any future process. Table 14 (see page 119) reports information on the reasons for denial of claims in the FCSC data. Three primary reasons for denial were most often cited. First, “other”, while not defined, is the most commonly cited reason for denial and represents nearly 32% of all denials. Second is “burden of proof” at 29%, followed by “Americans in Cuba” at nearly 27%, round out the top three reasons for denial. Other reasons for denial, as reported below, may need further information by those stating claims if they become part of the claims process in an effort to refute the denied status.

Tables 15, 16 and 17 (see pages 120 - 121) examine FCSC denied claims by type of claimant, type of loss and location of property. While this represents denied claims, the patterns present in overall claims and certified claims remain fairly consistent in the tables and suggest no systematic denial of claims. In Table 15 for example, individuals are the most likely to have their claims denied. This is not surprising as they were the most likely to file claims and represent the largest pool of certified claimants as well. Table 16 also reports securities as the most common type of loss denied, while in Table 17 Havana and Isle of Pines are the most common location for denied claims.

#### IV.(I) Description of Foreign Claims Settlement Commission Claims by Value<sup>4</sup>

Additional information based on the size of claims filed with the FCSC may provide insight

| Value              | Number | Percent |
|--------------------|--------|---------|
| \$10,000 or less   | 7912   | 78.5    |
| More than \$10,000 | 2161   | 21.5    |
| Total              | 10073  | 100.0   |

Table 18: Number of Foreign Settlement Claims Commission Claims (All Claims) by \$10,000 distribution<sup>5</sup>

<sup>4</sup> One hundred and forty-one observations have no reported value and are excluded from Figures 2 through 3.

<sup>5</sup> Not included in the table are 101 observations coded as “missing” and one coded as “pending.”

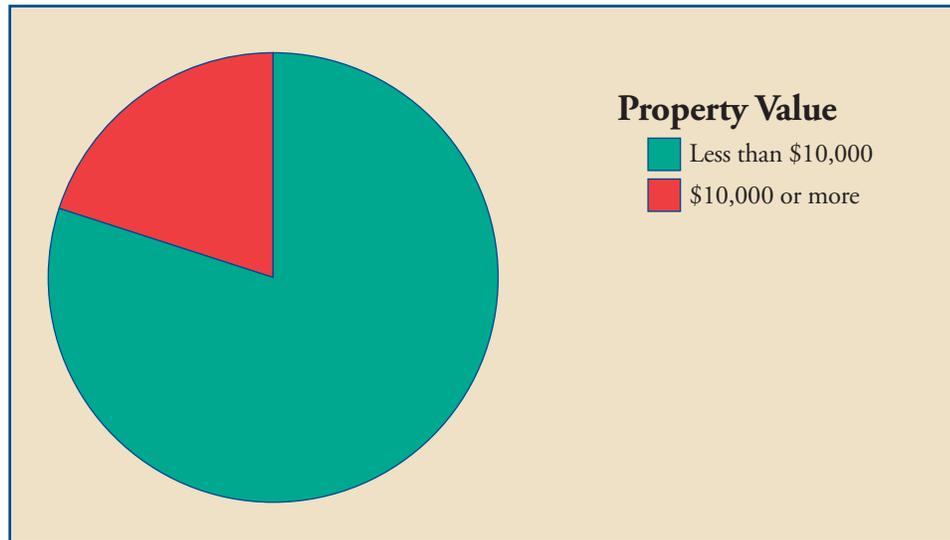


Figure 2: FCSC **Filed** Claims by Value

into the process of claims resolution. First, the number of claims with a value of \$10,000 or less is reported in Table 18 (see page 121). In the proposed instrument we suggest using a streamlined process for claims with an original value \$10,000 and less.

Figure 2 above and Table 19 below examine the distribution of all FCSC claims \$10,000 or less and those greater than \$10,000. As Table 19 reports, of those with a reported value, 7912 or 78.5% of all claims are \$10,000 or less. This leaves 2161 claims, or 21.5% of the total, seeking more than \$10,000. Clearly as represented in Table 19, the overwhelming majority of claims are relatively small in comparison to the largest claims as reported below.

Information on size of claim and disposition of claim as certified or denied is presented in Table 19. Here the number of certified and denied claims by amount is presented. Further reinforcing the observation that most claims are small and may be handled in a different manner than larger claims, for certified claims, over 75% (5,224 of 6,945) are under \$10,000. The ratio is a bit larger for denied claims with 85.9% (2,688 of 3,128) of denied claims \$10,000 or less. Overall given the chi-squared statistic for Table 19, we would expect a clear majority of claims to be \$10,000 or less, in this case, regardless of certified or denied status. Should future claims arise as part of the process, we might expect the preponderance of these claims to be for smaller rather than larger amounts as well given the chi-squared statistic.

Figure 3 shows the distribution by value for certified claims. Again noting that the 75.2% (5,224 of 6,945) of certified claims may be settled in a more streamlined manner as noted in Section V, a large share of certified claims may be disposed of given evidence available through the FCSC.

| Value of Claim     | Certified   | Denied      | Total        |
|--------------------|-------------|-------------|--------------|
| \$10,000 or less   | 5224        | 2688        | 7912         |
| More than \$10,000 | 1721        | 440         | 2161         |
| <b>Total</b>       | <b>6945</b> | <b>3128</b> | <b>10073</b> |

Chi-Squared Value = 146.911, P>.001

Table 19: Cross-tabulation of Claimant Class and Amount of Claim<sup>6</sup>

<sup>6</sup> Not included in the table are 101 observations coded as “missing” and one coded as “pending.” The addition of 102 observations coded as missing for amount sought, totals 10,175 as reported in Table 1.

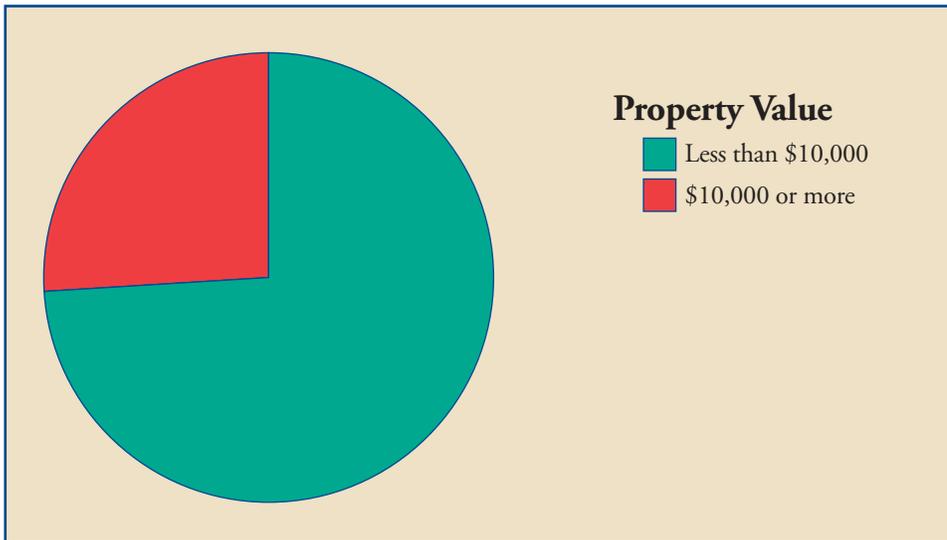


Figure 3: FCSC **Certified** Claims by Value

The final sets of tables examined here provide a description of FCSC data given the value of the claim. The first set examines claims over \$10,000 while the second outlines claims \$10,000 or less.

Information on claims over \$10,000 is found in Tables 20, 21, and 22. Importantly, comparison between all claimants, claimants above \$10,000, and claimants \$10,000 and below may shed light onto any future settlement process. Additional comparison of all and certified claims over \$10,000 with all filed and certified claims \$10,000 and less can provide insight into the differences any future settlement process will encounter with these groups.

| Claimant Type                      | Number of Claimants | Percent |
|------------------------------------|---------------------|---------|
| Individual                         | 1530                | 70.9    |
| Corporation: Bank                  | 25                  | 1.2     |
| Corporation: Export-Import Bank    | 1                   | .0      |
| Corporation: Cattle Ranches        | 1                   | .0      |
| Corporation: Mining                | 1                   | .0      |
| Corporation: Sugar                 | 9                   | .4      |
| Corporation: Insurance company     | 30                  | 1.4     |
| Corporation: other                 | 560                 | 25.9    |
| Joint tenants                      | 0                   | .0      |
| Partnership                        | 1                   | .0      |
| Other                              | 1                   | .0      |
| Total Identified Claimants by Type | 2159                | 99.8*   |
| Missing                            | 2                   |         |
| <b>Total</b>                       | <b>2161</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 20: Description of U.S. Claimant Class for All Claims over \$10,000 Type of Claimant

Table 20 outlines the type of claimant for all claims over \$10,000. Here over 70% of all claimants are individuals with corporations nearly 30% of all claims. In contrast, Table 4 (page 114, which looks at all claims) reports that over 88% of all claimants by type of claimant are individuals with the remaining 11% corporations. Thus using the \$10,000 threshold for larger claims means that dividing the claims process into two classes will place a larger share of corporate interests in that process. However even with the \$10,000 threshold, seven in ten claims over \$10,000 are individuals.

Also important for an understanding of the type of claimant, certified claims in excess of \$10,000, as noted in Table 23, report the same general findings as all claims as noted in Table 23 (see page 126). In Table 23, for example, individuals represent fewer than 70% of all claimants at 69.2%. Other observations in Table 23 mirror Table 20.

In contrast, Table 26 below reports claims for \$10,000 and less. Here the difference is stark with individuals representing 92.8% of all claimants \$10,000 and less compared to just 70.9% over \$10,000. Similar findings are reported in Table 29, where 92% of certified claims are for \$10,000 and under.

Table 21 outlines all claims over \$10,000 by type of loss. Here the distribution of type of loss varies greatly with securities 26.2% and improved real estate 28.3% of all claims. In contrast, Table 5 (page 114) reports that over 70% of all claims are for securities with improved real estate measuring just over 8% of all claims. Using the \$10,000 threshold for larger claims means that dividing the claims process into two classes will alter the distribution of type of loss in comparison to all claims. In addition, the proportion of claims over \$10,000 dealing with land and debt/mortgages is much greater than compared to all claims.

Also important for an understanding of the type of loss, certified claims in excess of \$10,000, as noted in Table 24 (see page 126), report the same general findings as all claims in excess of

| Loss Type                       | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Land                            | 228                 | 10.9    |
| Debt/Mortgage                   | 368                 | 17.6    |
| Securities                      | 542                 | 25.9    |
| Improved Real Estate            | 601                 | 28.7    |
| Bank Account/Cash               | 49                  | 2.3     |
| Personal Property               | 136                 | 6.5     |
| Corporate Assets                | 123                 | 5.9     |
| Merchandise/Stock Inventory     | 19                  | .9      |
| Personal Injury/Death           | 4                   | .2      |
| Pension                         | 9                   | .4      |
| Buildings                       | 4                   | .2      |
| Other                           | 8                   | .4      |
| Total Identified Losses by Type | 2091                | 100.2*  |
| Missing                         | 70                  |         |
| <b>Total</b>                    | <b>2161</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 21: Description of U.S. Claimant Class for All Claims over \$10,000 Type of Loss

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 444                 | 62.8    |
| Oriente, Cuba                   | 58                  | 8.2     |
| Camaguaey, Cuba                 | 44                  | 6.2     |
| Isle of Pines, Cuba             | 99                  | 14.0    |
| Las Villas, Cuba                | 26                  | 3.7     |
| Pinar del Rio, Cuba             | 17                  | 2.4     |
| Matanzas, Cuba                  | 19                  | 2.7     |
| Total Identified Losses by Type | 707                 | 100.0   |
| Missing                         | 1454                |         |
| <b>Total</b>                    | <b>2161</b>         |         |

Table 22: Description of U.S. Claimant Class for All Claims over \$10,000 Location of Property

\$10,000. In Table 24 for example, improved real estate and securities are clearly the largest percentage of all claims with debt/mortgage and land much more common in the larger certified claims than in all claims. The proportion of other types of losses in Table 24 mirrors Table 21 as well.

In contrast, Table 27 below reports claims for \$10,000 and less. Here the difference is stark with securities representing 85% of all claimants \$10,000 and less compared to just 25.9% for all claims over \$10,000 and 26.2% for certified claims over \$10,000. Similarly in Table 30, securities represent the overwhelming majority of certified claims of less than \$10,000 at 84.6% of the total.

Finally, Table 22 outlines all claims over \$10,000 by the location of property. Here the distribution of location of the property varies greatly with Havana the location of 62.8% of all claims over \$10,000. In contrast, Table 6 (page 115) reports that number at 54.8% of all claims are located in Havana. The difference is a bit greater for the second most common site of property claims with only 14% of claims over \$10,000 in Isle of Pines. In contrast 24.6% of all claims are in the Isle of Pines. Using the \$10,000 threshold for larger claims will focus even more attention on claims in Havana in comparison to all claims.

Also important for an understanding of the location of property, certified claims in excess of \$10,000, as noted in Table 25 (see page 127), report the same general findings as all claims in excess of \$10,000. In table 25 for example, Havana is clearly the location with the largest percentage of all certified claims at 63.3%, with Isle of Pines a very distant second at 14%. The proportion of other types of losses in table 25 mirrors table 22 as well.

In contrast, Table 28 (see page 128) reports the location of property for claims for \$10,000 and less. Here the difference is stark with the Isle of Pines representing 52.8% of all claims \$10,000 and less compared to just 14% for all claims over \$10,000 and 14% for certified claims over \$10,000. Havana, as the location of all claims \$10,000 and less, drops to second with 34.8% of these claims. For certified claims of \$10,000 or less, Havana registers 34.4% trailing Isle of Pines which registers 52.7 of certified claims of \$10,000 or less.

### Tables for Certified Claims over \$10,000

| Claimant Type                      | Number of Claimants | Percent      |
|------------------------------------|---------------------|--------------|
| Individual                         | 1190                | 69.2         |
| Corporation: Bank                  | 15                  | .9           |
| Corporation: Export-Import Bank    | 1                   | .1           |
| Corporation: Cattle Ranches        | 1                   | .1           |
| Corporation: Mining                | 0                   | .0           |
| Corporation: Sugar                 | 6                   | .3           |
| Corporation: Insurance company     | 29                  | 1.7          |
| Corporation: other                 | 476                 | 27.7         |
| Joint tenants                      | 0                   | .0           |
| Partnership                        | 1                   | .1           |
| Other                              | 1                   | .1           |
| Total Identified Claimants by Type | 1720                | 100.2*       |
| Missing                            | 1                   |              |
| <b>Total</b>                       | <b>1721</b>         | <b>100.0</b> |

\* Percentage does not equal 100 due to rounding.

Table 23: Description of U.S. Claimant Class for Certified Claims over \$10,000 Type of Claimant

| Loss Type                       | Number of Claimants | Percent      |
|---------------------------------|---------------------|--------------|
| Land                            | 168                 | 9.8          |
| Debt/Mortgage                   | 315                 | 18.4         |
| Securities                      | 450                 | 26.2         |
| Improved Real Estate            | 486                 | 28.3         |
| Bank Account/Cash               | 44                  | 2.6          |
| Personal Property               | 114                 | 6.6          |
| Corporate Assets                | 108                 | 6.3          |
| Merchandise/Stock Inventory     | 12                  | .7           |
| Personal Injury/Death           | 3                   | .2           |
| Pension                         | 9                   | .5           |
| Buildings                       | 3                   | .2           |
| Other                           | 3                   | .2           |
| Total Identified Losses by Type | 1715                | 100.0        |
| Missing                         | 6                   |              |
| <b>Total</b>                    | <b>1721</b>         | <b>100.0</b> |

Table 24: Description of U.S. Claimant Class for Certified Claims over \$10,000 Type of Loss

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 426                 | 63.3    |
| Oriente, Cuba                   | 54                  | 8.0     |
| Camaguaey, Cuba                 | 42                  | 6.2     |
| Isle of Pines, Cuba             | 94                  | 14.0    |
| Las Villas, Cuba                | 25                  | 3.7     |
| Pinar del Rio, Cuba             | 15                  | 2.2     |
| Matanzas, Cuba                  | 17                  | 2.5     |
| Total Identified Losses by Type | 673                 | 99.9*   |
| Missing                         | 1048                |         |
| <b>Total</b>                    | <b>1721</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 25: Description of U.S. Claimant Class for Certified Claims over \$10,000 Location of Property

### Tables for Claims \$10,000 & Less

| Claimant Type                      | Number of Claimants | Percent |
|------------------------------------|---------------------|---------|
| Individual                         | 7340                | 92.8    |
| Corporation: Bank                  | 19                  | .2      |
| Corporation: Export-Import Bank    | 1                   | .0      |
| Corporation: Cattle Ranches        | 0                   | .0      |
| Corporation: Mining                | 0                   | .0      |
| Corporation: Sugar                 | 2                   | .0      |
| Corporation: Insurance company     | 2                   | .0      |
| Corporation: other                 | 541                 | 6.8     |
| Joint tenants                      | 1                   | .0      |
| Partnership                        | 0                   | .0      |
| Other                              | 3                   | .0      |
| Total Identified Claimants by Type | 7909                | 99.8*   |
| Missing                            | 4                   |         |
| <b>Total</b>                       | <b>7913</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 26: Description of U.S. Claimant Class for All Claims \$10,000 and Less

| Loss Type                       | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Land                            | 186                 | 2.7     |
| Debt/Mortgage                   | 471                 | 6.0     |
| Securities                      | 5876                | 85.0    |
| Improved Real Estate            | 142                 | 2.1     |
| Bank Account/Cash               | 59                  | .9      |
| Personal Property               | 123                 | 1.8     |
| Corporate Assets                | 29                  | .4      |
| Merchandise/Stock Inventory     | 7                   | .1      |
| Personal Injury/Death           | 1                   | .0      |
| Pension                         | 9                   | .1      |
| Buildings                       | 0                   | .0      |
| Other                           | 68                  | 1.0     |
| Total Identified Losses by Type | 6917                | 100.1*  |
| Missing                         | 996                 |         |
| <b>Total</b>                    | <b>7913</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 27: Description of U.S. Claimant Class for All Claims \$10,000 and less Type of Loss

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 94                  | 34.8    |
| Oriente, Cuba                   | 9                   | 3.3     |
| Camaguaey, Cuba                 | 5                   | 1.9     |
| Isle of Pines, Cuba             | 142                 | 52.6    |
| Las Villas, Cuba                | 6                   | 2.2     |
| Pinar del Rio, Cuba             | 9                   | 3.3     |
| Matanzas, Cuba                  | 5                   | 1.9     |
| Total Identified Losses by Type | 270                 | 100.2*  |
| Missing                         | 7643                |         |
| <b>Total</b>                    | <b>7913</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 28: Description of U.S. Claimant Class for All Claims \$10,000 and less Location of Property

### Description of Certified Claims \$10,000 & Less

| Claimant Type                      | Number of Claimants | Percent |
|------------------------------------|---------------------|---------|
| Individual                         | 4803                | 92.0    |
| Corporation: Bank                  | 13                  | .2      |
| Corporation: Export-Import Bank    | 1                   | .0      |
| Corporation: Cattle Ranches        | 0                   | .0      |
| Corporation: Mining                | 0                   | .0      |
| Corporation: Sugar                 | 2                   | .0      |
| Corporation: Insurance company     | 2                   | .0      |
| Corporation: other                 | 398                 | 7.6     |
| Joint tenants                      | 1                   | .0      |
| Partnership                        | 0                   | .0      |
| Other                              | 3                   | .0      |
| Total Identified Claimants by Type | 5223                | 99.8*   |
| Missing                            | 1                   |         |
| <b>Total</b>                       | <b>5224</b>         |         |

\* Percentage does not equal 100 due to rounding.

Table 29: Description of U.S. Claimant Class for Certified Claims \$10,000 and less Type of Claimant

| Loss Type                       | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Land                            | 150                 | 2.9     |
| Debt/Mortgage                   | 365                 | 7.0     |
| Securities                      | 4412                | 84.6    |
| Improved Real Estate            | 114                 | 2.2     |
| Bank Account/Cash               | 49                  | .9      |
| Personal Property               | 87                  | 1.7     |
| Corporate Assets                | 23                  | .4      |
| Merchandise/Stock Inventory     | 5                   | .1      |
| Personal Injury/Death           | 1                   | .0      |
| Pension                         | 8                   | .2      |
| Buildings                       | 0                   | .0      |
| Other                           | 2                   | .0      |
| Total Identified Losses by Type | 5216                | 100.0   |
| Missing                         | 8                   |         |
| <b>Total</b>                    | <b>5224</b>         |         |

Table 30: Description of U.S. Claimant Class for Certified Claims \$10,000 and less Type of Loss

| Locaton of Property             | Number of Claimants | Percent |
|---------------------------------|---------------------|---------|
| Havana, Cuba                    | 88                  | 34.4    |
| Oriente, Cuba                   | 8                   | 3.1     |
| Camaguaey, Cuba                 | 5                   | 2.0     |
| Isle of Pines, Cuba             | 135                 | 52.7    |
| Las Villas, Cuba                | 6                   | 2.3     |
| Pinar del Rio, Cuba             | 9                   | 3.5     |
| Matanzas, Cuba                  | 5                   | 2.0     |
| Total Identified Losses by Type | 256                 | 100.0   |
| Missing                         | 4968                |         |
| <b>Total</b>                    | <b>5224</b>         |         |

Table 31: Description of U.S. Claimant Class for Certified Claims \$10,000 and less Location of Property

#### IV.(J) Additional Information

Reported below in Appendix A is an overview of the 50 largest certified claims as identified by the FCSC. This overview is intended to shed additional light on the largest claims and what any future tribunal will need to consider when dealing with large claims.

Missing from this overview of available data is information on public opinion. Information on public opinion and the opinion of elites was to be gathered in year two of this study. In addition, while a number of studies that may shed light on prevailing opinions have been completed by others, this information was not made available to us for inclusion in this report. This information may become available in the future and may shed light onto the disposition of the Cuban community in the United States.

#### IV.(K) Conclusion

In this section a general description of the data available from the Foreign Claims Settlement Commission was outlined. As proposed in Section V, most of these claims could proceed before the tribunal. Claims denied in certain cases, however, may be presented to the Court. Limitations on resources precluded a more extensive analysis and almost completely precluded any measure of the claims of Cuban expatriates that would be presented to the Court.

In general the findings suggest that a large number of claims, including both certified and denied claims, may need to be addressed. Importantly, differences between certified and denied as well as differences between claims for more than \$10,000 and \$10,000 and less were noted. While not all permutations of the data were examined, this overview should cast additional light onto the size of the issue to be handled in the future.

#### IV.(L) Appendix 1: The 50 Largest Certified Claims

The following section outlines the 50 largest claims certified by the FCSC. Importantly this includes information on both amount sought and amount certified by the FCSC. Future processes will likely consider claims based on the certified amount, however questions may arise given the initial amount sought, thus this information is included as well. In addition to the Anderson brothers' claim discussed at the beginning of this section, the Creighton team also conducted on-site evaluations of the properties identified in Havana for the claims by William Powe, Havana Docks, and the Brothers of the Order of Hermits that are listed on the following pages.

- 1. Cuban Electric Company** — Under the Cuban Claims Program, the Foreign Claims Settlement Commission (“FCSC”) certified the claim of Cuban Electric Company (Claim No. CU-2578, Decision No. 4122). Cuban Electric Company (“CEC”) asserted a loss of \$323,000,000. However, the FCSC certified the claim for \$267,568,413.62, which was the largest certification. CEC was a corporate claimant who suffered losses described as corporate assets. CEC filed this claim on April 28, 1967, and the FCSC reached its decision on August 19, 1970.
  - 2. International Telephone and Telegraph Corporation as Trustee** — International Telephone and Telegraph Corporation (“ITT”) claimed a loss of \$61,089,234.00 on April 28, 1967, (Claim No. CU-2615, Decision No. 5013). ITT was a corporate claimant, asserting a loss of corporate assets. This claim involved multiple claimants. The FCSC certified this claim for \$50,676,963.88.

ITT as Trustee filed an additional claim. This second claim also asserted a loss of corporate assets. Although this claim appears as a zero value claim in our dataset, the FCSC certified the claim for \$80,002,794.14. Thus the total value of ITT’s certifications was \$130,679,758.02, the second largest certification awarded by the FCSC.
  - 3. North American Sugar Industries, Inc.** — North American Sugar Industries, Inc. (“North American Sugar”) asserted a loss of \$114,003,157.00 (Claim No. CU-2622, Decision No. 3578). North American Sugar was a corporate claimant and it suffered a loss of “corporate assets.” It also consisted of multiple claimants. The data provided no information regarding the location of the property. North American Sugar filed this claim on May 1, 1967, and the FCSC issued a decision on April 25, 1969. The FCSC certified a loss of \$108,975,062.13, the third largest certification.

Two additional claimants share claim and decision numbers with North American Sugar: West India Company and Cuban-American Mercantile Corporation (Claim Nos. CU-2622, Decision Nos. 3578). These claims both involved corporate claimants and corporate assets. Although West India Company and Cuban-American Mercantile Corporation appeared as zero value claims, the data indicated they were certified.
  - 4. Moa Bay Mining Company** — Moa Bay Mining Company, a corporate claimant, filed a claim for \$98,005.00 on April 28, 1967 (Claim No. CU-2619, Decision No. 6049). The loss was characterized as improved real property located in Oriente, Cuba. The specific address of the rural mining property was Moa Bay, Baracoa. On March 15, 1971, the FCSC certified the loss in the amount of \$88,349,000.00.
  - 5. United Fruit Sugar Company** — United Fruit Sugar Company (“United Fruit”) alleged a loss of \$85,100,147.09 (Claim No. CU-2776, Decision No. 3824). United Fruit was a corporate claimant. Its loss was described as improved real property. Specifically, the property was located in Havana City, and Preston and Banes, Province of Oriente. The loss included an urban commercial building. United Fruit filed its claim on May 1, 1967. The FCSC issued its decision on September 29, 1969, and certified a loss of \$85,100,147.09.
  - 6. West Indies Sugar Corporation** — West Indies Sugar Corporation (“West Indies”) filed a claim for \$89,708,774.00 (Claim No. CU-0665, Decision No. 5969).
-

West Indies was a sugar corporation and it suffered the loss of its corporate assets. The property was located in Oriente, Cuba, along the Rio Cauta. The land was described as rural farming land and the data noted West Indies “owned thousands of acres of sugar plantation, plus infrastructure.” West Indies filed this claim on February 4, 1966 and the FCSC issued its decision on March 19, 1971. The FCSC certified West Indies’ claim for \$84,880,957.55.

**7. American Sugar Company** — American Sugar Company (“American Sugar”) asserted a loss of \$90,330,769.00 (Claim No. CU-2445, Decision No. 3969). American Sugar was a sugar corporation. It lost corporate assets. One of the properties involved was located in Camaguey, at Port Tarafa. The claim also included land on Cayo Romano and Cayo Cruz. These properties were described as urban beachfronts. The data noted they were intended for use as ports. American Sugar filed its claim on April 28, 1967, and the FCSC certified a loss of \$81,011,240.24 on November 3, 1969.

**8. Exxon Corporation** — Exxon Corporation claimed a loss of \$ 71,686,002.90 on January 10, 1967, (Claim No. CU-0938, Decision No. 3838). It asserted a loss of corporate assets located in the Havana Harbor in Havana, Cuba. This was an oil refinery. Exxon also owned stock in Ferrocarriles Occidentales de Cuba. On October 10, 1969, the FCSC certified the claim for \$ 71,611,002.90.

**9. Texaco, Inc.** — Texaco, a corporate claimant, filed a claim for \$58,145,692.00 (Claim No. CU-1331, Decision No. 4546). Texaco lost its corporate assets located in Havana, Cuba. Texaco filed its claim on April 7, 1967, and the FCSC certified a loss of \$56,196,422.73 on June 10, 1970.

Two related claims appear in the dataset and share a decision number with Texaco (Decision No. 4546). Claim No. CU-1332, filed by Texas Petroleum Co., asserted a loss of corporate assets located in Havana, Cuba. This claim was certified. Texaco Export Inc. filed a claim for the loss of corporate assets as well (Claim No. CU-1333). The FCSC certified this claim as well.

**10. The Francisco Sugar Company** — The Francisco Sugar Company (“Francisco Sugar”) asserted a loss of \$58,505,859.00 (Claim No. CU-2500, Decision No. 6066). Francisco Sugar, a sugar corporation, asserted a loss of corporate assets. However, the FCSC noted Francisco Sugar may have dissolved during the early 1980s, according to correspondence. The Francisco Sugar claim involved multiple claimants. Francisco Sugar filed its claim on April 28, 1967, and the FCSC certified a loss of \$53,389,438.37 on March 18, 1971.

Compania Canadera El Indio, S.A. appeared as an additional claimant involved in this certification. Compania Canadera El Indio was a sugar corporation. Its loss was defined as corporate assets and the claim was certified.

**11. Bangor Punta Corporation** — Bangor Punta Corporation (“Bangor Punta”) claimed a loss of \$53,542,691.42 (Claim No. CU-2156, Decision No. 6034). Its losses were described as securities. Bangor Punta filed its claim on April 26, 1967, and the FCSC certified a loss of \$ 53,379,123.06 on May 19, 1971. This claim involved multiple claimants: Macareno Industrial Corporation of New York; Florida Industrial Corporation of New York; Baragua Industrial Corporation of New York; and Bangor Punta Operations.

**12. Manati Sugar Company** — Manatai Sugar Company (“Manatai Sugar”), a corporate claimant, asserted a loss of \$54,721,773.00 (Claim No. CU-2525, Decision No. 6020). It based its claim on a loss of corporate assets. Manatai Sugar filed its claim on April 28, 1967, and the FCSC certified a loss of \$48,587,847.82.

**13. Nicaro Nickel Company** — Nicaro Nickel Company (“Nicaro”) filed a claim for \$22,494,708.62 (Claim No. CU-2624, Decision No. 6247). Nicaro was a corporate claimant and asserted a loss of corporate assets. Nicaro filed the claim on April 27, 1967, and the FCSC certified a loss of \$33,014,082.52 on July 30, 1971.

**14. The Coca-Cola Company** — Coca-Cola Company asserted a loss of \$41,037,460.00 (Claim No. CU-1743, Decision No. 6818). Coca-Cola, a corporate claimant, asserted a loss for improved real property, located at Alejandro Ramirez 66, Havana, and Santa Catalina 930, Havana, Cuba. The properties were described as urban commercial buildings. Comments to this claim listed several addresses: 6-8 Paseo de Marti, Santiago de Cuba, Oriente; Carretera al Acueducto Avenida Marta, City of Santa Clara; Carretera Central, City of Artemisa, Pinar del Rio; and Carretera Central Este y Ave. B, City of Camaguey. This claim also involved machinery and equipment, vehicles, coolers and dispensers, containers, furniture and fixtures, inventories, accounts receivable, bank accounts, cash, and added value. Coca-Cola filed this claim on April 4, 1967, and the FCSC certified a loss of \$27,526,239.03 on June 30, 1972.



*A “trio” performing on the grounds of Hotel El Nacional.*

**15. Lone Star Cement Corporation** — Decision No. 6217, Amount of Loss Certified: \$ 24,881,287.00, This claim did not appear in the data.

**16. The New Tuinucu Sugar Company, Inc.** — The New Tuinucu Sugar Company (“Tuinucu Sugar”) asserted a loss of \$21,895,208.00 (Claim No. CU-1850, Decision No. 6817). Tuinucu Sugar was a sugar corporation whose loss involved improved real property located in Las Villas, Cuba. Tuinucu suffered the loss of its sugar mills, named Tuinucu and La Vega, located in Las Villas. Compania Destiladora Paraiso, S.A., an alcohol distillery owned by claimant, was also located in Las Villas. These properties were categorized as rural farming land. The FCSC certified the claim on October 22, 1971, in the amount of \$23,336,079.64.

**17. Colgate-Palmolive Company** — Colgate-Palmolive filed a claim for \$29,293,109.78 on May 6, 1966 (Claim No. CU-0730, Decision No. 4547). Colgate- Palmolive was a corporate claimant whose loss involved corporate assets. The FCSC certified a loss of \$14,507,935.04 on March 3, 1971.

**18. Sinclair Oil Corporation** — Sinclair Oil Corporation asserted a loss of \$18,563,812.35 on April 27, 1967, (Claim No. CU-2338, Decision No. 6031). The corporation asserted a loss of corporate assets. On September 30, 1971, the FCSC certified the claim for \$13,202,466.92.

Sinclair's claim involved multiple claimants. The FCSC certified several other claims in this decision: Atlantic Refining Company of Cuba; Candelaria Exploration Corporation; Silva Exploration Corporation; Santa Cruz Exploration Corporation; Los Palacios Exploration Corporation; and Rodas Exploration Corporation. (The above claims comprise Claim No. CU-3017.)

**19. Braga Brothers, Inc.** — Braga Brothers Inc. (“Braga”) claimed a loss of \$18,502,362.74 on April 28, 1967, (Claim No. CU-2526, Decision No. 6057). Braga, a corporate claimant, asserted a loss of securities. On November 6, 1971, the FCSC certified a loss of \$12,612,873.34.

**20. Boise Cascade Corporation** — Boise Cascade, a corporate claimant, filed a claim for \$42,714,767.55 on May 29, 1967, (Claim No. CU-3548, Decision No. 3866). The data indicated this was a late filing. The claim involved improved real property, located in Marianao, Havana, Cuba. The property was described as an urban commercial building. On November 3, 1969, the FCSC certified the claim for \$11,745,959.55.

**21. Claffin, Helen A.** — Helen Claffin, an individual claimant, filed a claim seeking \$7,483,632.00 on April 10, 1967, (Claim No. CU-1393, Decision No. 3836). She asserted a loss described as securities. The data indicated multiple claimants. On November 8, 1969, the FCSC certified a loss of \$11,686,342.27.

\* In addition to Helen Claffin's certification, the FCSC also certified the following claims in Decision No. 3836:

- CU-1394 William H. Claffin, III
- CU-1395 Mary G. Rentschler
- CU-1396 Anne C. Allen
- CU-1397 John W. Weeks

These claims all involved losses of securities.

**22. American Brands, Inc.** — American Brands, a corporate claimant, asserted a loss of \$11,279,308.47 on April 27, 1967, (Claim No. CU-2354, Decision No. 4839). Its loss involved debts and mortgages. The FCSC certified a loss of \$11,679,901.95 on October 7, 1971.

**23. Burrus Mills, Inc.** — Burrus Mills, Inc. asserted a loss of \$9,847,099.78 on November 5, 1965, (Claim No. CU-0548, Decision No. 4234). The corporation asserted a loss of its corporate assets. The property, located in Havana, Cuba, was described as a rural commercial building. The data noted Burrus Mills “owned a unified tract of land at Regla, Havana, Cuba, comprising an area of 35,584 sq. meters and land at Wajay, Marianao, Cuba which was utilized as an experimental farm.” The FCSC certified a loss of \$9,847,099.78 on December 26, 1969.

**24. Pan-American Life Insurance Company** — Pan-American Life Insurance Company, a corporate insurance claimant, asserted a loss of \$2,853,277.25 on May 31, 1967, (Claim No. CU-3651, Decision No. 4212). Pan-American's losses were categorized as corporate assets. Although this claim was filed late, the FCSC certified a loss of \$9,742,800.27 on July 6, 1971.

**25. United States Rubber Company, Ltd.** — United States Rubber Company filed a claim for \$9,203,371.70 on May 1, 1967, (Claim No. CU-3074, Decision No. 4071). The corporation asserted a loss of its corporate assets. The FCSC certified a loss of \$9,523,891.92 on November 26, 1969.

**26. Powe, William** — William Powe, an individual claimant, asserted a loss of \$9,924,315.30 on October 15, 1965 (Claim No. CU-0502, Decision No. 4511). Powe claimed a loss of urban residential property, located at the intersection of Via Blanca, Carretera Central, and Cojimar, Guanabacoa, in Havana, Cuba. He also owned majority interests in several Cuban corporations, some of which owned land, including a lot at 23rd and O Street, Vedado (less than a block from Hotel El Nacional) and another near Cabaret Sans Souci. In addition, Powe owned 75% of a yacht and a debt owed by the Cuban Government. On March 16, 1970, the FCSC certified a loss of \$9,507,785.73. The images below show the current condition of the properties at the intersection of 23rd and O Street, Vedado:

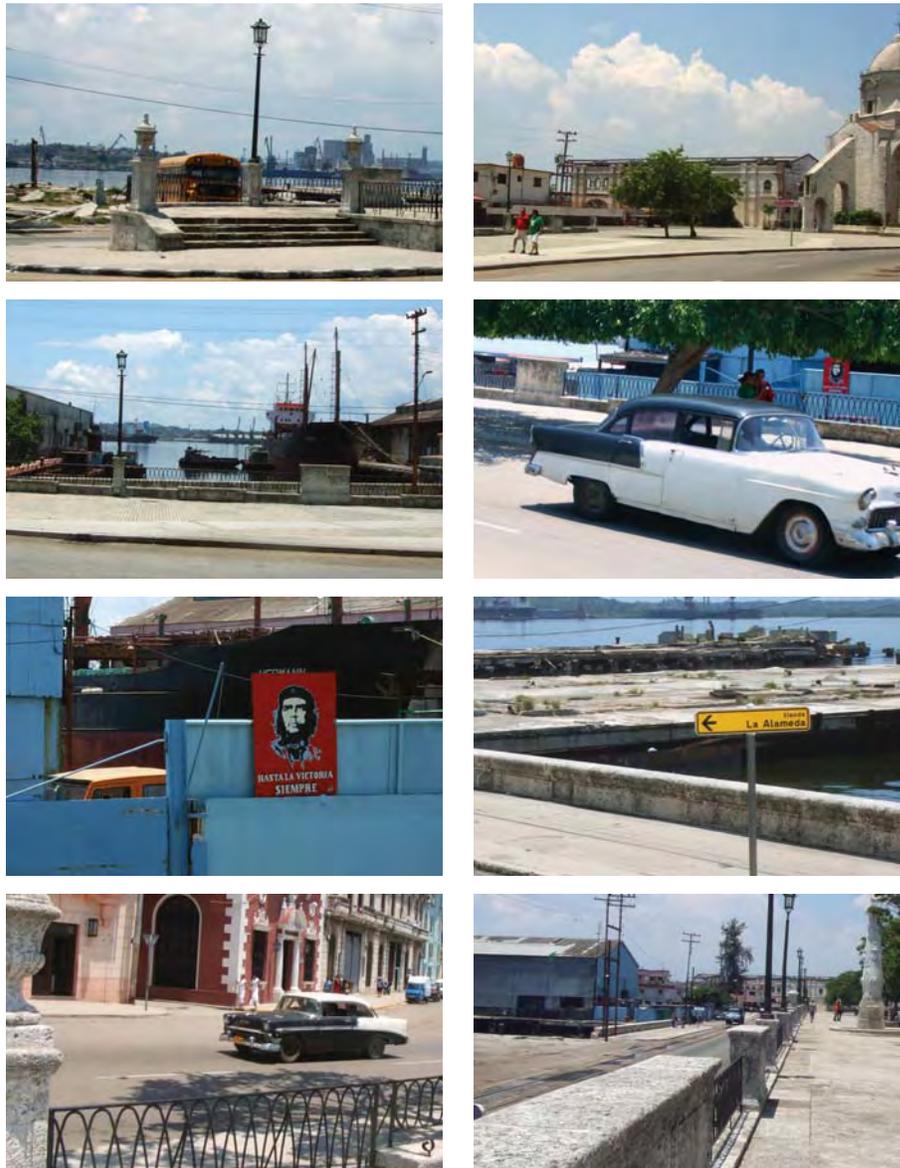


**27. Pingree, Sumner, Estate of** — The Estate of Sumner Pingree, an individual claimant, submitted three separate claims.\* The first claim (Claim No. CU-2269, Decision No. 5928) was filed on April 27, 1967, in the amount of \$ 9,782,745.00. The claim concerned rural farming land, located in Oriente, Cuba, called Hacienda San Andres, S.A. The data indicated the above property was a 56,000 acre cattle ranch. Claimant was the sole owner of Hacienda San Andres, S.A. The FCSC certified the claim for \$9,370,167.72 on December 7, 1970. \*See Claim 43 for information on Pingree's two additional claims.

**28. F.W. Woolworth Co.** — F.W. Woolworth Co., a corporate claimant, asserted a loss of \$9,575,689.00 on April 5, 1967, (Claim No. CU-1319, Decision No. 3713). The type of loss was described as improved real property located in Havana, Cuba. The urban commercial building was located at No. 308 Jose A. Saco, Santiago. The FCSC noted that Claimant operated a chain of eleven retail stores throughout Cuba, as well as a principal office in Havana. The only claim for real property related to the above address. However, Claimant also asserted losses of cash on hand, cash in banks, receivables, merchandise inventories, operating supplies,

net fixtures after depreciation, net equipment after depreciation, alterations, and leaseholds. The FCSC certified the claim for \$9,188,256.08 on July 18, 1969.

**29. Havana Docks Corporation** — Havana Docks Corporation filed a claim for \$9,915,879.00 on April 28, 1967, (Claim No. CU-2492, Decision No. 6165). Havana Docks' loss was described as an urban commercial building and land. The property was located at San Pedro, on the Havana Bay waterfront in Havana, Cuba. The FCSC noted the pier facilities were known as "San Francisco," "Machina," and "Santa Clara." On September 28, 1971, the FCSC certified the claim for \$9,179,700.88. The images below show the current condition of the properties claimed along the dock area on Havana Bay:



**30. Continental Can Company** — Continental Can Company asserted a loss of \$8,829,056.51 on July 27, 1966, (Claim No. CU-0778, Decision No. 3792). Continental Can's losses were described as corporate assets. It owned a rural commercial building located

at La Conchita Farm, Via Blanca Highway, in Havana, Cuba. On September 2, 1969, the FCSC certified the claim for \$8,906,809.92.

**31. Loeb, John L.** — John Loeb's claim appears in as a "zero value" claim. On March 9, 1967, Loeb filed an individual claim for lost securities (Claim No. CU-7659, Decision No. 5627). The FCSC certified Loeb's claim for \$8,573,095.64 on February 8, 1971. *See also* Claim No. CU-7648, Decision No. 5623. An individual securities claim by John L. Loeb. It appears as a zero value claim but was certified.

**32. International Harvester Company** — International Harvester Company asserted a loss of \$7,100,000.00 on April 28, 1967, (Claim No. CU-2458, Decision No. 1943). The corporate claimant alleged a loss of corporate assets. This claim involved multiple claimants. *See also* CU-2459, an additional claim filed by International Harvester and certified in this decision. On November 10, 1970, the FCSC certified the claim for \$8,262,809.77.

**33. Owens-Illinois Inc.** — Owens-Illinois filed a claim in the amount of \$10,577,821.76 on April 27, 1967, (Claim No. CU-2644, Decision No. 3701). Owens-Illinois was a corporate claimant seeking to recover lost securities. On July 18, 1969, the FCSC certified the claim for \$8,039,240.12.

**34. Arango, Mercedes** — This claim involved two claimants, Mercedes Arango and Carmen de Arango Giroux. On May 29, 1967, the individual claimants asserted a loss of \$2,892,095.88 (Claim No. CU-3598, Decision No. 4129). The rural farming land was located in Las Villas, Cuba. The specific address was listed as Ramon Alto de Cagueiras, borough of Pelayo. On November 21, 1969, the FCSC certified the claim in the amount of \$7,922,577.62.

**35. Brothers of the Order of Hermits of St. Augustin** — The Brothers of the Order of Hermits was a corporate claimant. On May 26, 1976, Claimant asserted a loss of \$7,976,728.68 (Claim No. CU-3503, Decision No. 6812). The loss was described as improved real property. The data indicated this property included an urban commercial building. The properties were described as "the block surrounded by Villages Street, Lamparilla Street, Amagura Street, and Bernaza Street" and the block "surrounded by Avenida Novena, Calle Quinta, Solar 24, and Solareo 2-11 Marianao." These were located in Havana, Cuba. The data indicated this claim was filed late. On October 8, 1971, the FCSC certified the claim for \$7,885,098.68. The images below, and on on page 138, show the current condition of the properties claimed:





**36. The Chase Manhattan Bank, N.A.** — The Chase Manhattan Bank, a corporate bank, asserted a loss of \$8,598,346.83 on May 1, 1967, (Claim No. CU-2685, Decision No. 6295). The loss was described as corporate assets. On October 20, 1971, the FCSC certified the loss for \$7,707,526.93.

Two additional claims share the decision number as above. The claims of Ralph D. Moyer and Charlotte A.P. Moyer (Claim Nos. CU-3595, Decision Nos. 6295), as individual claimants, asserted losses of securities. Both were filed late and involved multiple claimants. Ralph Moyer's claim asserted a loss of \$ 1,110,792.00. Charlotte Moyer's claim was a zero value claim. However, both indicated certification.

**37. Firestone Tire and Rubber Company** — Firestone Tire and Rubber Company filed a claim for \$8,878,866.00 on April 6, 1967, (Claim No. CU-1330, Decision No. 3338). Firestone was a corporate claimant and it asserted a loss of corporate assets. On December 27, 1968, the FCSC certified the claim in the amount of \$7,649,180.00.

**38. Carl Marks & Company, Inc.** — Carl Marks & Co. asserted a loss of \$7,638,928.17 on April 4, 1967, (Claim No. CU-2545, Decision No. 6820). The loss was described as "multiple securities." On October 29, 1971, the FCSC certified the claim for \$7,333,000.22.

**39. IBM World Trade Corporation** — IBM filed a claim of \$7,866,167.00 with the FCSC on April 26, 1967, (Claim No. CU-2155, Decision No. 3231). IBM was a corporate claimant and its loss consisted of corporate assets. On January 20, 1971, the FCSC certified the claim for \$6,449,434.00.

**40. Swift and Company** — Swift and Company, a corporate claimant, asserted a loss of \$6,053,239.00 (Claim No. CU-2577, Decision No. 3976). The loss was described as corporate assets and included land, buildings, machinery, inventory, and debts. On November 3, 1969, the FCSC certified the claim in the amount of \$5,953,392.74.

**41. The First National Bank of Boston** — First National Bank of Boston (“First National”) asserted a loss of \$12,496,000.00 on April 27, 1967, (Claim No. CU-2268, Decision No. 3071). First National was a corporate bank whose loss was described as corporate assets. The FCSC certified a loss of \$5,904,940.88 on February 26, 1969.

**42. General Electric Company** — General Electric filed a claim for \$4,319,050.00 on April 25, 1967, (Claim No. CU-2038, Decision No. 6143). General Electric’s loss was categorized as corporate assets. On May 5, 1971, the FCSC certified the claim for \$5,870,436.86.

**43. Pingree, Sumner, Estate of** — The Estate of Sumner A. Pingree filed three claims. (*See above* # 27, CU-2269, Decision No. 5928). The second claim, Claim No. CU-2275, Decision No. 5930, was an individual claim for securities in the amount of \$5,671,236.00. The securities were described as “Central Ermita, S.A.”

The third claim, in the amount of \$9,782,745.00, (Claim No. CU-2276, Decision No. 5930) concerned rural farming land located in Oriente, Cuba. It was described as a ranch consisting of 8,862,530 caballerias. The FCSC noted that no information on this land was available. On December 7, 1970, the FCSC certified these claims in the amount of \$5,814,525.64.

**44. Libby, McNeill & Libby** — Libby, McNeill & Libby, a corporate claimant, asserted a loss of \$10,374,311.62 on April 21, 1967, (Claim No. CU-1821, Decision No. 4783). Its loss consisted of securities. The FCSC certified the claim for \$5,713,617.46 on October 29, 1971.

**45. The Goodyear Tire and Rubber Company** — Goodyear Tire and Rubber Company, a corporate claimant, filed a claim for \$6,282,053.85 (Claim No. CU-0887, Decision No. 887) on December 1, 1966. The loss was described as debts and mortgages. On February 12, 1968, the FCSC certified the claim in the amount of \$5,118,762.26.

**46. Procter & Gamble Company** — Procter & Gamble, a corporate claimant, asserted a loss of \$4,996,256.42 on February 19, 1965, (Claim No. CU-0569, Decision No. 3393). The losses were described as debts and mortgages. The FCSC certified \$4,996,256.42 on January 22, 1969. The data indicated Claim No. CU-0568 was a related claim.

Procter & Gamble Distributing Company filed a claim seeking \$211,598.12 on November 19, 1965, (CU-0568, Decision No. 3401). This loss consisted of debts and mortgages. The FCSC certified this claim on January 22, 1969. It is unclear whether this amount was included in the above figure. The data only indicated that the claims were related.

**47. First National City Bank** — First National City Bank, a corporate claimant, filed a claim seeking \$12,899,132.00 on April 28, 1967, (Claim No. CU-2628, Decision No.



*A Sculpture of Che Guevara in front of the Ministry of the Interior, Plaza de la Revolucion, in Havana*

3835). The property was listed as improved real property. It consisted of urban commercial buildings located in Havana, Cuba. The comments listed the following addresses: Presidente Zayas 402; Rancho Boyeros 2601; Jose A. Saco 202, Santiago de Cuba, Oriente; Dr. Codina 12, Manzillo, Oriente; Justa Street 24-26, Caibarien, Las Villas; Avenue Cespedes 252, Cardenas, Matanzas; Independencia 37-39, Matanzas, Matanzas. On November 14, 1969, the FCSC certified the claim for \$4,973,028.81.

**48. Lengyel, Olga** — Olga Lengyel, an individual claimant, asserted a loss of \$5,274,663.00 on May 31, 1967, (Claim No. CU-3669, Decision No. 6827). This claim was filed late. It involved improved real property described as urban apartments. The specific addresses were listed as Apartments 15-B and 15-D, 201 Primera Avenida, Vedado, Havana, Cuba. The FCSC noted that Claimant had interests in several apartments, household furnishings, art objects, and other personalty, including paintings, jewelry, cash, currency, and certain stock interests. On July 6, 1972, the claim was certified for \$4,865,766.48.

**49. Davis, Arthur V.** — Arthur V. Davis, an individual claimant, filed a claim for \$4,312,424.31 on April 28, 1967, (Claim No. CU-2620, Decision No. 5970). Davis' loss consisted of rural farming land located in Isle of Pines, Cuba. The FCSC certified the claim for \$4,267,083.68.

**50. GMAC, South America** — GMAC, South America, a corporate claimant, asserted a loss of \$896,011.00 on May 1, 1967, (Claim No. CU-3089, Decision No. 3875). GMAC's claim consisted of multiple claimants and asserted a loss of corporate assets. In addition, General Motors Corporation asserted a claim for \$466,198.00 (Claim No. CU-3089, Decision No. 3875). General Motors losses involved corporate assets. On October 10, 1969, the FCSC certified \$3,877,702.44, the total value of these claims.

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## Section V Outline

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# The Proposed Instruments & Analysis

## V.(A) Proposed Instrument Creating Cuba-United States Claims Tribunal

As discussed extensively below, our central recommendations take the form of two instruments, one creating a Cuba-United States Claims Tribunal and another memorializing Cuba's intent to create a Cuban Special Claims Court to resolve between them various classes of potential claims.

In this section, the entirety of the proposed instrument creating the Tribunal is reproduced. Below in V.B., the entirety of the proposed instrument stating the intent to create the Court is reproduced.

Each of the nine articles of the instruments is then analyzed separately in the sections beginning with V.C. For ease of reference, each of those sections reproduces both the Tribunal and the Court instrument's articles that are the subject of that section.



*Home of the Cuban Legal Professional Association.*

### Declaration for the Creation of a Cuba-United States Claims Tribunal

#### *1. Purposes and Creation*

1.1 The Governments of Cuba and of the United States of America hereby declare their willingness and desire to finally resolve all claims of expropriation of or wrongful interference with property, breach of contract, or unjust enrichment, accruing from January 1, 1959 through the date of entry into force of this instrument, of the nationals of the United States against the Government of Cuba, of nationals of Cuba against the Government of the United States and of the two Governments against each other. There is hereby created the Cuba-United States Claims Tribunal for the resolution of such claims.

1.2 The Government of Cuba also pledges to create a Special Claims Court to finally resolve all claims of expropriation of or wrongful interference with property, breach of contract, or unjust enrichment accruing on or after January 1, 1959 against the Government of Cuba by Cuban nationals who became nationals of the United States after the date of accrual of such claims but before the date of entry into force of a separate instrument creating that Court.

1.3 Both Governments declare their firm intention to promote the fair resolution of all claims regardless of the nationality of the claimants and to act in good faith so as to promote the mutual prosperity of their nations and citizens.

### *2. Composition of the Cuba-United States Claims Tribunal*

2.1 The Cuba-United States Claims Tribunal (hereafter “Tribunal”) is hereby constituted as an international arbitral tribunal. The Tribunal shall consist of nine Members or such larger multiple of three as Cuba and the United States may agree is necessary to conduct the Tribunal’s business expeditiously. Within ninety days after the entry into force of this instrument, each Government shall appoint one-third of the Members. Within thirty days after their appointment, the Members so appointed shall by mutual agreement select the remaining third of the Members and appoint one of the remaining third President of the Tribunal.

2.2 The Tribunal shall conduct its business in accordance with the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law (hereafter “UNCITRAL”) except to the extent modified by the terms of this instrument or by the Tribunal.

2.3 Members of the Tribunal may be removed only for misfeasance or neglect of duties and with the concurrence of both Governments and any replacement Members shall be appointed with the concurrence of both Governments.

### *3. Competence of the Tribunal*

3.1 The Tribunal shall have exclusive jurisdiction to finally and conclusively resolve all claims described in Article 1.1 regardless of the value of the claim. Parties may not by agreement derogate from or prorogate to the jurisdiction of the Tribunal.

3.2 The Tribunal shall have jurisdiction to interpret all provisions of this instrument except for Article 9.7.

3.3 The Tribunal shall have the authority to promulgate rules of procedure to effectuate the purposes of this instrument.

### *4. Law Applied by the Tribunal and Nature of Remedies*

4.1 Subject to the qualifications of this Article, both with regard to the availability of relief and remedies, the Tribunal shall decide, except to the extent modified by the terms of this instrument, all cases on the basis of the applicable principles of international law including applicable principles of private international law.

4.2 In the case of small claims, as defined below, the sole remedy shall be in the form of payment in the currency of the nationality of the claimant.

4.3 In the case of medium and large claims, as defined below, specific restitution of real property or tangible personal property shall be awarded only if the claimant requests this remedy and it can be granted without adversely impacting innocent third parties.

4.4 In the case of medium and large claims in which the Tribunal determines the Claimant is entitled to relief, the Government against which the claim is brought may propose a remedy such as tax credits, development rights or other rights in property owned by the Government. The Tribunal shall award the Government’s proposed remedy if it finds that the remedy is the fair equivalent of the remedy to which the Claimant would be entitled under the applicable legal principles set forth in Article 4.1. Such remedies may include reasonable terms and conditions designed to promote investment in the Government’s economy.

4.5 In determining claims that were within the jurisdiction of the Foreign Claims Settlement Commission brought by nationals of the United States, the Tribunal shall give due weight to all legal and factual findings relative to such claim made by the Foreign Claims Settlement Commission including those related to valuation.

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4.6 The Tribunal may order appropriate interim measures of relief, including stays of closely related proceedings in other forums and orders regarding the production of evidence. The courts of each Government shall, subject to the provisions of Article 4.7 regarding the gathering of evidence, aid in the enforcement of and comply with all orders of interim measures of relief, including stays of closely related proceedings, regardless of which of the proceedings was first filed. In the event that the closely related proceeding is before the Special Claims Court and the Tribunal orders a stay, the proceeding before the Special Claims Court shall be stayed and transferred to the Tribunal which shall then consolidate the related proceedings for resolution. Nothing in this instrument shall be construed to forbid a court of a nation other than the United States or Cuba from also making appropriate interim orders to preserve the status quo pending the Tribunal's resolution of a claim.

4.7 At the request of the Tribunal, the competent courts of each Government shall entertain applications for orders necessary to assist the Tribunal in gathering evidence, including evidence held by non-parties. In the case of courts of the United States, such applications shall be directed to the appropriate United States District Court pursuant to 28 U.S.C. section 1782. Such applications may be made only by the Tribunal and neither party shall make any application to any court of the United States or any other nation, under section 1782 or any other provision of law, without being so ordered by the Tribunal. The courts of Cuba shall make reasonable provisions to entertain such applications from the Tribunal pursuant to the applicable laws of Cuba. The Tribunal may also make requests to the courts of nations other than Cuba or the United States. Nothing in this section shall be construed to require a court to enter an order that would offend any applicable privilege or principle of sovereignty or public policy.

#### *5. Small Claims Before the Tribunal*

5.1 A small claim is one over which the Tribunal has jurisdiction and in which recovery of \$10,000.00 or less, exclusive of any claim for interest, is sought and is brought by a national against a Government.

5.2 If necessary for the timely and efficient resolution of small claims, the Tribunal may appoint any number of hearing officers who shall have the power to act for the Tribunal in all respects with regard to small claims.

5.3 The Tribunal shall promulgate one or more forms to assist Claimants in providing notice of the arbitration as required under Article 3 of the UNCITRAL arbitration rules. In the case of small claims, the notice of the arbitration shall also constitute the statement of claim under Article 18 of the UNCITRAL arbitration rules. The Government against which the claim is brought shall not be required to submit a statement of defense or appear in opposition to the claim. In the event that Government elects not to submit a statement of defense or appear in opposition to the claim, the Tribunal shall treat the material elements of the claim as contested by the Government and shall require the Claimant to meet its burden of proof as set forth in Article 5.4.

5.4 The Claimant shall prevail on a small claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1. The Tribunal shall, however, in all small claims take due regard of difficulties of proof and valuation and shall draw all reasonable inferences in favor of the Claimant.

5.5 The Tribunal shall resolve small claims on the basis of written submissions and documentary evidence and without an oral hearing or live testimony unless the small claim presents a substantial issue of fact that cannot be resolved without an oral hearing or live testimony. If an oral hearing or live testimony is required, the Tribunal shall take all steps practicable (such as taking testimony remotely) to minimize inconvenience to the Claimant and any other

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witnesses. The UNCITRAL arbitration rules concerning the conduct of hearings shall apply in small claims only to the extent consistent with this Article.

5.6 The sole remedy in the case of small claims shall be payment in the national currency of the Claimant.

5.7 In small claims, the decision of the Tribunal in the first instance shall be final with no right of appeal.

#### *6. Medium Claims Before the Tribunal*

6.1 A medium claim is one over which the Tribunal has jurisdiction and in which recovery of more than \$10,000.00 but less than \$250,000.00, exclusive of any claim for interest, is sought and is brought by a national against a Government.

6.2 A single Member shall be assigned at random to hear each medium claim. The nationality of the Member is not grounds to challenge the impartiality or independence of the Member under Article 10 of the UNCITRAL arbitration rules. If the claim presents an important question of law or fact, the Member hearing the claim may refer that question to the full Tribunal for resolution.

6.3 The Claimant shall prevail on a medium claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1.

6.4 The Tribunal shall in all medium claims conduct the hearing in accordance with the UNCITRAL arbitration rules and the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration of 1999 (“IBA Rules”) and shall conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Tribunal shall in all medium claims take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

#### *7. Large Claims Before the Tribunal*

7.1 Large claims are claims over which the Tribunal has jurisdiction and (1) must be claims in which recovery of more than \$250,000, exclusive of any claim for interest, is sought and is brought by a national against a Government, or (2) claims of any size brought by one Government against the other.

7.2 To promote the resolution of large claims both before the Tribunal and the Special Claims Court, the United States and Cuba shall jointly select a Claim Resolution Process Facilitator (“CRPF”). If they cannot agree on a CRPF, the Chief Judge of the Special Claims Court and the President of the Tribunal shall jointly submit a list of five proposed names and the Governments shall each strike one name in succession; the remaining person will serve as CRPF. The CRPF may not be a citizen of either the United States or Cuba, must be bilingual in Spanish and English and must be experienced and knowledgeable in international commercial or property claims dispute resolution. In all large claims, the CRPF shall (1) meet with the parties; (2) assist the parties in identifying suitable alternative dispute resolution processes; (3) facilitate creation or selection of a mutually agreed upon dispute resolution process and persons to assist with the process; (4) assist the parties in identifying any necessary materials to prepare for resolution of the dispute; (5) assist the parties in establishing a timetable for the dispute resolution process; (6) maintain rosters of mediators and other third-party neutral dispute resolution providers as the CRPF deems appropriate; (7) report to the Court, the Tribunal, and to the Governments on aggregate patterns and issues emerging in process selection without disclosing confidential information supplied by the parties. The CRPF may hire such staff and conduct such training, research, and public discussions as may reasonably be appropriate to carry out the duties set forth above.

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7.3 A large claim not resolved under Article 7.2 or otherwise shall be heard by three Members of the Tribunal each of a different nationality. The nationality of a Member is not grounds to challenge the impartiality or independence of that Member under Article 10 of the UNCITRAL arbitration rules. If the claim presents an important question of law or fact, the Members hearing the claim may refer that question to the full Tribunal for resolution.

7.4 The Claimant shall prevail on a large claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1.

7.5 The Tribunal shall in all large claims conduct the hearing in accordance with the UNCITRAL arbitration rules and the IBA Rules and shall conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Tribunal shall in all large claims take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

#### 8. Definitions

8.1 “Claim” means all theories of legal relief set forth in Article 1.1 arising out of a transaction or occurrence. In the case of a claim brought by a United States national, “claim” also means a claim that was duly certified by the Foreign Claims Settlement Commission provided the Commission had jurisdiction to certify the claim. The denial of a claim by the Foreign Claims Settlement Commission on the grounds that the Claimant was not a United States national at the time the claim arose shall not prejudice the Claimant’s right to proceed before the Special Claims Court.

8.2 “Claim of a national” means a claim owned continuously by a national from the time the claim arose through presentation to the Tribunal. A claim continues to be the claim of a national if it was lawfully assigned or succeeded to by another national.

8.3 “Claimant” means a natural or juridical person asserting a claim or persons asserting a joint or common interest in a claim.

8.4 “Cuba” or “the Government of Cuba” means any political subdivision of Cuba and any agency, instrumentality, or entity controlled by the Government of Cuba or any political subdivision thereof.

8.5 “The United States of America” or “the Government of the United States” means any political subdivision of the United States and any agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof.

8.6 “National” of Cuba or of the United States, as the case may be, means (a) a natural person who is a citizen of Cuba or the United States; and (b) a corporation or other legal entity organized under the laws of Cuba or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock. In the case of partnerships, joint ventures or other non-corporate entities which are comprised of both nationals and non-nationals, such entities shall be treated as nationals in proportion to the ownership interest of nationals of each nation in such entities. Nationals may also make claims based upon an ownership interest in a juridical person provided the ownership interest was sufficient to control the juridical person at the time the claim arose, the juridical person is not entitled to bring a claim either before the Tribunal or the Special Claims Court and the juridical person has not previously recovered on that claim in any forum.

8.7 “Property” means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.

8.8 “Proves” means to carry the appropriate burden of proof as determined by the Tribunal.

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### 9. Other Provisions

9.1 No claim may be filed more than one year after entry into force of this instrument. No defense of prescription, limitation, laches, sovereign immunity or like defense shall be allowed if the claim is timely filed under this Article.

9.2 The location of the seat of the Tribunal shall be determined by the President of the Tribunal. The location of the seat shall not, however, prejudice the ability of the Tribunal to conduct hearings at locations outside the seat so as to minimize any inconvenience to the parties and witnesses.

9.3 The official languages of the Tribunal shall be Spanish and English.

9.4 The expenses of the Tribunal shall be borne equally by the two Governments.

9.5 Each Government shall designate an Agent at the seat of the Tribunal to represent the Government to the Tribunal and to receive notices or other communications directed to the Government in connection with proceedings before the Tribunal. The Tribunal shall notify the Agent of all filings against the Government. The filing of any document with the Tribunal by a Claimant shall constitute notice to the Government against which the claim is brought and no separate notice to the Government need be given under Article 2 of the UNCITRAL arbitration rules or any other provision of law. A Government, however, must give separate notice to a Claimant of any filing it makes relative to the Claimant's claim.

9.6 The awards of the Tribunal shall be final, binding and not subject to appeal or collateral attack in any other forum. Any award the Tribunal may render against either Government shall be enforceable against such Government in the courts of any nation in accordance with its laws. Any award of the Tribunal shall be given the same preclusive effect as a judgment of a court of competent jurisdiction. Claims resolved by agreement of the parties under Article 7.2 in any other manner shall be treated as if they were the subject of an award by the Tribunal.

9.7 If necessary for Cuba to comply with its obligations under this instrument, the United States shall either loan on favorable terms to Cuba, or assist Cuba in obtaining loans of, funds sufficient to allow Cuba to comply with its obligations. These funds shall be held by Cuba in a separate account and used only for the purposes of complying with Cuba's obligations under this instrument.

9.8 Each proceeding before the Tribunal shall be public unless good cause can be shown that the interests of justice would be better served by a closed proceeding.

9.9 The Tribunal shall cease to operate when all claims have been resolved or five years from the entry into force of this instrument, whichever is earlier, unless one of the Governments for good cause files a notice with the Tribunal extending the Tribunal's operation for up to one year with successive notices for good cause being permitted.

## **V.(B) Proposed Instrument Declaring Cuba's Intention to Create a Special Claims Court**

### **Declaration of Cuba's Intention to Create a Cuban Special Claims Court**

#### *1. Purposes and Intent to Create*

1.1 The Governments of Cuba and of the United States of America hereby declare their willingness and desire to finally resolve all claims of expropriation of or wrongful interference with property, breach of contract, or unjust enrichment, against Cuba, accruing from January 1, 1959 through the date of entry into force of this instrument, asserted by Cuban nationals who became nationals of the United States after the date of accrual of such claims but before the date of execution of this instrument.

1.2 Both Governments declare their firm intention to promote the fair resolution of all claims and to act in good faith so as to promote the mutual prosperity of their nations and citizens.

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### *2. Composition of the Cuban Special Claims Court*

2.1 Cuba hereby pledges that as a sovereign act it will constitute a Cuban Special Claims Court (hereafter “Court”) as an independent chamber of the Supreme Court of Cuba in accord with the terms of this Declaration. The Court shall consist of twelve Judges appointed by the Government of Cuba in consultation with the Government of the United States. All appointments shall be made within 90 days after the entry into force of this instrument. The appointments shall be of persons of any nationality who are knowledgeable regarding the civil law and international law. No more than six Judges may be of the same nationality. The Judges shall elect from their number a Chief Judge. If they fail or are unable to elect one of their number Chief Judge, the Court shall request that the Secretary General of the International Centre for the Settlement of Investment Disputes choose the Chief Judge from among their number.

2.2 Judges of the Court shall be appointed and the Court shall conduct its business in accordance with the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law (hereafter “UNCITRAL”) except to the extent modified by the terms of this instrument or by the Court.

2.3 Judges may be removed only for misfeasance or neglect of duties and with the concurrence of both Governments and any replacement Judges shall be appointed with the concurrence of both Governments.

### *3. Competence of the Court*

3.1 The Court shall have exclusive jurisdiction to finally and conclusively resolve all claims described in Article 1.1 regardless of the value of the claim. Parties may not by agreement derogate from or prorogate to the jurisdiction of the Court.

3.2 The Court shall have jurisdiction to interpret all provisions of this instrument except for Article 9.7.

3.3 The Court shall have the authority to promulgate rules of procedure to effectuate the purposes of this instrument.

### *4. Law Applied by the Court and Nature of Remedies*

4.1 Subject to the qualifications of this Article, both with regard to the availability of relief and remedies, the Court shall decide, except to the extent modified by the terms of this instrument, all cases on the basis of the applicable principles of the civil law. In all cases, the Court shall respect basic concepts of fundamental fairness and internationally accepted principles of fair compensation.

4.2 In the case of small claims, as defined below, the sole remedy shall be in the form of payment in United States dollars.

4.3 In the case of medium and large claims, as defined below, specific restitution of real property or tangible personal property shall be awarded only if the Claimant requests this remedy and it can be granted without adversely impacting innocent third parties.

4.4 In the case of medium and large claims in which the Court determines the Claimant is entitled to relief, Cuba may propose a remedy such as tax credits, development rights or other rights in property owned by the Cuba. The Court shall award Cuba’s proposed remedy if it finds that the remedy is the fair equivalent of the remedy to which the Claimant would be entitled under the applicable legal principles set forth in Article 4.1. Such remedies may include reasonable terms and conditions designed to promote investment in the Cuban economy.

4.5 The Court may order appropriate interim measures of relief, including orders regarding the production of evidence, and, except for proceedings before the Cuba-United States Claims Tribunal,

stays of closely related proceedings in other forums. The courts of each Government shall, subject to the provisions of Article 4.6 regarding the gathering of evidence, aid in the enforcement of and comply with all orders of interim measures of relief, including stays of closely related proceedings, regardless of which of the proceedings was first filed. In the event the Cuba-United States Claims Tribunal orders the stay of a closely related proceeding before the Court, the proceeding before the Court shall be stayed and transferred to the Tribunal for consolidated resolution. Nothing in this instrument shall be construed to forbid a court of a nation other than Cuba or the United States from making appropriate interim orders to preserve the status quo pending the Court's resolution of a claim.



*The courtyard of Hotel El Nacional.*

4.6 At the request of the Court, the courts of the United States shall entertain applications for orders necessary to assist the Court in gathering evidence, including evidence held by non-parties. Such applications shall be directed to the appropriate United States District Court pursuant to 28 U.S.C. section 1782. Such applications may be made only by the Court and neither party shall make any application to any court of the United States or any other nation, under section 1782 or any other provision of law, without being so ordered by the Court. The Court shall if necessary make reasonable provisions for obtaining the assistance of other Cuban courts in gathering evidence. The Court may also make requests to the courts of nations other than the United States or Cuba. Nothing in this section shall be construed to require a court to enter an order that would offend any applicable privilege or principle of sovereignty or public policy.

4.7 In the event that a Claimant presented a claim to the Foreign Claims Settlement Commission, a denial of the claim on the grounds that the Claimant was not a United States national at the time the claim arose shall not prejudice the Claimant's right to proceed with the claim before the Court.

### *5. Small Claims Before the Court*

5.1 A small claim is one over which the Court has jurisdiction and in which recovery of \$10,000.00 or less, exclusive of any claim for interest, is sought.

5.2 If necessary for the timely and efficient resolution of small claims, the Court may appoint any number of hearing officers who shall have the power to act for the Court in all respects with regard to small claims.

5.3 The Court shall promulgate one or more forms to assist Claimants in providing notice of the arbitration as required under Article 3 of the UNCITRAL arbitration rules. In the case of small claims, the notice of the arbitration shall also constitute the statement of claim under Article 18 of the UNCITRAL arbitration rules. Cuba shall not be required to submit a statement of defense or appear in opposition to the claim. In the event Cuba elects not to submit a statement of defense or appear in opposition to the claim, the Court shall treat the material elements of the claim as contested by Cuba and shall require the Claimant to meet its burden of proof as set forth in Article 5.4.

5.4 The Claimant shall prevail on a small claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1. The Court shall, however, in all small claims take due regard of difficulties of proof and valuation and shall draw all reasonable inferences in favor of the Claimant.

5.5 The Court shall resolve small claims on the basis of written submissions and documentary evidence and without an oral hearing or live testimony unless the small claim presents a

substantial issue of fact that cannot be resolved without an oral hearing or live testimony. If an oral hearing or live testimony is required, the Court shall take all steps practicable (such as taking testimony remotely) to minimize inconvenience to the Claimant and any other witnesses. The UNCITRAL arbitration rules concerning the conduct of hearings shall apply in small claims only to the extent consistent with this Article.

5.6 The sole remedy in the case of small claims shall be in the form of payment of United States dollars.

5.7 In small claims, the decision of the Court in the first instance shall be final with no right of appeal.

#### *6. Medium Claims Before the Court*

6.1 A medium claim is one over which the Court has jurisdiction and in which recovery of more than \$10,000.00 but less than \$250,000.00, exclusive of any claim for interest, is claimed.

6.2 A single Judge shall be assigned at random to hear each medium claim. The nationality of the Judge is not grounds to challenge the impartiality or independence of the Judge under Article 10 of the UNCITRAL arbitration rules.

6.3 The Claimant shall prevail on a medium claim if the Claimant proves evidence that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1.

6.4 The Court shall in all medium claims conduct the hearing in accordance with the UNCITRAL arbitration rules and the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration of 1999 (“IBA Rules”) and shall conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Court shall in all medium claims take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

6.5 A party who suffers an adverse award by the Court hearing a medium claim in the first instance may appeal to have the claim heard by the twelve Judges of the full Court. The appeal shall be heard if a majority of the Judges votes to hear the appeal. If the appeal is heard, the full Court may, as required by the applicable legal principles set forth in Article 4.1, affirm, reverse or modify the decision of the Court in the first instance. If after hearing the appeal the Court is evenly divided, the decision of the Court in the first instance shall be affirmed.

#### *7. Large Claims Before the Court*

7.1 A large claim is one over which the Court has jurisdiction and in which recovery of more than \$250,000.00, exclusive of any claim for interest, is claimed.

7.2 To promote the resolution of large claims both before the Court and the Cuba-United States Claims Tribunal, the United States and Cuba shall jointly select a Claim Resolution Process Facilitator (“CRPF”). If they cannot agree on a CRPF, the Chief Judge of the Special Claims Court and the President of the Tribunal shall jointly submit a list of five proposed names and the Governments shall each strike one name in succession; the remaining person will serve as CRPF. The CRPF may not be a citizen of either the U.S. or Cuba, must be bilingual in Spanish and English and must be experienced and knowledgeable in international commercial or property claims dispute resolution. In all large claims, the CRPF shall (1) meet with the parties; (2) assist the parties in identifying suitable alternative dispute resolution processes; (3) facilitate creation or selection of a mutually agreed upon dispute resolution process and persons to assist with the process; (4) assist the parties in identifying any necessary materials to prepare for resolution of the dispute; (5) assist the parties in establishing a timetable

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for the dispute resolution process; (6) maintain rosters of mediators and other third-party neutral dispute resolution providers as the CRPF deems appropriate; (7) report to the Court, the Tribunal, and to the Governments on aggregate patterns and issues emerging in process selection without disclosing confidential information supplied by the parties. The CRPF may hire such staff and conduct such training, research, and public discussions as may reasonably be appropriate to carry out the duties set forth above.

7.3 A large claim not resolved under Article 7.2 or otherwise shall be heard by three Judges no more than two of whom shall be of the same nationality. The nationality of a Judge is not grounds to challenge the impartiality or independence of that Judge under Article 10 of the UNCITRAL arbitration rules.

7.4 The Claimant shall prevail on a large claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1.

7.5 The Court shall in all large claims conduct the hearing in accordance with the UNCITRAL arbitration rules and the IBA Rules and shall conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Court shall in all large claims take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

7.6 A party who suffers an adverse award by the Court hearing a large claim in the first instance may appeal to have the claim heard by the twelve Judges of the full Court. The appeal shall be heard if a majority of the Judges votes to hear the appeal. If the appeal is heard, the full Court may, as required by the applicable legal principles set forth in Article 4.1, affirm, reverse or modify the decision of the Court in the first instance. If after hearing the appeal the Court is evenly divided, the decision of the Court in the first instance shall be affirmed.

### 8. Definitions

8.1 “Civil law” means the civilian legal tradition particularly as derived from the Spanish Civil Code of 1889 and includes applicable rules of private international law.

8.2 “Claim” means all theories of legal relief set forth in Article 1.1 arising out of a transaction or occurrence.

8.3 “Claims of Cuban nationals who became nationals of the United States after the date of accrual of such claims but before the date of entry into force of this instrument” include claims that were lawfully assigned or succeeded to by United States nationals.

8.4 “Claimant” means a natural or juridical person asserting a claim or persons asserting a joint or common interest in a claim.

8.5 “Cuba” or “the Government of Cuba” means any political subdivision of Cuba and any agency, instrumentality, or entity controlled by the Government of Cuba or any political subdivision thereof.

8.6 “The United States of America” or “the Government of the United States” means any political subdivision of the United States and any agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof.

8.7 “National” of Cuba or of the United States, as the case may be, means (a) a natural person who is a citizen of Cuba or the United States; and (b) a corporation or other legal entity organized under the laws of Cuba or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock. In the case of partnerships, joint ventures or other

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non-corporate entities which are comprised of both nationals and non-nationals, such entities shall be treated as nationals in proportion to the ownership interest of nationals of each nation in such entities. Nationals may also make claims based upon an ownership interest in a juridical person provided the ownership interest was sufficient to control the juridical person at the time the claim arose, the juridical person is not entitled to bring a claim either before the Court or the Cuba-U.S. Claims Tribunal and the juridical person has not previously recovered on that claim in any forum.

8.8 “Property” means any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.

8.9 “Proves” means to carry the appropriate burden of proof as determined by the Court.

### *9. Other Provisions*

9.1 No claim may be filed more than two years after creation of the Court. No defense of prescription, limitation, laches, sovereign immunity or like defense shall be allowed if the claim is timely filed under this Article.

9.2 The location of the seat of the Court shall be determined by the Chief Judge. The location of the seat shall not, however, prejudice the ability of the Court to conduct hearings at locations outside the seat so as to minimize any inconvenience to the parties and witnesses.

9.3 The official language of the Court shall be Spanish though reasonable translation services shall be available to Claimants who wish to present their claims in English.

9.4 The expenses of the Court shall be borne by Cuba.

9.5 The Government of Cuba shall designate an Agent at the seat of the Court to represent Cuba to the Court and to receive notices or other communications directed to Cuba in connection with proceedings before the Court. The Court shall notify the Agent of all filings against Cuba. The filing of any document with the Court by a Claimant shall constitute notice to Cuba and no separate notice to Cuba need be given under Article 2 of the UNCITRAL arbitration rules or any other provision of law. Cuba, however, must give separate notice to a Claimant of any filing it makes relative to the Claimant’s claim.

9.6 The awards of the Court shall be final, binding and not subject to appeal or collateral attack in any other forum. Any award the Court may render shall be enforceable in the courts of any nation in accordance with its laws. Any award of the Court shall be given the same preclusive effect as a judgment of a court of competent jurisdiction. Claims resolved by agreement of the parties under Article 7.2 in any other manner shall be treated as if they were the subject of an award by the Court.

9.7 If necessary for Cuba to comply with its obligations under this instrument, the United States shall either loan on favorable terms to Cuba, or assist Cuba in obtaining loans of, funds sufficient to allow Cuba to comply with its obligations. These funds shall be held by Cuba in a separate account and used only for the purposes of complying with Cuba’s obligations under this instrument.

9.8 Each proceeding before the Court shall be public unless good cause can be shown that the interests of justice would be better served by a closed proceeding.

9.9 The Court shall cease to operate when all claims have been resolved or five years from the entry into force of this instrument, whichever is earlier, unless Cuba elects to extend the period of operation. If any claims are left unresolved at the time the Court ceases operation Cuba shall make reasonable provision for their resolution.

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## **V.(C) Analysis of Article 1**

### *Tribunal Article*

#### *1. Purposes and Creation*

1.1 The Governments of Cuba and of the United States of America hereby declare their willingness and desire to finally resolve all claims of expropriation of or wrongful interference with property, breach of contract, or unjust enrichment, accruing from January 1, 1959 through the date of entry into force of this instrument, of the nationals of the United States against the Government of Cuba, of nationals of Cuba against the Government of the United States and of the two Governments against each other. There is hereby created the Cuba-United States Claims Tribunal for the resolution of such claims.

1.2 The Government of Cuba also pledges to create a Special Claims Court to finally resolve all claims of expropriation of or wrongful interference with property, breach of contract, or unjust enrichment accruing on or after January 1, 1959 against the Government of Cuba by Cuban nationals who became nationals of the United States after the date of accrual of such claims but before the date of entry into force of a separate instrument creating that Court.

1.3 Both Governments declare their firm intention to promote the fair resolution of all claims regardless of the nationality of the Claimants and to act in good faith so as to promote the mutual prosperity of their nations and citizens.

### *Court Article*

#### *1. Purposes and Intent to Create*

1.1 The Governments of Cuba and of the United States of America hereby declare their willingness and desire to finally resolve all claims of expropriation of or wrongful interference with property, breach of contract, or unjust enrichment, against Cuba, accruing from January 1, 1959 through the date of entry into force of this instrument, asserted by Cuban nationals who became nationals of the United States after the date of accrual of such claims but before the date of execution of this instrument.

1.2 Both Governments declare their firm intention to promote the fair resolution of all claims and to act in good faith so as to promote the mutual prosperity of their nations and citizens.

## **V.(C)(1) Power to Constitute the Tribunal & the Court**

### **V.(C)(1)(a) Presidential Authority**

An important threshold question is the legal authority of the U.S. government to enter into the agreements creating the Tribunal and demonstrating the intent to create the Court. Analytically, the more difficult questions surround the establishment of the Tribunal as it would involve the creation of an alternative forum in which the FCSC-certified claimants (as well as Cuban claimants against the U.S. and government claimants against each other) could press their claims and would also involve direct U.S. participation in the adjudicative process. Since these claims are held by parties continuously considered nationals of either country, they are proper for both the U.S. and Cuba to espouse respectively.

In order to respect Cuban sovereignty, the proposed Declaration outlining a Special Claims Court within Cuba is stated only as an expression of Cuba's intent to create such a Court. As such, the actual creation of the Court would take place under Cuban internal law in a manner consistent with the Declaration. Of course, once Cuba and the United States enter into the agreement, under the well-known *pacta sunt servanda maxim* of international law, both states

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would be required to honor the declaration according to its terms. The Court, thus, as an arm of the Cuban judiciary, would be adjudicating claims that were Cuban at the time they arose, not American. The U.S. would have no claims to espouse in this regard. *See infra* Section V.C.3.a. The Cuban claims would therefore be initiated in and adjudicated by the Cuban judiciary and no U.S. participation would occur following formation of the Court. Thus, if the U.S. has power to enter into the proposed agreement creating the Tribunal then, a fortiori, the U.S. has the power to enter into the proposed agreement expressing Cuba's intent to create the Court where no U.S. espousal would occur but where claims critical to Cuban reconciliation would be resolved.

The U.S. could enter into the pacts either as Article II treaties, congressional-executive agreements, or sole executive agreements. Only the treaty method is expressly provided for in the U.S. Constitution; however, both congressional-executive agreements and sole executive agreements appear constitutionally sound when used in appropriate situations. In theory, each method has equal legal effect and force under international law. However, domestic legal effect and international durability of an agreement depend, at least in part, on the method chosen.

Under Article II, Section 2, Clause 2 of the U.S. Constitution, the President has the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The Constitution does not expressly provide for congressional-executive agreements or sole executive agreements. Despite the lack of express constitutional authority, Presidents have used congressional-executive agreements and sole executive agreements to enter international pacts with increasing frequency since the latter half of the nineteenth century. Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 Harv. Int'l L.J. 1, 23-30 (2003).

Some scholars contend that the constitutional basis for such agreements can be implied from the President's express foreign affairs powers in the Constitution. Schlomo Cohen et al., *The Iranian Hostage Agreement under International and United States Law*, 81 Colum. L. Rev. 822, 843-44 (1981). These express sources from which the implied powers extend include the President's power to act as commander in chief, to receive ambassadors and other public ministers, and to act under "inherent powers as the 'sole organ of the nation in its external relations.'" *Id.*; Wuerth, *supra*, at 12.

Others argue that constitutional flexibility further grants the President complete discretion to form international settlement agreements if the agreements are negotiated in conjunction with foreign government recognition. Evan Todd Bloom, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 Colum. L. Rev. 155, 176 (1985). This assumed discretion stems from consistent legislative deference to the President in recognizing new governments and in designating the status of foreign governments. *Id.* at 166. Presidential discretion in claims settlement situations related to nation recognition is particularly relevant to U.S. property claims against the Cuban government. Resolution of these more-than-40-year-old disputes is a key to normalizing U.S. diplomatic and economic relations with Cuba. As such, the President arguably has very broad discretion and autonomy in negotiating and constituting the Tribunal and Court as part of the recognition of a democratic transition government in Cuba. *But see* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 Tex. L. Rev. 961, 962 (2001); Wuerth, *supra*, at 13 (noting that some contend, based on the Constitution's text, that Article II treaties are the only constitutional method of entering international agreements).

Wherever the precise boundaries of executive power lie, the authority to enter into important international pacts outside of Article II treaty strictures seems well-established by the practice of past Presidents. The North American Free Trade Agreement, the General Agreement on Tariffs and Trade, and the Strategic Arms Limitation Talks I Treaty were all entered into by congressional-executive

agreement, and those settling the high-stakes disputes following the Russian and Iranian revolutions were entered into by sole executive agreements. John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?* 31 J. Legal Stud. 5, 7 (2002). Further, no litigant has successfully challenged the constitutionality of the President's actions in conjunction with these agreements. *Id.* at 7. Nor has Congress voiced disapproval. In fact, the U.S. Supreme Court has noted that "Congress has consistently failed to object to [the] longstanding practice of claim settlement by executive agreement, even when it has had an opportunity to do so." *Dames & Moore v. Regan*, 543 U.S. 654, 682 n.10 (1981).

In *Dames & Moore*, the Supreme Court directly addressed the constitutionality of non-Article II treaty agreements used in claims settlement situations. The *Dames & Moore* Court contemplated three situations where the President's power to enter congressional-executive agreements or sole executive agreements changes.

First, when the President acts with express authorization from Congress, "his actions are supported by the strongest of presumptions, and the burden of persuasion...rest[s] heavily upon any who might attack it." *Id.* at 668. Second, without congressional approval, the President's power is more uncertain, and a court may examine "congressional inertia, indifference or quiescence" in discerning the legitimacy of the act under separation of powers principles. *Id.* at 668-69. Finally, presidential acts in opposition to the will of Congress are constitutional only if Congress has no authority to act on the subject. *Id.* at 669.

The Court applied these principles to the sole executive agreement used to settle the 1979 Iranian hostage crisis in the Declaration of Algiers. According to the Court, where a settlement agreement is necessary to resolve a major U.S. foreign policy dispute, and where Congress appears to have acquiesced in the President's action, the judiciary would not interfere with the President's power to settle the dispute. *Id.* at 688. The Court found that Congress had approved of and created a means for the President to enter claims settlement agreements by enacting the International Claims Settlement Act of 1949. *Dames & Moore*, 543 U.S. at 680. Further, the Court noted that when Congress enacts legislation closely related to the President's authority to act in a particular case, such legislation invites independent presidential action on the subject. *Id.* at 678.

More recently, in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court considered the preemptive effect of a sole executive agreement entered into with Germany. The agreement created a foundation funded equally by the German government and insurance companies to compensate those "who suffered at the hands of German companies during the National Socialist era." *Agreement Concerning the Foundation Remembrance, Responsibility and the Future*, 39 Int'l Leg. Mat. 1298 (2000). The Court held that the executive agreement preempted a California state law that purported to require foreign companies doing business in California to disclose information about Holocaust insurance policies. In so holding, the Court observed:

[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic. Making executive agreements to settle the claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799, when the Washington administration settled demands against the Dutch government by American citizens who lost their cargo when Dutch privateers overtook the schooner *Wilmington Packe*....

*Garamendi*, 536 U.S. at 415.

The Iranian agreement considered in *Dames & Moore* is a fairly close analogy to the Cuban situation. As in that case, a court may find that Congress has acquiesced in and invited presidential discretion to constitute property claims tribunals by sole executive agreement with Cuba. This acquiescence could be based on the International Claims Settlement Act of 1949 and the Libertad Act. The Libertad Act authorizes the President to take independent action towards Cuba in numerous instances, including determining when Cuba has made a transition to a democratically elected government and developing a plan of economic assistance toward Cuba in preparation for transition to democracy. See 22 U.S.C. § 6062(a)(1). The case for presidential discretion is further supported in that constituting the Tribunal and Court would be necessary to resolve a major U.S. foreign policy dispute, similar to the situation in *Dames & Moore*.

The circumstances of Cuban property disputes do, however, differ in some respects from the Iranian hostage situation. The nature of the dispute with Cuba gives the President more time for preparation and consideration of appropriate action. Under current law, no negotiation is possible until the communist regime has transitioned to a democratic government, and until Fidel and Raúl Castro die or are replaced and democracy takes hold, the U.S. has time to prepare detailed plans and to recruit the legislative support necessary for a congressional-executive agreement or Article II treaty.

Legislative acquiescence under the Libertad Act also has somewhat indefinite contours. Although some provisions of the Act appear to authorize presidential discretion and independence, other provisions specifically require the President to obtain legislative approval before acting. For example, section 6067(a)(5) of the Act requires the Secretary of State to provide a report to appropriate congressional committees regarding “an assessment of any areas requiring legislative review or action regarding the resolution of property claims in Cuba prior to a change of government in Cuba.” The Act also states that the President cannot make changes to a plan of economic assistance to Cuba without notification to “appropriate congressional committees at least 15 days in advance.” 22 U.S.C. § 6063(d). Although these provisions do not expressly require congressional approval, their tenor indicates that there could be some legal and political advantages to employing either an Article II treaty or congressional-executive agreement to enact the proposed instruments.

Nevertheless, it seems likely that any of the three avenues for agreement will be open to the President and the question of which one to employ will be primarily a political judgment. Although in theory agreements that exclude legislative input are more susceptible to constitutional challenges, once the President has used a sole executive agreement in a proper situation, courts are particularly inclined to defer to the President’s judgment. A recent case from the U.S. Court of Appeals for the Second Circuit demonstrates this point.

In *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005), a group of Austrians sued the Austrian government in a U.S. federal court under exceptions to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, to resolve property claims arising from confiscation during the Second World War. Before and after the filing of the plaintiff’s suit, the President was in the process of negotiating an international agreement to establish a fund to compensate Austrian property claimants. One of the terms of the agreement required the Executive Branch to seek dismissal of any pending litigation in the U.S. regarding Austrian property confiscation during World War II. The agreement was constituted through a series of executive letters. *Id.* at 59-63.

Upon completion of the agreement, the U.S. Department of State filed a Statement of Interest with the district court. The statement urged the court to dismiss the plaintiffs’ case to accommodate U.S. foreign policy interests. On appeal, the Second Circuit dismissed the case pursuant to the Statement of Interest. *Id.* at 62-73.

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The court held that deference to a State Department foreign policy interest statement recommending suit dismissal was appropriate in the following situation:

[W]here...(1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of...claims; (2) the United States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims.

431 F.3d 57,59-60.

*Whiteman* and cases like it make it less likely any claimant could undermine the Tribunal or the Court by seeking a remedy in a U.S. court once the instruments have been enacted, even if by sole executive agreement. The President could protect the legitimacy of the Tribunal and the Court by filing appropriate Statements of Interest. U.S. courts are likely to defer to executive judgment with respect to property claims within the scope of the agreement in order to protect the alternative forum established by the President.

### **V.(C)(1)(b) International Law Status**

Both the U.S. and Cuba are parties to the Vienna Convention on the Law of Treaties (“Convention”). The Convention defines a treaty as “any international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention on the Law of Treaties, May 22, 1969, As such, international law does not distinguish between the label “treaty,” “congressional-executive agreement,” or “sole executive agreement” with respect to legal effect; both forms of executive agreements along with Article II treaties are binding pacts under international law. Senate Comm. on Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 4 (Comm. Print 2001). Further, domestic legislation generally cannot legally undermine international commitments entered into by Article II treaty or either of the two executive agreement methods. *Id.* at 174.

The Convention requires a country to implement the terms of a treaty in good faith and demands that no action be taken to undermine the purpose of a treaty. More over, Article 46 of the Convention provides that the only instance where a state can invoke its domestic law to undermine a treaty is if the state’s consent to be bound under treaty terms was a manifest violation of fundamentally important internal law. According to section 2 of Article 46, “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” Consequently, the President’s consistent prior use of sole executive agreements for international property claims settlement mechanisms would prevent a determination that use of such an agreement was a manifest violation “objectively evident to any State.” As such, even if a U.S. court found that the agreement creating the Tribunal or the agreement expressing the intention to create the Court unconstitutional, the violation of internal law would likely not be manifest, and the agreement would remain binding under international law.

### V.(C)(1)(c) Practical Considerations

Although an Article II treaty, a congressional-executive agreement, and a sole-executive agreement all have the same international legal implications, the relevant political considerations for each type of agreement differ. Article II treaties and congressional-executive agreements have significant disadvantages. “A president who chooses to seek legislative approval of a treaty risks delay, textual modification, and even outright defeat.” Setear, *supra*, at 5. Congressional-executive agreements and Article II treaties can generally be amended when they are brought for legislative approval. *Id.* at 21.

During legislative review, Congress has the power to force the President to include “reservations, understandings, and declarations” (“RUDs”) in his ratification letter. *Id.* If Congress chooses to add RUDs to an agreement, the President has a choice to either accept the RUDs or veto the agreement by refusing to ratify it. *Id.* at 22. The President can try to prevent RUDs by including a no-reservations clause in a proposed agreement, but such a clause may undermine the agreement’s chances of success. *Id.* at 23-24. Sole executive agreements avoid the risk of textual amendment. Finally, the necessity of recruiting either a two-thirds majority in the Senate or a simple majority in both houses of Congress makes ratifying Article II treaties and congressional-executive agreements more cumbersome and time consuming than ratifying sole executive agreements.

Despite these shortcomings, legislative approval does provide off-setting advantages: Legislative consent reveals the attitude of the U.S. toward the agreement as a whole, and makes it more likely the terms of the agreement will be honored. Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 Va. J. Int’l L. 113, 124 (2003).

Further, legislative consent solidifies the President’s commitment to the agreement and assures that the interest of the country is in line with what the President represents. *Id.* at 124-25. Finally, legislative consent “can render a treaty enforceable by domestic courts” and cause the legislature to create “domestic institutional obstacles to renegeing on the international promise.” *Id.* at 126.

Further, the practical effect and durability of an Article II treaty is usually stronger despite its equivalent status under international law. A treaty requiring the advice and consent of two-thirds of the U.S. Senate, which has a six-year staggered election cycle, reduces the likelihood of domestic legislation that might undermine the effect of a treaty. Setear, *supra*, at 16. Further, respect for Article II treaties is theoretically more entrenched than respect for either kind of executive agreement formed without express constitutional authority.

A congressional-executive agreement is slightly less durable than an Article II treaty because the agreement could lose domestic support sooner in light of the two-year election cycle and the requirement of only a simple majority in both houses to support the agreement. *Id.* Finally, a sole executive agreement is most vulnerable to domestic attempts to undermine the effectiveness of the agreement because sole executive agreements exclude the legislative branch from the formal agreement process. As a result, an Article II treaty is generally most dependable and durable, followed by congressional-executive agreements and sole executive agreements.

Beyond this general theory of respect and durability, the particulars of a situation will affect the choice of ratification method. Presidents have a tendency “to opt for...legislative participation, when (1) the other nation demands a strong or lasting commitment; (2) the president’s foreign policy goals converge sufficiently with the legislature’s so that consent can be obtained; and (3)



*A view of Old Havana.*

immediate action is not required.” Goldsmith & Posner, *supra*, at 127. Under these considerations, Presidents have consistently favored congressional-executive agreements or sole executive agreements in past claims settlement situations, which may be because “[t]he need to signal long-term commitments is [generally] absent with respect to claims agreements.” Setear, *supra*, at 30.

The U.S. State Department has developed eight factors to consider in deciding whether the President should constitute an international agreement by Article II treaty, by congressional-executive agreement, or by sole executive agreement. The factors are:

1. The degree of commitment or risk for the entire Nation;
2. Whether the agreement is intended to affect state laws;
3. Whether the agreement requires enabling legislation;
4. Past U.S. practice;
5. The preference of Congress;
6. The degree of formality desired;
7. The proposed duration and the need for prompt conclusion; and
8. General international practice on similar agreements.

Senate Comm. On Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 26 (Comm. Print 2001).

Under these criteria, some factors favor using the more formal method of an Article II treaty to constitute the Tribunal and the Court. First, the degree of risk and commitment for the U.S. and Cuba is relatively high. Even though extensive domestic enabling legislation would probably not be necessary, the settlement process could suffer irreversible damage if the Cuban people sense any lack of U.S. commitment. In addition, the potentially fragile political situation in post-Castro Cuba calls for a high degree of formality.

On the other hand, a sole executive agreement, or perhaps a congressional-executive agreement, could be concluded much more quickly. Leaving the claims issue in limbo for any significant period after the transition begins may be politically unacceptable. Use of a sole executive agreement or congressional-executive agreement would also be consistent with international practice, although the potential number of American claimants and the amount of money at stake for those claimants is greater than settlement agreements previously negotiated by any U.S. President.

To make any property claims forum effective, the Cuban people must buy into the course of action and must believe the U.S. is dedicated to a fair and reasonable process. Therefore, the agreement must be durable enough to allow all parties to buy into and respect the claims settlement process. Ultimately, any of the three options may accomplish this goal depending on the circumstances, and all three are available to give the proposed instruments the force of law. The question of which route to take will be a political judgment based on the competing factors discussed above.

## **V.(C)(2) Descriptions of Claim Classes**

In order to understand the nature of the bodies recommended by this Report, it is necessary to analyze the claimant classes.

### **V.(C)(2)(a) FCSC-Certified Claims Against Cuba**

The most obvious class of claims against Cuba is comprised of claims held by those who were U.S. citizens at the time of loss and who continue to be U.S. citizens up to the time the claim is presented to the Tribunal. These claims we refer to as the “FCSC-certified claims” because, as discussed below, U.S. law provided an administrative process for their certification. The International Claims

Settlement Act of 1949 (“Act”) was enacted for the purpose of adjudicating claims arising out of the nationalization or other taking of property by a foreign state. The Act states that adjudication must occur in accordance with any subsequent claims settlement agreement between the government of the U.S. and the government of a foreign state. In addition, the Act created the Foreign Claims Settlement Commission (“FCSC”) and conferred jurisdiction upon the FCSC to “receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or any national of the United States included within specified claims agreements or categories.” International Claims Settlement Act of 1949, Pub. L. 80-453 § 4(a), 64 Stat. 12, 13-14 (1950).

Congress amended the International Claims Settlement Act in 1964 to create the Cuban Claims Program. The amendment states that the purpose of the program is “to obtain information concerning the total amount of such claims against the Government of Cuba on behalf of nationals of the United States. This Title shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims.” International Claims Settlement Act Amendment, Pub. L. 88-666, 78 Stat. 1110 (1964). Additionally, the FCSC website, in the Cuban Claims Program section, states that “[a]lthough there are no funds currently available to make payment on any American claims, the certification of the Commission’s findings to the Secretary of State will be used as a basis for future negotiation of a claims settlement with the Government of Cuba.” See United States Department of Justice, Cuban Claims Program, *available at* <http://www.usdoj.gov/fcsc/cubanclaims.htm>.

### **V.(C)(2)(b) Cuban Expatriate Claims Against Cuba**

Another class of claims against Cuba consists of those held by Cuban expatriates. As discussed extensively, *infra* Section V.C.3, analytically the claims of Cuban expatriates, those who were Cuban at the time of loss but are now U.S. nationals, stand on somewhat different footing. While the FCSC-certified claims are appropriately determined under international law and thus handled by the Tribunal, the Cuban expatriate claims are appropriately handled under civil law principles and thus by the Court.

### **V.(C)(2)(c) Cuban Claims Against Cuba**

Although not directly the subject of this Report, it is likely current Cuban citizens will have viable property claims against the government of Cuba once the transition is underway. These claims will be an intra-Cuban matter appropriate for handling in Cuban courts of general jurisdiction. See Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad* § 133 (1927) (noting “[e]ach state in the international community is presumed to extend complete protection to the life, liberty and property of all individuals within its jurisdiction” with the exception of situations involving extreme human rights violations). Nevertheless, any just policy towards Cuba – including towards property claims issues – must take account of the needs and interests of the Cuban people. Resolution of the property claims will not contribute to the development of a healthy democracy in Cuba if the resolution contributes, or is seen as contributing, to economic misery on the island. Accordingly, policy towards a new Cuba should attempt to make resolution of the claims a vehicle for promoting economic growth and improving the lives of ordinary Cubans. So, while not directly the concern of this Report, the stake of Cuban citizens is considerable.

### **V.(C)(2)(d) Cuban Claims Against the United States**

Under the doctrine of espousal, it will be up to the new Cuban government to decide how it wishes to approach resolution of property claims of Cubans against the U.S. Although not

approaching in any way the magnitude of the claims against Cuba, they are potentially substantial. The Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101 - 515.901 have existed in essentially their current form since 1963. They impose some severe restrictions on Cuban nationals seeking to recover property (e.g., bank accounts, life insurance policy proceeds, etc.) located in the U.S. The statutory authority for these regulations is the Trading with the Enemy Act, 5 U.S.C. App. § 5(b)(1) (2000). See *Sardino v. The Fed. Reserve Bank of New York*, 361 F.2d 106, 109 (2d Cir. 1966) (“The statutory authority for the regulations seems plain enough.”).

As of 2002, the U.S. Treasury Department reported that there were \$146.5 million in blocked assets of the Cuban government, but this did not include the blocked accounts of individual Cuban nationals. See Terrorist Assets Report, Calendar Year 2002, available at <http://www.ustreas.gov/offices/enforcement/ofac/reports/tar2002.pdf>. This figure would be closer to a quarter of a billion dollars but for the \$97 million used to pay the tort judgment resulting from the shooting down of the “Brothers to the Rescue” plane. Madeline Baro Diaz, *Families Still Seeking Justice in 1996 Shootdowns: Four Men Were Killed When Cuban Migs Downed two Unarmed Planes*, South Florida Sun - Sentinel, February 24, 2006, at 1B.

In the seminal *Sardino* case, the court upheld the regulations against various procedural and constitutional challenges. The claimant in *Sardino*, a Cuban national, had an account of about \$7,000 in a New York bank that represented the proceeds of a life insurance policy on the claimant’s son. As a practical matter, the claimant had very limited access to the account. He could use it only to pay customs duties and the like. The court, however, upheld the seizure against a Fifth Amendment challenge, in part relying on the following rationale that the blocking program was a method of retaliating against Cuba for its seizure of U.S. assets:

Still other considerations support the constitutionality of the freezing order. Cuba has adopted a program of expropriating property within its territory owned by designated American nationals, with a system of compensation holding out only an ‘illusory’ possibility of payment. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)... There is a long history of governmental action compensating our own citizens out of foreign assets in this country for wrongs done them by foreign governments abroad.

Other Cuban claimants have been unsuccessful. In *Richardson v. Simon*, 420 F. Supp. 916 (E.D.N.Y. 1976), a Cuban husband died in 1965 leaving his wife as his only heir. The couple had maintained an account in a Canadian bank that was subject to blockage. Later, in 1969, the wife left Cuba for the U.S. and the Treasury Department granted a license to unblock half the account in favor of the wife. When the wife died, she left the blocked portion to her niece who was an American citizen. However, the Treasury refused to unblock the account. In upholding the Treasury’s determination as reasonable, the court distinguished the Fifth Circuit’s *Real* decision as involving only assets that were beneficially owned by Americans as of the effective date of the regulations (July 8, 1963). See also *American Airways harters, Inc. v. Regan*, 746 F.2d 865 (D.D.C. 1984) (noting that the corporation was a “specially designated Cuban national” and had its assets blocked under the regulations); *Tole S.A. v. Miller*, 530 F. Supp. 999 (S.D.N.Y. 1981) (Panamanian and Venezuelan joint venture unable to unblock assets).

Nevertheless, some of these assets have found their way into the hands of expatriate Cubans. In *Real v. Simon*, 510 F.2d 557 (5th Cir. 1975), a Cuban citizen who was the owner of an account held by a broker in Miami died intestate. The account had been blocked under the regulations mentioned above. The takers by intestacy were all U.S. citizens or lawfully admitted

residents. According to the Fifth Circuit, the Treasury Department's continued blocking of the account was arbitrary and capricious and without a foundation in the Trading with the Enemy Act, as the beneficiaries of the money were all now Americans.

None of this is to question the legality of U.S. policies regarding the freezing of assets – they clearly are legal as the *Sardino* case held. However, as the transition progresses towards a new Cuba, international law will require that the property claims of Cubans against the U.S. be addressed. One possibility, of course, is that diplomacy will reach a lump sum figure. But if there is a need for an individualized determination, then the Tribunal applying international law is clearly the best vehicle.

### **V.(C)(2)(e) Claims Between the Governments**

The Cuban and U.S. governments may have property claims against each other. If they do, these are clearly cognizable under international law. *See* Restatement (Third) of Foreign Relations § 904. An important precedent for government-to-government claims is the Iran-U.S. Claims Tribunal which had “jurisdiction over official claims of the United States and Iran arising out of contractual arrangements between them for the purchase and sale of goods and services.” Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, Art. II(2) (Jan. 19, 1981). There are other historical examples of international tribunals having jurisdiction over claims between governments.

For instance, the agreement ending official hostilities between Eritrea and Ethiopia signed in Algiers on December 12, 2000, created a neutral Claims Commission. Article 5(1) of the agreement provided that “[t]he mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party....” United Nations Mission in Ethiopia, Algiers Peace Agreement, available at [http://www.unmeeonline.org/index.php?option=com\\_content&task=view&id=15&Itemid=50](http://www.unmeeonline.org/index.php?option=com_content&task=view&id=15&Itemid=50). The United Nations Compensation Commission was established to process claims against Iraq for its unlawful invasion of Kuwait and also allows government-to-government claims. The Commission's website states that “[t]he Commission has accepted for filing claims of individuals, corporations and Governments submitted by Governments, as well as those submitted by international organizations for individuals who were not in a position to have their claims filed by a Government....” United Nations Compensation Commission, The Claims, available at <http://www2.unog.ch/uncc/theclaims.htm>. As such, international law and custom demonstrates that the Tribunal is the appropriate venue for government-to-government claims assuming that a diplomatic resolution does not take place.

### **V.(C)(3) Justification for Separate Bodies**

One of the central recommendations of this Report is for two separate bodies to handle different classes of claims. The Cuba-U.S. Claims Tribunal (“Tribunal”) would handle FCSC-certified claims against Cuba, claims by Cubans against the U.S., and claims between the two governments. *See supra* Section V.A., art. 1.1. It would be an international body and, according to the well-accepted UNCITRAL arbitration model, one third of the arbitrators would be drawn from each of the affected nations and the remaining third from neutral countries. The Cuban Special Claims Court (“Court”) would handle expatriate claims against Cuba. *See supra* Section V.B., art. 1.1. It would be a part of the Cuban judiciary, albeit one with a special mission operating under a variety of substantive and procedural constraints designed to ensure fair results and just treatment of the expatriate claimants.

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One might reasonably question whether two separate bodies, with somewhat parallel structures, are necessary to handle the different types of claims. There are, however, numerous legal and practical reasons commending this approach.

### V.(C)(3)(a) International Law

Under the doctrine of espousal, and the shape of various international agreements, the predominant – in fact nearly universal – rule is that the injured party must be a national of the espousing state at the time of injury.

The authorities supporting the requirement of nationality at the time of injury are legion. In *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203 (D.C. Cir. 1987), the court (speaking through Judge, later Justice, Ginsburg) held that American owners of textile mills nationalized in Czechoslovakia could not bring an action against that government for compensation. When the mills were nationalized in 1945, the Czechoslovakian government promised compensation, but when the regime changed in 1948, it reneged. The mill owners were citizens of Czechoslovakia at the time of nationalization but became U.S. citizens just prior to the regime change. In 1981, an \$81.5 million settlement was reached with the U.S. government. Because they were dissatisfied with their lack of compensation under the settlement agreement, the owners tried to enforce the earlier promise by the Czechoslovakian government to pay compensation to U.S. nationals. In rejecting their claim, the court held that the settlement was their exclusive remedy. As the court noted, the treaty contained no direction as to when a party need have been a U.S. national in order to fall within the terms of the treaty. Thus, the court concluded that the treaty was insufficient to dislodge the act of state doctrine. In part, the court relied upon the State Department's explanation of espousal, quoted as follows:

Under well-established principles of international law...the United States cannot espouse claims against foreign governments for injuries inflicted upon persons who were not U.S. citizens at the time of injury. Under international law, the date of taking is fixed by the date of the expropriation decrees and/or the date of physical seizure, and not by a subsequent date of repudiation of an undertaking to provide compensation.

*Id.* at 206-07 (quoting letter from Richard Fairbanks, Asst Sec'y of State for Congressional Relations, reprinted in REP no. 211, 97th Cong., 1st Sess. 4-5 (1981)).

Thus, for our purposes, this authority requires that nationality be fixed at the time of physical invasion or decree. Conceivably, this could give rise to some difficult cases as to whether to treat claimants as expatriates, but in principle this is something the Tribunal should be able to handle.

There are many other instances where courts enforced the requirement that the claimant be a national of the espousing country at the time of expropriation. In *Chytil v. Powell*, 15 Fed. Appx. 515 (9th Cir. 2001), the plaintiff claimed that the State Department discriminated against him impermissibly on the basis of his national origin by failing to espouse his claim. His property was allegedly seized by the Czechoslovakian government in 1939 but he did not become a naturalized U.S. citizen until later. The court reasoned that “[b]ecause in espousing a claim a sovereign takes the claim as its own, a sovereign cannot espouse claims for people who were not citizens of that sovereign at the time the injury was inflicted.” *Id.* at 516 (citing *Dayton*, 834 F.2d at 506-07). The court also held that the matter was not justiciable under the political question doctrine. An identically reasoned companion case was *Marik v. Powell*, 15 Fed. Appx. 517 (9th Cir. 2001). See also *Hau v. Dept of State*, CV-F-94-5964 (E.D. Cal.

1995) (noted Am. Soc. of Int'l L., Int'l Law in Brief Sept 28-Oct. 2, 1998) (claim by plaintiff who was a Vietnamese citizen at time of taking by Vietnam need not be espoused by the government).

Legal commentators also recognize the importance of nationality at the time the claim arose. One author summarizes the requirement as follows:

There is no clearly recognized legal right in international law to the restitution of or compensation for property seized by one's own government. It is well-established that international law principles provide only for the 'prompt, adequate and effective' compensation where the property of aliens has been confiscated.

Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation – a New Form of Property*, 27 U. Miami Inter-Am. L. Rev. 453, 479 (1996).

The issue can be seen as a choice-of-law question. It is beyond dispute that the FCSC-certified claims are governed by international law. The expatriate claims, however, must be determined under Cuban legal principles because of the Cuban nationality of the claimants at the time of the injury and the location of the affected properties. A subsequent change in nationality generally does not alter the legal relation of the parties. *See* Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad* § 306 (1927). It is conceivable that one body could adjudicate both classes of claims. However, it would be awkward, to say the least, to have a single body under some circumstances acting as an international entity applying international law and in others acting as part of the Cuban judiciary. Moreover, there are many other practical and legal reasons, discussed *infra*, for distributing the claims between two bodies.

### **V.(C)(3)(b) United States Precedent**

As noted immediately above, *see supra* Section V.C.3.a., U.S. courts have adhered to the doctrine that a nation espouses the claims only of those who were its nationals at the time of injury. There are some circumstances in which this approach has been deviated from, but these instances do not counsel creating only one body.

An example of such a deviation is the Libertad Act. The Act does contemplate expatriate claimants being able to assert private claims against those who traffic in confiscated U.S. property, though their ability to bring such an action was delayed until two years after the enactment of the statute and Presidents Clinton and Bush have continually suspended the right to bring these actions since the Act went into force. *See* 22 U.S.C. § 6082(a)(5)C (§ 302(a)(5)C of the Act). The two-year delay did not apply to claimants with claims certified by the FCSC, all of whom were necessarily U.S. nationals at the time of expropriation. As one commentator notes, the provisions of the Act contravene established American practice regarding the internationally accepted doctrine of espousal, by which a government represents claims of its citizens to foreign states. Christine L. Quickenden, *Helms-Burton and Canadian-American Relations at the Crossroads: The Need for an Effective, Bilateral Cuban Policy*, 12 Am. U.J. Int'l L. & Poly 733, 749 (1997). Still, even if it violates the traditional notion of espousal, the Libertad Act represents the most recent U.S. statement of policy on this issue.

Moreover, as a customary rule, the time-of-injury rule is not immune from variation. One commentator puts it this way: "[R]equiring the claimant to have the nationality of the espousing state at the time of his injury may well have become a rule of customary international law, although there would exist notable conventional exceptions, including the numerous human rights treaties

that allow a state to protect individual rights regardless of the individual's nationality." Matthew S. Duchesne, *The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes*, 36 Geo. Wash. Int'l L. Rev. 783, 799 (2004).

A parallel to the Libertad situation occurred when the expropriation settlement with Czechoslovakia was entered into. Section 6 of the Czechoslovakian Claims Settlement Act of 1981, 22 U.S.C. § 1642a et seq. (2000), which approved of the President's negotiated settlement with Czechoslovakia discussed in *Dayton*, allowed for the payment of claims to persons who were not U.S. citizens at the time of the taking but became citizens by the end of 1948. In so doing, Congress was clear that this was discretionary and not intended to set any precedent. The relevant language from the Act is as follows:

Sec. 6. (a)(1) The Congress finds that  
(A) in the case of certain persons holding claims against the Czechoslovakian Government who became nationals of the United States by February 26, 1948, the date on which the current Communist Government of Czechoslovakia assumed power; and  
(B) while the Commission had the authority to deny those claims described in subparagraph (A) on the basis that the properties involved had been taken by the Benes Government while the claimants were not yet nationals of the United States, the effect of that denial is to withhold compensation to persons who have been United States citizens for many years and whose expropriated property has benefited the Communist Government of Czechoslovakia no less than properties expropriated more directly and clearly by the Communist Government.  
(2)(A) It is therefore the purpose of this section, in accordance with the intent of the Congress in enacting title IV of the International Claims Settlement Act of 1949 [this subchapter] and in the interests of equity, to make ex gratia payments to the claimants described in paragraph (1) of this subsection.  
(B) The Congress reaffirms the principle and practice of the United States to seek compensation from foreign governments on behalf only of persons who were nationals of the United States at the time they sustained losses by the nationalization or other taking of their property by those foreign governments. In making payments under this section, the Congress does not establish any precedent for future claims payments. (emphasis added).

As a matter of fundamental justice, all potential claimants should get roughly equal treatment, and Congress seems to have agreed in the Czechoslovakian situation. Still, the situation was somewhat different then, as the expatriate claimants there would have had no hope of practical redress in the Czechoslovakian courts, while redress might be possible for the expatriate claimants assuming a favorable regime change in Cuba. Congress recognized that the situation in Czechoslovakia was atypical when it stated that the Act's exception did "not establish any precedent for future claims payments." As such, the general rule still appears to be that expatriate claimants are not a proper subject of the Executive Branch's concern. Still, the above exceptions prove there are some considerations pulling in the opposite direction.

Taking into account current U.S. practice and policy on these matters, it seems clear that expatriate claimants are entitled to a reasonable avenue of redress but it need not be, and likely should not be,

the same avenue as the one open for FCSC-certified claimants. This was the general position taken by Congress in the Libertad Act where it subjected the expatriate plaintiffs' claims to a two-year delay not applicable to FCSC-certified plaintiffs. Thus, the approach most faithful to U.S. law and policy would be to create separate bodies to resolve the FCSC-certified claims and the expatriate claims.

### **V.(C)(3)(c) Report of the Commission for Assistance to a Free Cuba**

In 2006, the Commission for Assistance to a Free Cuba ("CAFC"), a multi-agency panel created by President Bush in 2003, published a 93-page report. Secretary of State Rice is the Chair of CAFC and her co-chair is Secretary of Commerce Carlos Gutierrez. This CAFC Report therefore represents an important and recent expression of U.S. policy.

A section of the Report beginning on page 68 is entitled "Property Rights and Confiscated Properties." This section warns that "[p]erhaps no issue will be fraught with more difficulty and complexity for the Cuban Transitional Government than the status of property rights and confiscated property." It notes the need for the Transitional Government to assure the current residents of Cuba that they will be secure in their homes and property and not subject to "arbitrary expulsion." It also suggests that "a democratically elected government, representing the will of the Cuban people, should make decisions regarding confiscated property." However, the Report also recognizes that "persons whose property was expropriated without compensation in Cuba may choose to pursue legal remedies or seek compensation."

Perhaps most the most pertinent paragraph for present purposes reads as follows:

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

The Report also calls for "government-to-government" negotiations to settle the FCSC-certified claims but goes on to recommend that the U.S. allow "any claimants who wish to seek private settlements to do so."

The last piece of important discussion appears on page 86 where the Report states that "Cubans abroad [expatriate claimants, obviously] should understand that action on confiscated property is best postponed until a fully legitimate, broadly representative democratic government is elected by the sovereign people of Cuba."

Thus, the CAFC Report demonstrates strong support for having different bodies deal with FCSC-certified claims and expatriate claims. As the Report notes, the expatriate claims are more of an intra-Cuban matter than are FCSC-certified claims and resolving them will require a genuine expression of goodwill on the part of a new Cuban government. Of course, this does not mean the expatriate claims are less deserving, only that they need to be treated in a way that will promote "fairness, equity and national reconciliation," as stated in the Report. As for FCSC-certified claims, the Tribunal approach is consistent with the general policy expressed in the Report of having the governments set the parameters of the resolution but allowing claimants to have a say in the resolution of their disputes.

### **V.(C)(3)(d) Establishing Respect for the Rule of Law**

An important and difficult task for Cuba in the transition will be to establish that it respects the rule of law. In terms of attracting foreign investment and developing the economy, a functioning

judiciary and respect for contract and property rights will be particularly critical. *See China's Next Revolution*, *The Economist* 9, 23-25 (March 10, 2007) (discussing importance of new law creating enforceable property rights to Chinese government's future economic plans). Even the Castro regime seemed to recognize on a practical level that attracting foreign investment depends upon some mechanism for enforcing contract and property rights when it created a special arbitration court for foreign investors called the "Corte de Arbitraje de Comercio Exterior." Although, as discussed *infra* Section V.C.3.f, this body is not an adequate vehicle for resolving any of the claims that are the subject of this report, it does help to illustrate the need for specialized tribunals in this area. *See also* Jorge F. Pérez-López, "The Cuban Economy in 2005-06: The End of the Special Period?", pp. 1, 9, in *16 Cuba in Transition: Papers and Proceedings of the Sixteenth Annual Meeting of the Ass'n for the Study of the Cuban Economy* (2006) (noting that severe economic downturn in Cuba forced the government to allow for foreign investment with enforceable contractual expectations). In furtherance of meeting a new Cuba's need to show respect for the rule of law, the creation of the Court has the potential to be a bridge to a more developed Cuban judiciary. Importantly, it would include judges from a mixture of nationalities who are knowledgeable in the civil law tradition and could help to develop Cuban law in a constructive manner.

The pressing need for respect for the rule of law in Cuba, both international and domestic law, is demonstrated by the fact that the Castro regime ignored even Cuban expropriation laws in place at the time when most nationalizations occurred. Most of the expatriate expropriations took place between 1959 and 1968. *See* Mathias F. Travieso-Díaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 *U. Pa. J. Int'l Econ. & Law* 659, 661-662 (1996).

The 1940 Cuban Constitution provided that expropriations could take place only by judicial decree and with the payment of compensation. This provision was amended in 1959 to enlarge the authority for expropriations to any "competent authority," but it still provided for compensation. Even the 1976 and 1992 Cuban Constitutions continued to pay homage to the idea of compensation. The 1976 Constitution provides:

The expropriation of property for reasons of public benefit or social interest and with due compensation is authorized. The law establishes the method for the expropriation and the bases on which the need for and the usefulness of this action is to be determined as well as the form of the compensation, taking into account the interest and the economic and social needs of the [owner].

Article 25 (quoted in Travieso-Díaz, *supra*, at 668).

So, even the application of Cuban law as written would not necessarily result in a complete lack of compensation. "Even if the takings are considered constitutional, the Cuban government would still have an obligation to provide some form of compensation [because] [t]he Fundamental Law, under whose authority the expropriations were executed, requires that compensation be paid." Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation – a New Form of Property*, 27 *U. Miami Inter-Am. L. Rev.* 453, 493 (1996).

Though Cuba has consistently recognized a right to compensation, considerations of elementary justice and practical administration would make it unfair and counterproductive to apply the elastic terms of these Cuban decrees. To the extent that the instrument creating the Court represents a *lex specialis* applicable to the expatriate claims, it can seek to achieve a

just solution rather than one bogged down in technicalities of what Cuban law did or did not provide for at the time of the takings from the expatriate claimants.

As a convenient and effective alternative, a well-established body of legal rules familiar to the Cuban legal tradition are those derived from the Spanish Civil Code of 1889. The Spanish Civil Code was the result in part of the codification movement that swept through continental Europe beginning with the famous Code of Napoleon of 1804. *See* Stephen Jacobson, *Catalan Nationalism and Civil Codification in Nineteen-Century Europe*, 20 *Law & Hist. Rev.* 307, 311 (2002). “Codification of the 19th Century was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as ius-naturalism, rationalism and the Enlightenment.” Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 *J. Transnat’l L. & Pol’y* 163, 163 (2001). Although a distinct entity, the Spanish Civil Code is “clearly a member of the French family.” Jacobson, *supra*, at 312.

Because Cuba was a Spanish possession until the Spanish-American war, the Spanish Civil Code of 1889 was adopted almost in whole in Cuba. Murillo, *supra*, at 172. A version of the Spanish Civil Code persisted in Cuba until 1987, and even now “continues to exert a heavy influence on Cuban jurisprudence.” Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 *Transnat’l L. & Contemp. Probs.* 529, 539 (2004). Thus, as a body of principles well adapted to Cuban culture that would provide a fair and just framework for resolution of the expatriate claims, the legal traditions derived from the Spanish Civil Code offer a uniquely appropriate framework both for fairly resolving the expatriate claims and demonstrating a respect for law and a functional judiciary that will be essential as Cuba moves forward.

Another advantage of using the civilian tradition, particularly as embodied in the 1889 Spanish Civil Code, is that the code’s influence has been manifested throughout Latin America. For example, the Spanish Civil Code has heavily influenced the law of Mexico (*see* Calvin G.C. Pang, *Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai’i and Beyond*, 20 *Haw. L. Rev.* 1, n. 30 (1998) (“After Mexico gained independence in 1821, it used the code as a foundation for governance. Beginning in 1848, regions of Mexico that later formed many of the southwestern and southern border states of the United States, came under the U.S. sovereignty. In these regions, the influence of the Spanish Civil Code persisted in varying degrees thus blending Spanish jurisprudence into the formation of American law. *See* W.S. McClanahan, *Community Property Law in the United States* 8 (1982).”)

Because of this blended history, finding lawyers and jurists who are familiar with this system should not be difficult. Their presence on the Court can help infuse the new Cuban judiciary with the benefits of a comparative perspective from those trained in a system with important links to Cuba’s.

Although, as we have noted, the Cuban claims are not directly the subject of this Report, a functioning Cuban judiciary founded on respect for the rule of law will be a precondition to satisfaction of both expatriate and Cuban claims. The creation of the Tribunal and the Court as separate bodies could therefore be a positive step in a complicated process of national reconciliation.

### **V.(C)(3)(e) Cuba’s Arbitration Court of Foreign Trade**

Cuba’s Corte de Arbitraje de Comercio Exterior (“Arbitration Court of Foreign Trade” or “ACFT”) is appended to the Chamber of Commerce of the Republic of Cuba. *See* <http://www.camaracuba.cu/businesscuba/InternationalCommercialArbitration.htm>. The ACFT was formed in 1965 and is currently governed by a law passed in 1976. *Id.* Although other

observers have suggested that Cuba shares a distrust of arbitration proceedings along with other Latin American countries, the opposite view also exists. One commentator notes that socialist countries “have increasingly recognized the value of arbitration in facilitating international trade.” Enrique Dahl & Alejandro M. Garro, *Cuba’s System of International Commercial Arbitration: A Convergence of Soviet and Latin American Trends*, 15 *Law. Am.* 441, 445 (1984).

Cuba was in fact one of the first Latin American nations to ratify the New York Convention on arbitral award enforcement. *Id.* According to one researcher, the ACFT “has become a robust, sophisticated arbitral organization, with arbitrators thoroughly trained in international commercial law and dispute resolution, who participate extensively in international arbitration organizations.” Lucy V. Katz, *Arbitration as a Bridge to Global Markets in Transitional Economies: The Republic of Cuba*, 13 *Willamette J. Int’l L. & Disp. Resol.* 109, 134 (2005).

In fact, the ACFT’s President is a member of the ICC International Court of Arbitration in Paris, and other ACFT arbitrators participate in dispute resolution for the World Intellectual Property Organization. *Id.*; and n.187-88. Further, the ACFT has reportedly arbitrated international commercial disputes where no Cuban party was involved. *Id.* at 134. This claim is supported to some degree by the fact that the Japan Commercial Arbitration Association (“JCAA”) entered into an agreement with the ACFT on February 23, 1973, which was prior to JCAA agreements with German, British, Swiss, and Australian arbitral institutions, among others. ADR Institutions with Which JCAA Concluded Agreements (available at <http://www.jcaa.or.jp/e/arbitration-e/kyoutei-e/ichiran-e.html>).

On the other hand, at least one knowledgeable author disagrees with this optimistic assessment, concluding that arbitration is not advisable under the Cuban arbitration system. *See* Matias F. Travieso-Diaz, *So, Your Client wants to go to Havana...*, 6 *NAFTA: L. & Bus. Rev. Am.* 277, 280 (2000). Rather, an investor should contract for an “international arbitration provision” in negotiating any agreement with a Cuban trading partner. *Id.*

The jurisdiction of the ACFT encompasses “contract disputes arising out of foreign trade, including joint ventures or other direct foreign investment contracts, as well as contracts between Cuban state-owned enterprises and their foreign suppliers, buyers, or lenders.” Lucy V. Katz, *How International Arbitration Bridges Global Markets in Transition Economies*, 22 *Alternatives to High Cost Litig.* 145, 166 (2004). The ACFT also administers conciliation (mediation) proceedings according to party agreement. Conciliation settlements are treated as arbitral awards.

With respect to governing law, the Chamber of Commerce website states that “norms of Cuban substantive law, by interpretation of contractual clauses and taking into consideration the commercial customs and uses” will be applied to solve disputes (<http://www.camaracuba.cu/businesscuba/InternationalCommercialArbitration.htm>).

The website further reports that “[t]his [application of norms of Cuban substantive law]



*Courtyard of Catedral de San Cristobal, Old Havana.*

will be done regardless of the faculty enjoyed by the contracting parties to convene the norms that will be of application in the decision of their controversies.” *Id.* This appears to be a strict limitation on the parties’ ability to choose applicable law. However, according to one author, the 1976 law that currently governs the ACFT gives the parties the right to choose the law applicable to their arbitration with no apparent limits; Cuban substantive law will apply only in the absence of a choice-of-law clause. *See* Dahl, *supra*, at 457.

Use of Cuba’s ACFT is not mandatory and parties can choose other systems or formulate their own system. Katz (2004), *supra*, at 164. One observer speculates that despite the availability of Cuba’s ACFT, more international disputes involving Cuban parties are resolved under a wide variety of external international bodies or improvised agreements using rules like the UNCITRAL arbitration rules. *Id.*

One reason for this trend may be that Cuban bilateral investment treaties (“BITs”) often call for ad hoc arbitral tribunals that employ rules set out in the BITs. Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Contribution of BITs to Cuba’s Foreign Investment Program, Association for the Study of the Cuban Economy: Cuba in Transition* 469 (2000) (available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba10/plandtravieso.pdf#search=%22contribution%20of%20bits%20to%20Cuba%20foreign%20investment%20program%22>). Notably, prior to gathering an arbitration panel, the BITs generally require the parties to first attempt to resolve disputes through about six months of diplomacy (in the case of state-state disputes), “friendly consultations,” or “amicable” discussions (in the case of investor-state disputes). *Id.* at 469-70. The BITs normally contain standard arbitration rules in the context of state-state disputes, or require binding arbitration under the UNCITRAL rules or the International Chamber of Commerce rules in the case of investor-state disputes. *Id.* at 469-70. Interestingly, Cuba has been a very active promoter of BITs, ranking 23rd in the world, even ahead of the United States which ranks 26th. Paul A. Haslam, *Biting Back: Bilateral Investment Treaties and the Struggle to Define an Investment Regime for the Americas* 96 (available at <http://72.14.203.104/search?q=cache:fEBGJxxQquMJ:www.econ.usyd.edu.au/download.php%3Fid%3D6122+Bilateral+Investment+Treaties+arbitration+in+Cuba&hl=en&gl=us&ct=clnk&cd=20>). Since BITs are entered into “to secure additional and higher standards of legal protection and guarantees for the investments of its firms than those offered under national laws,” *id.*, Cuba appears to be taking steps to stabilize the legal framework for investments in Cuba.

Conduct of ACFT proceedings appears rather standard. The Court maintains a roster of arbitrators, but parties can also choose their own arbiters while also using the ACFT, which provides the advantage of increased availability of qualified candidates. Katz (2004), *supra*, at 164. The ACFT’s permanent panel consists of 15 arbitrators along with a staff of experts and clerical workers. Dahl, *supra*, at 448. The arbitrators do not have to be Cuban citizens, though as of 1984 there were no noted cases where foreigners served. *Id.* Arbitration panels consist of one or three arbitrators; if three, the final arbitrator is selected by the other two and is the president of the panel. Katz (2004), *supra*, at 166. Any disagreements or stalemates regarding arbitrator selection are resolved by the ACFT President. *Id.*

Arbitrators are appointed for two-year renewable terms by the President of the Chamber of Commerce. *Id.* at 166-67. Although arbitrators are not paid, they usually “hold important positions in government and business.” *Id.* at 167. As of 2004, ACFT arbitrators included a Supreme Court justice, a law professor, the vice president of a bank, a surveyor, a manager of an insurance firm, a shipping manager, and a National Bank secretary. In appointing these arbitrators, the Chamber of Commerce President is required to consider skill and experience in a variety of areas, including “foreign trade, law, transportation, insurance, banking, and ‘other necessary specialties.’” *Id.*

Of course, given the lengthy and difficult history of these claims no existing institution could hope

to resolve them without creating serious questions as to legitimacy and fairness. However, the existence of the ACFT is encouraging in the sense that it shows that Cuba, even under Castro, does recognize the need for specialized bodies enforcing contract and property rights. In that sense, creating of the Court and the Tribunal may represent a somewhat smaller step for Cuba than it appears at first blush.

### V.(C)(4) Theories of Relief

A wide variety of legal wrongs might reasonably be thought to be the appropriate subject of compensation as Cuba moves forward. One obvious source of compensation might be for tort or delictual liability. Powerful arguments can be made that redress should be had for these injuries. *See, e.g.*, Rolando H. Castañeda & George Plinio Montalván, *Transition in Cuba: A Comprehensive Stabilization Proposal and Some Key Issues*, Cuba In Transition Vol. 3 (1993) (available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba3/casmon1.html>); *see also* Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation – A New Form of Property*, 27 U. Miami Inter-Am. L. Rev. 453, 490-91 (1996). The appropriate mechanism, if any, for redressing these claims is beyond the scope of this Report, however. Our study is directed towards studying interference with property rights.

Of course, simply attempting to use an amorphous term such as “property rights” will not lend enough precision to the discussion to sufficiently inform policymakers with regard to this problem once Cuba begins to transition. Therefore, both proposed instruments spell out certain categories of relief.

### V.(C)(4)(a) Expropriation of or Wrongful Interference with Property

#### V.(C)(4)(a)(i) International Law

Many international tribunals have been created to deal with expropriation of the properties of foreign nationals. The Iran-U.S. Claims Tribunal, for instance, had jurisdiction over claims involving “expropriations or other measures affecting property rights.” Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran art. II (1) (Jan. 19, 1981). In many other cases, international arbitral bodies have recognized the need to compensate foreign nationals for the loss of value of their property rights. *See, e.g.*, R. von Mehren & N. Kourides, *International Arbitration between States and Private Parties: The Libyan Nationalization*, 75 Am. J. Int’l L. 476 (1981). There is well-developed international law as to the need to compensate both for legal (that is, generally non-discriminatory) expropriations as well as illegal ones (that is, expropriations taken in a discriminatory fashion). *See, e.g.*, Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years, 1981-1991* (1993); *see also* Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 Int’l Law. 51, 80 (1998).

The appropriate and just standard of compensation under international law can be a difficult and fact-intensive inquiry. In the hope that the Tribunal can add to the body of international law on this subject, we have chosen not to recommend any precise formula. It was in that way, for example, that the Iran-U.S. Claims Tribunal was able to make significant contributions on this subject. *See, e.g.*, Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 Am. J. Int’l L. 474, 482-86 (1991); *see also* Monroe Leigh, *Expropriation – Standard of Compensation Under International Law – “Fair Market Value” Versus “Prompt, Adequate and Effective” Compensation*, 80 Am. J. Int’l L. 181 (1986).

Nevertheless, the Tribunal here will have a rich body of law from which to draw. The traditional

statement of a nation's duty is the "prompt, adequate and effective" formula first set forth by then-Secretary of State Cordell Hull's letter to Mexico in which he demanded compensation for the expropriation of agrarian and oil properties owned by United States citizens. Hanoach Dagan, *Unjust Enrichment* 135 (1997). The Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987) ("Restatement") states that an expropriation requires payment of "just compensation" which means "in the absence of exceptional circumstances...an amount equivalent to the value of the property taken...paid at the time of taking...and in a form economically usable by the foreign national." "Prompt" requires payment at the time of the taking or within a reasonable time thereafter, including interest from the date of the taking. *Id.* at cmt. d. "Adequate" contemplates "full" compensation. *See* Dagan, *supra*, at 135. Finally, "effective" mandates that compensation be paid in a form economically usable by the foreign national. *See* Restatement § 712, cmt. d.

The comments to § 712 further explain "international law requires that when foreign properties are expropriated there must be compensation and such compensation must be just." *Id.* at cmt. b. Yet the Restatement acknowledges that some declarations of international law require only that compensation be "appropriate." *Id.* at cmt. c. Despite recognition of these "declarations," the Restatement maintains the position that compensation must be "just" as required by the Fifth Amendment of the United States Constitution. *See* U.S. Const. amend. V ("nor shall private property be taken for public use without just compensation.").

However, the Restatement provides no precise elements of "just compensation." Rather, in the absence of exceptional circumstances, compensation is to be measured by the value of the property confiscated. The full value of the property is usually measured by the fair market value of the asset when such a determination is possible. This value contemplates the "going concern value" and other "generally recognized principles of valuation." Such valuation is to occur at the time of the taking. Under United States domestic law, if compensation does not occur at the time of the taking, interest accrues from the date of the taking. Restatement § 712 cmt. d.

There is also support in the literature for a more flexible standard of compensation than the so-called "Hull formula." This more flexible standard is sometimes defined in terms of "appropriate compensation." The traditional Hull formula requiring "prompt, adequate, and effective" compensation has been challenged by developing countries, such as Cuba, as they call for a new economic order based on a more equitable distribution of the world's wealth and resources. Dagan, *supra*, at 132. While no clear standard has been universally accepted, "it is fair to conclude that some minimal consensus has emerged, namely, that a nationalizing state...is liable to pay compensation for foreign-owned property it expropriates and that the compensation need not be the full economic value of such property." Dagan, *supra*, at 165.

It is also helpful to look to international behaviors as they are indicative of the emerging standard of compensation. For example, lump sum settlements have been the primary method of resolving expropriation disputes and as such, evidence modern state practice. Dagan, *supra*, at 148-49. In these settlements, partial compensation has been the predominant pattern. These agreements generally consider the expropriating state's ability to pay and result in less than full compensation. *Id.*

Moreover, in 1962, the UN General Assembly passed Resolution 1803 entitled "Permanent Sovereignty Over Natural Resources." The resolution states expropriations based on "public utility, security or national interest" require that the deprived owner "be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." G.A. Res. 1803, U.N. GAOR, 17th Sess., (1962). Resolution 1803 essentially affirms that international law applies to cases of expropriation and that under international law, there is a duty to pay compensation for the expropriated property.

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However, the definition of “appropriate” is left to individual states. Norton, *supra*, at 478.

In 1974, the United Nations General Assembly created the Charter of Economic Rights and Duties of States (“the Charter”) which addressed the subject of expropriation and compensation. However, the Charter did not explicitly refer to international law. The Charter affirmed every state’s right “to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals.... [unless otherwise agreed.]” U.N. GAOR, Charter of Economic Rights and Duties of States, art. (2)(2)(C).

Proponents of the “appropriate” standard of compensation argue the above statements accurately reflect the current state of international law. Although these statements clearly reject the traditional Hull formula, they fail to define “appropriate” compensation. These statements do, however, evidence a general shift in international values, from the values of developed states and full compensation, to current international values, which erode the ability of developed capitalist states to ensure investment security and assert an “appropriate” standard of compensation. Dagan, *supra*, at 154-55.

Depending on the factual context, the standard of “appropriate” compensation may or may not generate a significantly different result from that of the Hull formula. An important precedent here dealing with Cuban expropriations is that of *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F.Supp. 412 (S.D.N.Y. 1980), *modified*, 658 F.2d 875, 892 (2d Cir. 1981). That case involved the valuation of bank properties which were part of a counterclaim against the Cuban national bank. The court completed a review of applicable literature and concluded: “It may well be the consensus of nations that full compensation need not be paid ‘in all circumstances’...and that requiring an expropriating state to pay ‘appropriate compensation’ – even considering the lack of precise definition of that term, – would come closest to reflecting that international law requires.” The court did note, however, that by adopting an “appropriate compensation” standard, this would not preclude the possibility of full compensation in some cases. The court went on to describe factors to be considered in determining “appropriate” compensation, including the nature of the asset, its duration, the rate of return during the enterprise’s existence, the value of the asset to the expropriating state, and the value of the asset to the alien. *Banco Nacional de Cuba*, 658 F.2d at 893.

In any event, the central point here is that international law does provide a remedy for expropriations and other interferences with property rights. This category of relief is thus fully cognizable under international law.

### **V.(C)(4)(a)(ii) Civil Law**

The civil law, which would be applicable before the Court, also recognizes remedies for trespasses to and takings and conversions of property. Dutch civil law scholar Grotius is considered to be the intellectual father of the compensation clause in the U.S. Constitution’s Fifth Amendment. See Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 54 (1964); see also Matthew D. Zinn, *Ultra Vires Takings*, 97 Mich. L. Rev. 245, 260 (1998) (noting civil law origins of takings theory). The civil law also has a well-developed taxonomy of property rights and the remedies for violations thereof. See, e.g., Note, Konstantin Osipov, *The Genesis of Russian Secured Transaction Law Before 1917*, 42 Cleveland St. L. Rev. 641, 645-51 (1994); Peter Yu, *Intellectual Property and the Information Ecosystem*, 2005 Mich St. L. Rev. 1 (noting tendency of civil law judges to treat significant regulation as a de facto taking of property); Carl

E. Koller Lucio, *The Regulation of Hazardous Substances Under Mexican Law*, 5 Duke Env't L. & Pol'y 95, 119 (1995) (noting civil law remedies for trespass on real property); Michael Plaxton, *In Search of Prophylactic Rules*, 50 McGill L. Rev. 127, 134 (2005) (noting civil law remedy for trespass).

Even the Cuban Constitution under Castro continued to note that there was a right of compensation. Most the expropriations took place between 1959 and 1968. Mathias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. Pa. J. Int'l Econ. & Law 659, 661-662 (1996). The 1940 Cuban Constitution provided that expropriations could take place only by judicial decree and with the payment of compensation. This was amended in 1959 to enlarge the authority for expropriations to any "competent authority" but it still provided for compensation. Even the 1976 and 1992 Cuban Constitutions still pay homage to the idea of compensation. The 1976 Constitution provides:

The expropriation of property for reasons of public benefit or social interest and with due compensation is authorized. The law establishes the method for the expropriation and the bases on which the need for and the usefulness of this action is to be determined as well as the form of the compensation, taking into account the interest and the economic and social needs of the [owner].

Article 25 (quoted in Travieso-Diaz, *supra*, at 668).

Thus, the idea of compensation is well-embedded in the civil law tradition and Cuban law. Of course, the precise boundaries of compensation in any particular case will be fact-dependent. A capable Court, however, operating in the civil law tradition will be able to offer just remedies.

### **V.(C)(4)(b) Breach of Contract**

In some cases, the value of claimants' interests may rest in contractual rights. For example, a good number of the certified claims apparently rest on contractual rights. The Foreign Claims Settlement Commission ("FCSC") certified a total of 5,911 claims totaling \$1.8 billion. Eighty-five percent of these claims belonged to corporate claimants. Only 48 of the claimants had claims certified for more than \$5 million. Of these 48, 43 were corporate claimants. Travieso-Diaz, *supra*, at 663. Many of the certified claims involved the mining, oil, sugar, fruit, and tourism industries. The Cuban government expropriated not only real property, but also personalty and quasi-personalty including equipment and supplies, securities, patent rights, accounts, debts, and mortgages. Claims for these property interests, among others, were certified as compensable losses. Because of the varied nature of these claims, some may be better understood as contract claims.

It is well established under international law that states have an obligation to honor contracts with non-nationals. See, e.g., John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int'l L. 40, 54 (1996) (referring to general principles of international law regarding contracts); Richard B. Lillich & David J. Bederman, *The Jurisprudence of the Foreign Claims Settlement Commission: The Iran Claims*, 91 Am. J. Int'l L. 436, 462 (1997) ("The FCSC also applied customary concepts of contract and international law to compensate claimants for incidental damage arising out of a breach of contract."); Chittharanjan F. Amerasinghe, *State Breaches of Contracts with Aliens and International Law*, 58 Am. J. Int'l L. 881 (1964). Of course, the precise contours of the available remedies, defenses and the like will depend on the

factual basis and the application of the principles of international law. *See, e.g.*, R. von Mehren & N. Kourides, *International Arbitration between States and Private Parties: The Libyan Nationalization*, 75 Am. J. of Int'l L. 476 (1981) (discussing debate over appropriate contractual remedies in cases involving oil concessions). Again, however, breach of contract is a well-accepted theory of relief available to international claimants.

The civil law, of course, honors freedom of contract and remedies breaches. *See* John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 Geo. J. Int'l L. 61, 73 (2004) (discussing breach of contract remedies under Spanish and Mexican Civil Codes). In contrast to the common law, which generally prefers substitutionary remedies, the civil law generally prefers specific remedies. *See* Vivian G. Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 Am. J. Comp. L. 43, 82 (1998). The availability of specific remedies (such as specific performance) will often be circumscribed either by practicalities (the passage of time) or specific limitations in the proposed instruments on not negatively affecting innocent third parties. In such cases, the civil law tradition does authorize substitutionary remedies as a fallback. *Id.*; *see also* Jianming Shen, *The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules*, 13 Ariz. J. Int'l & Comp. Law 253, 281 (1996) (“Under the basic rules of the Spanish Civil Code relating to remedies for breach of contract, the aggrieved party has the right to request either specific performance of the contract or its termination, and is entitled to damages and interest in both cases.”). In any event, the Court applying the civil law tradition will be able to do justice as to the expatriate claimants.

### V.(C)(4)(c) Unjust Enrichment

Both proposed instruments allow claims for “unjust enrichment.” Interestingly, despite the lack of any explicit mention of unjust enrichment as a theory in the Iran-U.S. setting, the Claims Tribunal there did allow some unjust enrichment theories to proceed. *See* Stein, *Jurisprudence and the Jurists’ Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 Am. J. Int'l L. 1, 52 n. 190 (1984). This reflected an understanding that compensation for unjust enrichment is a principle of international law. *See* John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 Am. J. Int'l L. 278, 292 (1989).

Not only is unjust enrichment accepted as a principle of international law, it is well-embedded in the civil law tradition. In fact, the idea of compensation for “unjust enrichment” actually dates back to Roman law and thus is better embedded in the civil law than it is in the common law, though there has been a substantial convergence between the two as of late. *See* Smith, *Property, Subsidiarity, and Unjust Enrichment*, 2000 Oxford U. Comp. L. Forum 6. The basic idea is simple. If one party comes into possession of the property of another through compulsion, mistake, or in some other manner that is “unjust,” then the benefiting party must restore the losing party to his original position. Unjust enrichment does not depend upon showing wrongdoing on the part of the “enriched” party, but instead merely upon showing that the party was enriched and it is unjust to allow him to retain the benefits. The elements can be stated as follows:

- Was the defendant enriched?
  - Was the enrichment at the expense of the claimant?
  - Was the enrichment unjust?
  - Does the defendant have a defense?
  - What remedies are available to the claimant?
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See, e.g., *Schroder v. Buchholz*, 622 N.W. 2d 202 (N.D. 2001). Another similar formulation is: “(i) a benefit (or enrichment); (ii) which has been received by the defendant at the plaintiff’s expense; and (iii) the retention of which is unjust.” H. Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* 1 (1997).

The primary difference between claims for unjust enrichment and those founded on contract and tort theories is that unjust enrichment is restitutionary in nature. It seeks to disgorge the benefit gained by the party that came into the benefit and cannot retain it justly. Thus it focuses “not on the harm to the plaintiff but the benefit to the defendant.” Dagan, *supra*, at 12-13. In many cases, these two measures will be the same, but in cases in which undeveloped property was taken and then developed to become income-producing to Cuba (through tax revenues and the like), unjust enrichment may give a more fair measure of recovery. Dagan, *supra*, at 13.

There are some differences between the two major systems as to what constitutes “unjust” within the meaning of this formula and other important details. See Chen-Wishart, *In Defence of Unjust Factors: A Study of Rescission for Duress, Fraud and Exploitation*, 2000 Oxford U. Comp. L. Forum 2 (comparing English common law and German civil law). The common law recognizes mistake of law or fact, duress, failure of consideration, undue influence and some policy-based factors as creating a claim for unjust enrichment. The civil law seems to place the burden on the enriched party to show the absence of a reason to restore the losing party to his original position. Still, the underlying idea may be a necessary and valuable supplement to the basic theories of breach of contract and property expropriation. Cf. *Republic of Austria v. Altmann*, 541 U.S. 677, 686 (2005) (claim involving a painting stolen during the Nazi era stated both on theories of expropriation and unjust enrichment).

First, there may be situations in which a contract was partly performed but then became impossible or illegal to perform due to changes in Cuba. In fact, some of the “counterclaim” cases that came before the U.S. courts involved those sorts of facts. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 822 F.2d 230, 235 (2d Cir. 1987) (referring to the district court’s order: “It also ruled that Cuba was liable under international law for taking the property of defendants, under quasi-contract principles for unjust enrichment from the expropriation of Cuban Electric, and under the “internationally recognized equitable principles”); *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973). One of the major purposes of “unjust enrichment” has been that it can allow the party who partly performed to recoup the benefit that was transferred to the other party. See Krebs, *In Defence of Unjust Factors*, 2000 Oxford U. Comp. L. Forum 3. Such a theory of recovery would not be one based upon breach of contract nor would it necessarily involve an expropriation.

Second, particularly with regard to expatriate claims, Cubans who abandoned property and had it fall into the hands of the Cuban government may be able to state unjust enrichment theories against the government to the extent that it benefited from the property. In a strict sense they probably did not suffer at the hands of an expropriation decree that would violate international law nor was there a contract that was breached. Still, if they could show that they were forced from the island, this may satisfy the elements of unjust enrichment.

An excellent example of this sort of case is the recent decision in *Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263 (S.D. Fla. 2005). In that case, expatriate plaintiffs brought an unjust enrichment claim against a foreign (French) corporation that was operating a resort on property of theirs that was expropriated. The court held the action barred by the act of state doctrine because the claimants had no claim under international law and because the Hickenlooper Amendment does not apply to foreign real property. Still the case is illustrative of the sorts of issues that could arise.

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First it is not clear that unjust enrichment will reach remote parties like the resort operators. See Birks, *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, 2000 Oxford U. Comp. L. Forum 1 (discussing difficulty in deciding whether unjust enrichment claim can be stated beyond the “original enrichee”). Second, they would not be state parties within the jurisdiction of either the Tribunal or the Court. Still unjust enrichment might be useful to disgorge the benefits to Cuba (taxes, price paid for the rights, etc.) from having allowed the operators to run the resort.

The idea of “unjust enrichment” appears under a large number of legal labels: quasi contract, quantum meruit, negotiorum gestio, the common counts, assumpsit, (see J.H. Baker, *The Use of Assumpsit for Restitutionary Money Claims 1600-1800*, in *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (1995)), and so on. Still, the general idea of “unjust enrichment” is likely to be the one best understood by lawyers from all legal systems.

Thus, both the Court applying civil law principles and the Tribunal applying international law principles should be able to achieve justice under the rubric of unjust enrichment.

## **V.(D) Analysis of Article 2**

### **Tribunal Article**

#### *2. Composition of the Cuba-United States Claims Tribunal*

2.1 The Cuba-United States Claims Tribunal (hereafter “Tribunal”) is hereby constituted as an international arbitral tribunal. The Tribunal shall consist of nine Members or such larger multiple of three as Cuba and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this instrument, each Government shall appoint one-third of the members. Within thirty days after their appointment, the Members so appointed shall by mutual agreement select the remaining third of the Members and appoint one of the remaining third President of the Tribunal.

2.2 The Tribunal shall conduct its business in accordance with the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the terms of this instrument or by the Tribunal.

2.3 Members of the Tribunal may be removed only for misfeasance or neglect of duties and with the concurrence of both Governments and any replacements shall be made with the concurrence of both Governments.

### **Court Article**

#### *2. Composition of the Cuban Special Claims Court*

2.1 Cuba hereby pledges that as a sovereign act it will constitute a Cuban Special Claims Court (hereafter “Court”) as an independent chamber of the Supreme Court of Cuba in accord with the terms of this Declaration. All appointments shall be made within 90 days of the entry into force of this instrument. The appointments shall be of persons of any nationality who are knowledgeable regarding the civil law and international law. No more than six Judges may be of the same nationality. The Judges shall elect from their number a Chief Judge. If they fail or are unable to elect one of their number Chief Judge, the Court shall request that the Secretary General of the International Centre for the Settlement of Investment Disputes choose the Chief Judge from among their number.

2.2 Judges of the Court shall be appointed and the Court shall conduct its business in accordance with the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the terms of this instrument or by the Court.

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2.3 Judges may be removed only for misfeasance or neglect of duties and with the concurrence of both Governments and any replacements shall be made with the concurrence of both Governments.

## **V.(D)(1) Composition of the Tribunal & Court**

### **V.(D)(1)(a) Composition of the Tribunal**

The method for appointments and the composition of the Tribunal closely resembles that of the relatively successful Iran-U.S. Claims Tribunal which presents a modern, though imperfect, analogy to the Cuban claims situation. *See* Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years 1981-1991* 30-32 (1992) (discussing composition of the Iran-U.S. Tribunal).

The structure of one-third of the Members coming from each of the affected countries and one-third neutrals chosen by the other Members follows the Iranian precedent and also the well-established international arbitral model. John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. Miami Inter-Am. L. Rev. 1 (2004). (“One of the most frequently used methods of constituting an international arbitral tribunal is for each party to name an arbitrator, with a third arbitrator chosen either by the two party-appointed arbitrators, by agreement of the parties, or by an arbitral institution.”) *See also* John J. Kerr, Jr., et al., *Comparison of International Arbitration Rules* 20-31 (2d ed. 2002). The Tribunal is specifically designated as an “international arbitral tribunal” because of arbitration’s well-established place in resolving international disputes, even those of large magnitude. Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. Int’l & Comp. L. 499, 500 (2006). In that sense, it should be familiar to both the United States and to Cuba, each of which is a long-standing signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp>. Cuba also has at least one judicial entity, its Corte de Arbitraje de Comercio Exterior (“Arbitration Court of Foreign Trade”) that operates essentially as an international arbitral tribunal. *See supra* Section V.C.3.f. Arbitration of commercial disputes, both domestic and international, is extremely common in the United States. Joseph L. Daly, *Arbitration: The Basics*, 5 J. Am. Arb. 1, 9-10 (2006). Therefore, composing the Tribunal in this way will best accommodate the interests of both nations.

The Tribunal must be constituted of at least nine Members, which seems sufficient to expeditiously handle claims, though it could be enlarged by mutual agreement. Under the proposed instrument, three-Member panels sit only when a large claim is involved, which is a relatively small fraction of the total claims. The Foreign Claims Settlement Commission certified approximately 1,000 large claims, defined as claims valued at \$250,000 or more, during the First Cuban Claims Program. (Figures courtesy of the Foreign Claims Settlement Commission, *available at* <http://www.justice.gov/fcsc/>.) Moreover, the Tribunal has the option of appointing hearing officers to resolve small claims.

Appointment of each nation’s Members of the Tribunal will have to conform to the internal law of each nation. In the United States the appointments could be made directly by the President or his designee as the Members would clearly qualify as “inferior officers” for constitutional purposes. *See, e.g., Morrison v. Olson*, 487 U.S. 654 (1988) (special prosecutors are “inferior officers” for appointment purposes because of limited duration and functions). The three U.S. members of the Iran-U.S. Tribunal were appointed by President Reagan. *See* <http://www.presidency.ucsb.edu/ws/print.php?pid=43708>. Other U.S. representatives to international tribunals have been appointed by Presidents without Senate confirmation. For example, President Carter appointed four individuals to the Panel of Conciliators and four persons to the Panel of Arbitrators of the International Centre

for the Settlement of Investment Disputes (ICSID). See <http://www.presidency.ucsb.edu/ws/index.php?pid=45502&st=appointment&st1=international>.

The President has specific statutory authority to make such appointments as 22 U.S.C. § 1650 provides, “The President may make such appointments of representatives as may be provided for under the Convention [on the Settlement of Investment Disputes Between States and Nationals of Other States].” Available at <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965>.

The appointment of neutrals is common in international arbitration. Even in the politically charged aftermath of the Iranian hostage crisis, the U.S. and Iranian members were able to agree upon three neutrals in prompt fashion. Mapp, *supra*, at 44 (neutrals were appointed one month after national members first met). Because the President of the Tribunal will have significant administrative duties and discretion beyond that of the other Members, it is appropriate that the President be one of the neutrals. The necessity and merits of including an arbitrator of a different nationality than either party to the dispute is demonstrated by the provisions of numerous model international arbitration rules. See Kerr, *supra*, at 20-29.

### V.(D)(1)(b) Composition of the Court

The Court is an entity that differs in significant ways from the Tribunal. While the Tribunal will apply international law, Cuban legal principles must govern the expatriate claims. Of course wholesale importation of socialist legal concepts of the Castro regime would be wholly unjust, but application of the civil law tradition as adapted to Cuba would be the foundation for a just and mutually beneficial resolution of the expatriate claims. See *infra* Section V.F.2 and *supra* Section V.C.3.b.

The applicable legal principles have, however, some clear implications for the way in which the Court is constituted. In order for the Court to operate credibly it must be an organ of the Cuban judiciary. However, it would be unsatisfactory to relegate handling of the expatriate claims to the Cuban judiciary in anything close to its present form, even as the transition begins.

The Cuban court system is currently comprised of a Supreme Court, provincial courts, and municipal courts. At each level, a combined panel of professional and lay judges hears cases. Laypersons use community values and experience, rather than rules of law, to solve disputes. See Gerald J. Clark, *The Legal Profession in Cuba*, 23 Suffolk Transnat'l L. Rev. 413, 427 (2000). Cuban judges lack experience presiding over civil cases, such as the property claims that Cuban expatriates would assert, because the state-run economy generates few legal disputes outside of criminal cases. *Id.* As a result, the judiciary may lack the resources and legal professionals necessary to handle post-Castro property claims. In addition, judges appointed by the communist government may be unwilling to rule against the Cuban state even after a transition government comes to power. See *id.* (“The government intended the law, along with the state, to disappear.”). This situation will make it difficult for Cuban expatriates to receive fair and unbiased treatment in the Cuban court system. Cuban expatriates are likely to feel animosity toward judges appointed by the communist government and may resist adjudication of their claims in the Cuban court system.

The current Cuban Supreme Court has a civil/administrative chamber, criminal chamber, labor chamber, military chamber, economic chamber, and state security chamber. Laura Patallo Sánchez, *Cuba Transition Project, The Role of the Judiciary in a Post-Castro Cuba: Recommendations for Change*, 7 (2003), available at [http://ctp.iccas.miami.edu/Research\\_Studies/LPatalloJudiciary.pdf](http://ctp.iccas.miami.edu/Research_Studies/LPatalloJudiciary.pdf). Two professional judges and one lay judge sit on Supreme Court panels in most cases. *Id.*

Cuban courts and judges lack independence because the political branches of government

have the power to control the judiciary. *Id.* Cuba's Judicial Organization Law of 1973 permits a person to serve as judge and member of the popular assembly simultaneously. *See* Alberto Luzarraga, *Castro's Constitutional Law and the Changes Needed to Restore the Rule of Law, Part I*, 23 (July 14, 2001), available at <http://www.cubafreepress.org/art2/010714luzarraga.html>. Under Article 90(h) of the Cuban Constitution the Council of State, headed by Fidel Castro, has the authority to issue instructions to the courts. *Id.* The Council of State can override the independent functioning of the judiciary by issuing substantive, as well as administrative, instructions. *Id.*

In addition, current Cuban courts cannot restrain legislative or executive power. Cuba's court system is the only one in Latin America that has not heard a constitutional case. *Id.* According to Juan Mendoza, a law professor at the University of Havana who is also the president of the Union Nacional de Justistas in Cuba, the courts are not expected to act impartially when the Cuban state is party to a lawsuit. *See* Johannes Werner, *A Rare Glimpse*, Miami Daily Business Review, 12 (December 28, 2001), available at <http://www.lanuevacuba.com/archivo/notic-01-12-2900.htm>.

This failure to separate the judiciary from the political branches of government and "the extensive involvement of the Ministry of Justice in the selection, training, and evaluation of judges...calls into serious question the independence of the judiciary and makes it clear that the judiciary as currently organized is intended to operate as a political arm of the state." Sánchez, *supra*, at 11.

To place Cuba's current courts, judges, and lawyers in context, it is helpful to compare the judiciary with the legal systems in other countries. The World Bank has developed six governance indicators that compare "the traditions and institutions by which authority in a country is exercised." Sergio Diaz-Briquets & Jorge Perez-Lopez, *A Transparency/Accountability Framework for Combating Corruption in Post-Castro Cuba*, 10 (2002), available at [http://ctp.iccas.miami.edu/Research\\_Studies/DiazBriquetsPerezLopezCorruption.pdf](http://ctp.iccas.miami.edu/Research_Studies/DiazBriquetsPerezLopezCorruption.pdf). These indicators include "Voice and Accountability," "Political Stability," "Government Effectiveness," "Rule of Law," "Regulatory Quality," and "Control of Corruption." *Id.* at 10-11.

The "Rule of Law" indicator measures "the extent to which agents have confidence in and abide by the rules of society." *Id.* at 11. The indicator takes into account "perceptions of the incidence of both violent and nonviolent crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts." *Id.* The indicator's scale has a mean of zero and a range of -2.5 to 2.5. *Id.* Cuba scored a -0.32 on the "Rule of Law" indicator in 2001. *Id.* By comparison, the United States scored 1.58 and Sweden scored 1.70. *Id.* As low as Cuba's score is, however, other countries scored significantly lower. For example, Honduras scored -1.06 and Nigeria scored -1.13. *Id.*

Thus, even in a post-Castro transition to democracy, it seems unreasonably hopeful to assume that the expatriate claims could be funneled into the current Cuban judicial system with any realistic prospect of effective and just resolution. Nonetheless, there are reasons to be optimistic that the Special Claims Court proposed here can be an effective and just arbiter of the expatriate claims and an instrument for helping to develop a culture of respect for the rule of law and property and human rights in a new Cuba. Before the communist revolution, the Cuban judiciary was likely one of the most effective in Latin America. Mario Diaz-Cruz, III, *Challenges for a Transitional Judiciary in a Post-Castro Cuba*, 304 (2002), available at <http://www.futurodecuba.org/Challenges%20memo%207.18.02.htm>. The system was modeled after French and Spanish civil law traditions but also incorporated some concepts,



*Monument to José Miguel Gómez.*

such as habeas corpus, from the American legal tradition. *Id.* The Court could go a great distance towards restoring this proud Cuban tradition.

The Court would be an entirely new entity in the Cuban judiciary and thus structurally independent with a single mission of resolving the expatriate claims. Its resources would thus not be drained attempting to resolve other matters that will need to be addressed by other parts of the judiciary in a new Cuba.

The proposed instrument calls for the Judges to be knowledgeable in the civil law tradition as well as international law. Civil law knowledge will be necessary because the Court will be required to apply civilian concepts derived particularly from the Spanish Civil Code. Should a new Cuba decide to restore its civil law tradition in other areas, the development of an important organ of the Cuban judiciary applying civil law concepts could greatly enhance the credibility of a new Cuba. Although the Court will not be applying international law in a strict sense, rules of private international law could come into play and, given that the expatriate claimants are now U.S. nationals, the claims will have an undeniably international dimension.

The proposed instrument calls for the Judges to be nationals of any nation though no more than six from any one country. This will avoid having the Court dominated by nationals of any one country. Though instinctively it might seem that all of the Judges should be Cuban nationals, given that a new Cuba will be coming out of a long period of isolation, the creation of the Court would provide a golden opportunity to reinvigorate the Cuban judiciary by drawing on nations with sister legal traditions. For example, the Spanish Civil Code has heavily influenced the law of Puerto Rico, see Tamara York, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, 1997 D.C. L. Rev. 861, 869-70, Mexico, most of Latin America and to a lesser extent southern and southwestern border states of the U.S., see Calvin G.C. Pang, *Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond*, 20 U. Haw. L. Rev. 1, n. 30 (1998). Moreover, the 1870 revision of the Louisiana Civil Code has a considerable influence on the Spanish Civil Code of 1889. A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 La. L. Rev. 5 (1992). Thus, finding lawyers and jurists who can contribute to the development of the civil law in a new Cuba will not be difficult.

The proposed instrument calls for Cuba to consult with the United States with regard to the appointments. Though normally it might seem to be an intrusion on Cuban sovereignty to require such consultations, this seems like a reasonable concession given that the expatriate claims are now U.S. nationals and the difficult and protracted history of the claims. Because the Chief Judge will have some significant responsibilities beyond those of the other Judges, some mechanism must be made to direct his/her appointment. The proposed instrument calls for the selection by election of the Court and in the event of a tie that the Court make a request to the Secretary General of the International Centre for the Settlement of Investment Disputes, a well-respected international group with expertise in this area. See Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 Eur. J. Int'l L. 121, 126 (2006). See also <http://www.worldbank.org/icsid/about/about.htm>.

### **V.(D)(2) Application of the UNCITRAL Rules**

The UNCITRAL Arbitration rules adopted in 1976 are a logical choice for the operation of the Tribunal.

First, they are widely accepted, having been adopted by the largest and most important international agency, the United Nations. As a result, the UNCITRAL rules are “widely accepted even among parties from developing countries.” Gabrielle Kaufman-Kohler, *The*

*Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, 1324 (2003). There are preliminary discussions about updating the UNCITRAL rules. *Id.* at 1324, n. 50. Thus, it is probably necessary to specify that the instrument indicates the 1976 rules. Of course, by allowing the Tribunal to modify those rules, enough flexibility exists that those entities could essentially adopt the updated UNCITRAL rules if they are promulgated and would facilitate fair and efficient resolution of these matters.

Second, the UNCITRAL rules were used by the Iran-U.S. Claims Tribunal, an entity that in volume generated more international law than any other entity in the history of the world. As Mapp, *supra* at 260, states: “[t]he international acceptability and comprehensive nature of the UNCITRAL rules meant that they were the obvious choice for the Rules of Procedure of the Tribunal.” As a result, an important model exists for adapting these rules and promulgating more detailed rules of procedure. *See* Christopher S. Gibson, “Tribunal Rules of Procedure,” in *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration* (ASIL March 29, 2006). Moreover, the Iran-U.S. Claims Tribunal produced a large amount of common law related to those rules that has greatly influenced arbitral awards in other arenas. *See* Christopher R. Drahozal, “The Iran-U.S. Claims Tribunal and Investment Arbitration: A Citation Analysis,” in *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration* (ASIL March 29, 2006).

The UNCITRAL rules worked well in the context of a claims tribunal that functioned something akin to a municipal court, which would describe both the Court and the Tribunal. The following passage from Mapp, *supra*, at 259-60 is important:

Arbitration is usually considered to be a consensual process. Nevertheless, the UNCITRAL rules provide enough powers so that the arbitration cannot be sabotaged by non-participation or delay of one of the parties. These powers were most important for the Iran-United States Claims Tribunal, having such a large number of claims to deal with.... In this respect the Tribunal bears considerable resemblance to a municipal court.... It is a mark of success of the UNCITRAL rules that they have been successfully applied by the Iran-United States Claims Tribunal.

While the UNCITRAL rules might seem like a less logical choice as the procedural foundation for operation of the Court, the above passage suggests that they could be adapted successfully in this context. In many respects, both the Tribunal and the Court will have some features of a “municipal court” as Mapp analogizes the Iran-United States Claims Tribunal. It is therefore known that they can be employed successfully in this context.

Moreover, since both the Tribunal and the Court will have the power to adapt the rules to their needs, important aspects of the civilian procedural tradition can be employed without doing violence either to the rules or the requirements of basic fairness to the parties. For example, the civilian system contemplates much more active factual development by the Judge and a multi-hearing process as opposed to the more party-driven process aimed at a single trial which is familiar to the common law. *See* Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev. 1017 (1998); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299 (2002); Diana Lloyd Muse, *Discovery in France and The Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. Rev.

1073 (1989). The UNCITRAL rules give broad flexibility to the finder of fact to structure the proceedings and thus accommodating the civilian tradition should not be difficult, particularly given that the Court is given authority to make necessary adaptations in the rules.

### **V.(D)(3) Removal of Members & Judges**

Both instruments contain protections that allow for the removal of a Member or a Judge only for misfeasance or neglect of duties and then only with the concurrence of both Governments. Replacements are to be made by both Governments. In the United States independence of the federal judiciary is guaranteed by Article III of the Constitution, which gives judges tenure during “Good Behaviour.” U.S. Const. art. III, § 1 (“The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour”). Cuba, however, has little recent history of judicial independence and an unfortunate excess of political pressure upon judges. *See* Sánchez, *supra*, at 11. Consequently, once the Members and the Judges are selected it will be necessary to insulate them from undue pressure from any outside agency. Experience with the Iran-United States Claims Tribunal showed that this is an unfortunate possibility that must be guarded against. *See* Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 Am. Rev. Int’l Arb. 275, n. 21 (1997) (“Although the UNCITRAL Rules do not expressly prohibit ex parte communications between arbitrators and parties, the independence and impartiality of arbitrators serving on the Iran-U.S. Claims Tribunal has been questioned as a result of . . . alleged ex parte communications”).

### **V.(E) Analysis of Article 3 Tribunal Article**

#### *3. Competence of the Tribunal*

3.1 The Tribunal shall have exclusive jurisdiction to finally and conclusively resolve all claims described in Article 1.1 regardless of the value of the claim. Parties may not by agreement derogate from or prorogate to the jurisdiction of this Tribunal.

3.2 The Tribunal shall have jurisdiction to interpret all provisions of this instrument except for Article 9.7.

3.3 The Tribunal shall have the authority to promulgate rules of procedure to effectuate the purposes of this instrument.

### **Court Article**

#### *3. Competence of the Court*

3.1 The Court shall have exclusive jurisdiction to finally and conclusively resolve all claims described in Article 1.1 regardless of the value of the claim. Parties may not by agreement derogate from or prorogate to the jurisdiction of this Court.

3.2 The Court shall have jurisdiction to interpret all provisions of this instrument except for Article 9.7.

3.3 The Court shall have the authority to promulgate rules of procedure to effectuate the purposes of this instrument.

### **V.(E)(1) Finality**

The third Articles of both the Court and the Tribunal instruments are written in parallel to achieve parallel goals. One of the critical goals of each instrument is to provide a single and final forum for resolution of the claims.

Having multiple forums adjudicate overlapping classes of claims with the possibility of conflicting outcomes increases the transaction costs of resolution and thus limits the relief that flows to injured parties. *See, e.g.*, Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 *Ariz. L. Rev.* 559, 570 (1996) (“greater transactions costs will be generated as the various factions battle over distribution of any settlement.”). Similarly, the possibility of excessive layers of review and collateral attacks to the resolution of claims increases transaction costs. *See, e.g.*, Edward Brunet, *Class Action bjectors: Extortionist Free Riders or Fairness Guarantors?*, U. Chi. L.F. 403, 429 (2003).

Thus, the case for limiting the forums in which the claims can be resolved seems fairly clear as long as they maintain reasonable external and internal guarantees of fairness. Allowing other courts to review or collaterally challenge the decrees of the Tribunal or the Court would likely extort high transaction costs without any resulting gain in the fairness of the resolution.

Some recognize that the historical establishment of commissions similar to the Tribunal and Court have raised questions of fairness because they have been imposed on respondent states through military and economic power. Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years* 25 (1993). As a result, the application of law by these tribunals “has been seen by the respondent states as unduly favoring traditional Western precepts of international conduct.” *Id.* Cited examples of such incidents include the imposition of arbitral tribunals on Latin American countries and the establishment of the Mixed Arbitral Tribunals after World War I. *Id.* However, the establishment by the Court and Tribunal instruments of a means to provide for claims against the U.S. as well as Cuba might soften this perception. Similar allowance was made in the Algiers Accords establishing the Iran-U.S. Tribunal.

In general, persistent use of specialized international forums indicates that fairness and other benefits have outweighed their costs. In the case of the Iran-U.S. Tribunal, the establishment of the Tribunal saved time and money by allowing for expeditious release of Iranian assets in exchange for creation of a security account to secure future claims. Mapp, *supra*, at 27. Forming an international tribunal rather than resolving a dispute through lump sum settlement is advantageous when the parties want to resolve the dispute quickly in order to assume political and economic relations. *Id.* In Cuba’s case, lack of economic resources for a lump sum settlement further supports constituting specialized forums.

Although it is conceivable that Cuba and the United States might decide to settle some or all classes of claims by lump sum, in our view this would be a missed opportunity. A new Cuba will face many challenges. Rather than seeing the claims simply as a hurdle to overcome, the Tribunal and the Court structure could allow the claims process to be part of an economic engine to help revive Cuba’s economy by creating opportunities for investment and establishing that Cuba can honor basic concepts of contract and property rights. Simply resolving all of the claims with a lump sum payment that will necessarily be only a small fraction of the full value of the claims will do far less to achieve these secondary goals.

Although the fairness and effectiveness of specialized international tribunals depend on many factors, notably dependence or independence, some observers suggest that international forums “may help resolve disputes by clarifying the facts and the pertinent customary international law.” Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *Cal. L. Rev.* 1, 18 (2005). Importantly, international tribunals can provide comparatively unbiased factual information and uncover legal principles that apply to the particular dispute. *Id.* at 14. An international “arbitrator can reduce the transaction costs of writing treaties by enforcing the hypothetical optimal treaty.” *Id.* at 17. In addition, an international tribunal can increase party compliance where that compliance creates short-term loss and only prospective political gain.

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Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899, 904 (2005).

A threshold question is whether the U.S. can, by entering into the instruments, force the claimants into these specially created forums and deprive them of an alternative forum either in the U.S. or the Cuban courts. Fortunately, that question has been answered in the affirmative by the U.S. Supreme Court. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court sustained against various constitutional and statutory challenges the creation of the Iran-U.S. Claims Tribunal and the suspension and eventual termination of all actions brought in U.S. courts against Iranian interests. The Court held that the President had power to do so by virtue of his executive authority and was not impermissibly circumscribing the judicial authority vested in the courts by Article III of the Constitution. The reasoning of *Dames & Moore* applies with full force here both in the context of the Court and the Tribunal. In the Tribunal context, at least some U.S. claimants may well have claims that would be judicially cognizable in U.S. courts. *Dames & Moore* squarely holds that those rights can be terminated in favor of an international arbitral panel.

The power to enter into an instrument expressing the intent to create the Court seems even stronger. Because the expatriate claims arise under Cuban law, the Court instrument and Cuba's subsequent creation of the Court will have the effect of funneling those claims into an alternative (and superior) Cuban forum. Therefore, while in the Tribunal context there is at least theoretically an invasion of the judicial authority (though, as *Dames & Moore* makes clear, not an invasion that violates Article III of the Constitution) the Court instrument simply represents a commitment on the part of the new Cuban government to provide a remedy within its judiciary.

The need for a clear finality provision in Article 3, as well as a provision in Article 9.6 of each instrument requiring that full faith and credit be given to awards and decrees, is illustrated by the occasional confusion generated by the lack of such provisions in the past. In the context of the Iran-U.S. Claims Tribunal, Iran argued in the famous case of *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992), that it had a reciprocal right of direct enforcement against U.S. parties. *Id.* at 142 ("The Iranian parties argue that the district court erred in declining to enforce the Award because, as claimed by the Iranian parties, the Tribunal's awards are 'directly' enforceable in United States courts."). That position was rejected by the Avco court, by other U.S. courts, and by the Iran-U.S. Tribunal itself. See, e.g., *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 28 (D.D.C. 1999) (citing *The Islamic Republic of Iran v. United States*, Award No. 586-A27, p. 8 (Iran-U.S. Claims Tribunal June 5, 1998)).

The view that ultimately emerged was that the awards in favor of Iran and against the U.S. parties were subject to enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"). The New York Convention is implemented in the U.S. by a portion of the Federal Arbitration Act, 9 U.S.C. § 201 et. seq. Thus, despite the "final and binding" language in the Algiers Declarations, the position of U.S. courts has been that "the 'final and binding' language in the Accords does not bar consideration of the defenses to enforcement provided for in the New York Convention." *Avco*, 980 F.2d at 145.

In theory "[d]efenses to enforcement under the New York Convention are construed narrowly, 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts....'" *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) (quoting *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976)). In practice, however, arbitration confirmation proceedings under the New York Convention take on a look similar to that of appellate review of the award. In *Avco*, for example, the court denied enforcement because it took the

position that the confusion over the necessity of producing the original invoices made the award unenforceable under the applicable New York Convention defense if “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case....” *Avco*, 980 F.2d at 145 (quoting New York Convention Article V(1)(b)). As the *Avco* dissent pointed out, this was a very broad reading of what constitutes a party being “unable” to present its case.

The bizarre sequel to *Avco*, however, was that the U.S. was found by the Iran-U.S. Tribunal to be in breach of its obligations under the Algiers Declarations by virtue of the Second Circuit decision refusing to enforce the award. Therefore, the net effect was that the U.S. wound up being required to pay the \$3.6 million dollar award rather than *Avco*. See Roger P. Alford, “Evidentiary Practices Before the Iran-United States Claims Tribunal” at 3, n.4, in *The Iran-U.S. Claims Tribunal at 25* (ASIL 2006) (citing *Iran v. United States*, Award No. 586-A27-FT (June 5, 1998)). Obviously, this is a sequence of events to be avoided in the future.

This is not to say that U.S. courts routinely rejected enforcement of Iran-U.S. awards against U.S. parties. In the *Hoffman Export* arbitration, the Ninth Circuit ultimately upheld the award, including apparently a portion awarding what amounted to equitable relief. See *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992).

Still, the New York Convention contains some significant defenses that could result in a good deal of litigation over enforcement. Article V of the New York Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
  - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

In practice, the “public policy” and the “beyond the scope” exceptions allow parties to recast their substantive arguments and relitigate them in enforcement proceedings. *See, e.g., Celulosa Del Pacifico S.A. v. A. Ahlstrom Corp.*, 1996 U.S. Dist. LEXIS 2747 (S.D.N.Y.). “In the United States, most awards may be vacated for ‘manifest disregard of the law,’ a vague term subject to varying interpretations, some of which allow for judicial tinkering in the substantive merits of a case.” William Park, *Procedural Evolution in Business Arbitration: Three Studies in Change*, at 16 in *Arbitration of International Business Disputes: Studies in Law and Practice* (2006) (citing Noah Rubins, “*Manifest Disregard of the Law*” and *Vacatur of Arbitral Awards in the United States*, 12 *Am. Rev. Int’l Arb.* 837 (2002)).

While scrutiny of foreign arbitral awards is probably necessary and desirable in most circumstances, here – given the intra-Tribunal and Court review provided for in medium and large claims – it seems undesirable to add another layer of expense and potential uncertainty by subjecting the awards to the possible defenses under the New York Convention. As Park, *supra*, notes, “[t]he problematic nature of ‘manifest disregard’ lies in its potential for mischief in large international cases, where zealous litigants may be tempted to press the doctrine into service as a proxy for attack on the substantive merits of the award.” *Id.* at 18.

Thus, rather than bringing the New York Convention defenses into play, or allowing other avenues of appeal or collateral challenges, the better route is to make clear that the Tribunal and Court awards are final and to be given equal dignity with domestic court judgments in each system.

### V.(E)(2) Prorogation & Derogation

“Prorogation” and “derogation” are internationally accepted terms for contractual clauses that either stipulate that a particular forum is open to litigants (prorogation) or not available (derogation). *See* Patrick J. Borchers, *Forum Selection Clauses in Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 *Wash. L. Rev.* 55 (1992). Most standard commercial forum-selection and arbitration clauses have both effects.

Forum-selection and arbitration clauses (the latter being simply a “specialized kind of forum-selection clause,” *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)) are important elements of international commerce. Traditional forum-selection clauses, which could be subject to scrutiny before the Court or Tribunal, probably will not appear with great regularity in contracts from about the time of the Castro revolution, however. Cases from that time enforcing forum-selection clauses were a rarity. *Cf. Schwartz v. Zim Israel Navigation Co.*, 181 N.Y.S.2d 283 (1958). General acceptance of forum-selection clauses in the domestic context did not come until after the U.S. Supreme Court’s decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) but came earlier in international disputes. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *see also* Erin Ann O’Hara, *Exploring the Need for International Harmonization: The Jurisprudence and Politics of Forum-Selection Clauses*, 3 *Chi. J. Int’l L.* 301 (2002).

The New York Convention was not opened for signature until 1957 and not ratified by the U.S. until 1970. However, the Federal Arbitration Act considerably predates that and there are over 2,000 reported cases prior to 1965 that involve arbitration clauses. Consequently, arbitration clauses could be a factor in some claims from that era.

Prior to *The Bremen*, U.S. courts generally took the view that “exclusive” (i.e., clauses that limit or derogate a court’s jurisdiction), see Borchers, *supra* at 55, n.1, illegally “ousted” the jurisdiction of courts. See also David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 Temp. L. Rev. 785, 794-99 (1993). The idea of party autonomy has undergone something of a similar transformation in the civil law tradition of Latin America. See Michael A. Schwind, *Derogation Clauses in Latin-American Law*, 13 Am. J. Comp. L. 167 (1964).

Still, to the extent that forum and arbitration clauses might appear in contracts over which the Tribunal and Court have jurisdiction, it seems desirable to deal with that problem explicitly. The Iran-U.S. Claims Tribunal, for example, faced several cases in which there were forum-selection clauses. The most troublesome of these involved clauses that selected Iranian municipal courts. The Claims Declaration there included a clause that the Iranians had negotiated for which provided that the Tribunal lacks jurisdiction over claims “arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.” See Ted L. Stein, *Jurisprudence and the Jurists’ Prudence: The Iranian-Forum Clause Decisions of the U.S.-Iran Claims Tribunal*, 78 Am. J. Int’l L. 1, 2-3 (1984). As Stein notes, the Tribunal there faced several different kinds of clauses:

The clauses themselves were quite diverse. They ranged from clauses providing for arbitration in Paris under the auspices of the International Chamber of Commerce, through clauses calling for reference to ‘competent courts according to Iranian law,’ to clauses providing for reference to the Iranian courts as such.

*Id.* at 3.

The Iran-U.S. Tribunal held that certain kinds of forum-selection clauses had to be enforced and thus derogated from the Tribunal’s jurisdiction. Again, Stein summarizes the Tribunal’s work here:

First, it implicitly accepted the view that a claim had to be contract based in order to be excluded. Thus, even where a clause fitting the ideal type [i.e., fitting the Majlis clause exactly] was found, the Full Tribunal remanded to the respective chambers the question whether particular claims were based on the contract and thus outside the Tribunal’s jurisdiction, or instead, “not based on contract, and thus within the Tribunal’s jurisdiction.” Next, it held that choice-of-forum clauses had to be specific, comprehensive and exclusive in their reference of disputes to Iranian courts. However, by a vote of seven to two, the Tribunal refused to consider whether clauses meeting these requirements should be considered binding. In other words, where there was a clause fitting the ideal type, the inquiry ended. Claims arising under that contract would ipso facto be excluded from the Tribunal’s jurisdiction.

*Id.* at 9.

As worthy as the Iran-U.S. Tribunal's work might have been here, this result seems like one that ought to be avoided if possible. In particular, the splitting of contract and unjust enrichment claims based on the same underlying transaction between different forums would promote uncertainty, conflicting results, and increased costs without any corresponding gain.

One might argue that denying the effect of such clauses would be to deny parties the benefit of a clause for which they bargained. However, given the enormous passage of time here, the marginal benefit of trying to honor a particular clause from nearly a half-century ago as against providing a single, efficient, specialized forum would be an unjustified tradeoff.

There is also the question of whether to allow parties to prorogate in favor of the Tribunal or the Court. Here the answer would seem to be a clear "no." Even without an express prorogation provision, the correct result would likely be that the parties cannot create jurisdiction where it does not exist given the particularized nature of the forum and the limited waiver of sovereign immunity that it creates.

Both the Court and the Tribunal have a specialized mission with regard to the designated classes of claims. Giving effect either to forum-selection clauses entered into at the time of the underlying transactions that led to the claim, or to forum agreements entered into later that might arguably cover the claims, would tend to undercut the mission of the Court and the Tribunal. For that reason, a clear provision that such clauses will not be enforced is necessary and desirable.

### **V.(E)(3) Jurisdiction to Interpret the Instruments**

Giving the Court and the Tribunal the authority to interpret their governing instruments is a practical necessity. No matter how carefully drafted, the instruments cannot anticipate every possible issue that might arise. Because their structures give rise to the possibility of full Tribunal or Court review of important legal questions, including – of course – questions related to the interpretation of the instruments. Thus, it should be possible to achieve internal consistency. International claims tribunals have traditionally had either de jure or de facto power to interpret their organic instruments. *See, e.g.*, J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37 Harv. Int'l L.J. 411, 428 & n.74 (2006) ("Tribunals do have jurisdiction to determine their own competence by interpreting their constitutive instruments"); Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, art. VI (4) (Jan. 19, 1981) ("Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States").

The one significant exception here is Article 9.7 of both the Court and the Tribunal instruments. This is essentially a political commitment related only indirectly the resolution of particular claims. Any issues here as between Cuba and the U.S. must be resolved through diplomatic channels and not committed to the discretion of the Court or the Tribunal.

### **V.(E)(4) Rules of Procedure to Effectuate the Purposes**

Both proposed instruments give the Court and the Tribunal the authority to promulgate rules of procedure. There have been examples of other international tribunals which have had this authority. *See, e.g.*, Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, art. III (2) (Jan. 19, 1981) ("[T]he Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out"); Agreement Between the Government of the Federal

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Democratic Republic of Ethiopia and the Government of the State of Eritrea, art. 5(7) (December 12, 2000) (“The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States”); The Dayton Peace Accords Concerning Agreement between Bosnia and Herzegovina on Refugees and Displaced Persons, Annex 7, art XV (Nov. 21, 1995) (“The Commission shall promulgate such rules and regulations, consistent with this Agreement, as may be necessary to carry out its functions. In developing these rules and regulations, the Commission shall consider domestic laws on property rights”).

As a practical matter, both the Court and the Tribunal are likely to take on their own distinctive cultures and modes of approaching questions, including procedural questions. The advantage of having the authority to draft procedural rules is that these distinctive cultures and modes can be expressed in formal rules available to the claimants, their representatives, and the governmental agents. The unfortunate consequence of denying agencies the right to draft rules is that it results in a sort of “secret law” known only to insiders. *See, e.g.,* Erik Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107, 1144 (2000); Zigurds L. Zile, Book Review, *Embarrassing in Form, Promising in Substance, Reflections on Ioffe and Maggs’ Soviet Law in Theory and Practice*, 1985 Wisc. L. Rev. 349, 356. Thus, in the interest of making the processes of both the Court and the Tribunal as transparent as possible, each should be given rule-making authority.

## **V.(F) Analysis of Article 4 Tribunal Article**

### *4. Law Applied by the Tribunal and Nature of Remedies*

4.1 Subject to the qualifications of this Article, both with regard to the availability of relief and remedies, the Tribunal shall decide, except to the extent modified by the terms of this instrument, all cases on the basis of the applicable principles of international law including applicable principles of private international law.

4.2 In the case of small claims, as defined below, the sole remedy shall be in the form of payment in the currency of the nationality of the Claimant.

4.3 In the case of medium and large claims, as defined below, specific restitution of real or tangible personal property shall not be awarded unless the Claimant requests this remedy and it can be granted without adversely impacting innocent third parties.

4.4 In the case of medium and large claims in which the Tribunal determines that the Claimant is entitled to relief, the Government against which the claim is brought may propose a remedy such as tax credits, development rights or rights in property owned by the Government. The Tribunal shall award the Government’s proposed remedy if it finds that the remedy is the fair equivalent of the remedy to which the Claimant would be entitled under applicable principles of international law. Such remedies may include reasonable terms and conditions designed to promote investment in the Government’s economy.

4.5 In determining claims brought by nationals of the United States that were within the jurisdiction of the Foreign Claims Settlement Commission the Tribunal shall give due weight to all legal and factual findings, including those related to valuation, relative to such claim by the Foreign Claims Settlement Commission.

4.6 The Tribunal may order appropriate interim measures of relief, including stays of closely related proceedings in other forums and orders regarding the production of evidence. The Courts of each Government shall, subject to the provisions of Article 4.7 regarding the gathering of evidence, aid in the enforcement of and comply with all orders of interim measures of

relief, including the staying of closely related proceedings regardless of which of the proceedings was first filed. In the event that the closely related proceeding is before the Special Claims Court and the Tribunal orders a stay, the proceeding before the Special Claims Court shall be stayed and transferred to the Tribunal which shall then consolidate the related proceedings. Nothing in this instrument shall be construed to forbid a court of a nation other than the United States or Cuba from also making appropriate interim orders to preserve the status quo pending the Tribunal's resolution of a claim.

4.7 At the request of the Tribunal, the competent courts of each Government shall entertain applications for orders necessary to assist the Tribunal in gathering evidence, including evidence held by non-parties. In the case of courts of the United States, such applications shall be directed to the appropriate United States District Court pursuant to 28 U.S.C. section 1782. Such applications may be made only by the Tribunal and neither party shall make any application to any court of the United States or any other nation, under section 1782 or any other provision of law, without being so ordered by the Tribunal. The courts of Cuba shall make reasonable provisions to entertain such applications from the Tribunal pursuant to the applicable laws of Cuba. The Tribunal may also make requests to the courts of nations other than Cuba or the United States. Nothing in this section shall be construed to require a court to enter any order that would offend any applicable privilege or principles of sovereignty or public policy.

## Court Article

### *4. Law Applied by the Court and Nature of Remedies*

4.1 Subject to the qualifications of this Article, both with regard to the availability of relief and remedies, the Court shall decide, except to the extent modified by the terms of this instrument, all cases on the basis of the civil law. In all cases, the Court shall respect basic concepts of fundamental fairness and internationally accepted principles of fair compensation.

4.2 In the case of small claims, as defined below, the sole remedy shall be in the form of payment in United States dollars.

4.3 In the case of medium and large claims, as defined below, specific restitution of real or tangible personal property shall not be awarded unless the Claimant requests this remedy and it can be granted without adversely impacting innocent third parties.

4.4 In the case of medium and large claims in which the Court determines that the Claimant is entitled to relief, Cuba may propose a remedy such as tax credits, development rights or rights in property owned by Cuba. The Court shall award Cuba's proposed remedy if it finds that the remedy is the fair equivalent of the remedy to which the Claimant would be entitled under the applicable legal principles. Such remedies may include reasonable terms and conditions designed to promote investment in the Cuban economy.

4.5 The Court may order appropriate interim measures of relief, including orders regarding the production of evidence and, except for proceedings before the Cuba-United States Claims Tribunal, stays of closely related proceedings in other forums. The Courts of each Government shall, subject to the provisions of Article 4.6 regarding the gathering of evidence, aid in the enforcement of and comply with all orders of interim measures of relief, including the staying of closely related proceedings regardless of which



*A 1951 Chevrolet Styline De Luxe.*

of the proceedings was first filed. In the event that the Cuba-United States Claims Tribunal orders the stay of a closely related proceeding before the Court, the proceeding before the Court shall be stayed and transferred to the Tribunal for a consolidated resolution of the related proceedings. Nothing in this instrument shall be construed to forbid a court of a nation other than Cuba or the United States from making appropriate interim orders to preserve the status quo pending the Court's resolution of a claim.

4.6 At the request of the Court, the courts of the United States shall entertain applications for orders necessary to assist the Court in gathering evidence, including evidence held by non-parties. In the case of courts of the United States, such applications shall be directed to the appropriate United States District Court pursuant to 28 U.S.C. section 1782. Such applications may be made only by the Court and neither party shall make any application to any court of the United States or any other nation, under section 1782 or any other provision of law, without being so ordered by the Court. The Court shall if necessary make reasonable provisions for obtaining the assistance of other Cuban courts in gathering evidence. The Court may also make requests to the courts of nations other than the United States or Cuba. Nothing in this section shall be construed to require a court to enter any order that would offend any applicable privilege or principles of sovereignty or public policy.

4.7 In the event that a Claimant presented a claim to the Foreign Claims Settlement Commission, a denial of the claim on the grounds that the Claimant was not a United States national at the time the claim arose shall not prejudice the Claimant's right to proceed before the Court.

### **V.(F)(1) International Law Before the Tribunal**

It is abundantly clear that principles of international law govern the claims before the Tribunal. International law requires compensation of foreign nationals who lose property at the hands of a government and mandates compensation both of legal (that is, generally non-discriminatory) expropriations as well as illegal ones (that is, expropriations executed in a discriminatory fashion). *See, e.g.*, Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years, 1981-1991* (1993); *see also* Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 *Int'l Law*, 51, 80 (1998). Of course, the precise boundaries of this duty to compensate are the subject of some debate as explored elsewhere. *See supra* Section V.C.4.a. Nevertheless, there is no question that international law must govern the claims of Cuban citizens against the U.S. and FCSC-certified claimants against Cuba.

Similarly, there can be no question but that any property claims between the Cuban government and the U.S. government are governed by international law principles. *See* Restatement (Third) of Foreign Relations § 904; Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 *Berkeley J. Int'l L.* 296, 306 (2002) ("Classical public international law governs the relationships between states..."). Because the Tribunal will have international law expertise, it is the appropriate venue for all types of claims governed by international law.

### **V.(F)(2) Civil Law Before the Court**

An important question is what law to apply in the case of the Court. Because the Court will handle expatriate claims exclusively, as a matter of principle the claims should be resolved under some form of Cuban law. The doctrine of espousal of claims generally only applies to those who

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were continuous nationals of the claiming nation. See Edwin Borchard, *The Protection of Citizens Abroad and Changes of Original Nationality*, 43 Yale L.J. 359, 362 (1934). Therefore, the U.S. cannot lawfully espouse the claims of expatriate claimants. These claimants were Cubans at the time of the underlying transaction and have claims against the Cuban government that are all, or almost all, tied directly to Cuba. As a general proposition, the claimants' subsequent move to the U.S. does not affect the applicable law. See, e.g., *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684-85 (N.Y. 1985) (post-transaction change of domicile irrelevant for choice-of-law purposes).

Because the expatriate claimants were Cubans at the time they lost their property, it is doubtful they can claim compensation directly under international law. One commentator summarizes as follows:

There is no clearly recognized legal right in international law to the restitution of or compensation for property seized by one's own government. It is well-established that international law principles provide only for the 'prompt, adequate and effective' compensation where the property of aliens has been confiscated.

Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation – a New Form of Property*, 27 U. Miami Inter-Am. L. Rev. 453, 479 (1996).

However, merely applying the legal principles of Castro's regime would prove unsatisfactory since, at least as they have been applied in Cuba of recent times, they would not result in any compensation. Cuban law as written, however, is not completely anti-compensation. Most of the expatriate expropriations took place between 1959 and 1968. Mathias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. Pa. J. Int'l Econ. & Law 659, 661-62 (1996). As noted earlier in Section V.C.3.d., Cuban law still requires some degree of compensation for expropriation.

Nevertheless, as a matter of elementary justice, it would be unfair to apply the elastic terms of Cuban decrees concerning compensation for expropriation, particularly given that the prior written Cuban law at the time of most of the takings was relatively pro-compensation. To the extent that the instrument creating the Court represents a *lex specialis* applicable to the expatriate claims, it can seek to achieve a just solution rather than one bogged down in technicalities of what Cuban law did or did not provide for at the time of the expatriate takings.

A well-established body of legal rules familiar to the Cuban legal tradition is that derived from the Spanish Civil Code of 1889. The Spanish Civil Code was the result in part of the codification movement that swept through continental Europe beginning with the famous Code of Napoleon of 1804. See Stephen Jacobson, *Catalan Nationalism and Civil Codification in Nineteen-Century Europe*, 20 Law & Hist. Rev. 307, 311 (2002). "Codification of the 19th Century was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as ius-naturalism, rationalism and the Enlightenment." Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. Transnat'l L. & Pol'y 163 (2001). Although a distinct entity, the Spanish Civil Code is "clearly a member of the French family." Jacobson, *supra*, at 312.

Because Cuba was a Spanish possession until the Spanish-American war, the Spanish Civil

Code of 1889 was adopted almost in whole in Cuba. Murillo, *supra*, at 172. A version of the Spanish Civil Code persisted in Cuba until 1987, and “continues to exert a heavy influence on Cuban jurisprudence.” Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 *Transnat’l L. & Contemp. Probs.* 529, 539 (2004). Thus, this body of principles is well-adapted to Cuban culture and the legal traditions derived from it will provide a fair and just framework for resolution of the expatriate claims. For this reason, Article 8.1 of the proposed instrument specifically defines the term “civil law” to mean “the civilian legal tradition particularly as derived from the Spanish Civil Code of 1889....”

The civilian tradition provides legal categories and sufficient flexibility for the resolution of the issues that will confront the Court. The three categories of cases identified by the instrument are 1) expropriation of or wrongful interference with property; 2) breach of contract; or 3) unjust enrichment. As to all three categories, the civilian tradition offers an established framework for deciding and remedying breaches.

The civil law recognizes concepts of trespass, damage to property, interference with property and the like. See Matias F. Travieso-Diaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in Post-Transition Cuba*, 37 *Geo. Wash. Int’l L. Rev.* 885, 908 (2005). In fact, Travieso-Diaz and Musa conclude that such claims could be stated even under the current version of the Cuban Civil Code. See also A. N. Yiannopoulos, *Creation of Servitudes by Prescription and Destination of the Owner*, 47 *La. L. Rev.* 57, 80 (1982) (examining Louisiana law and stating, “[w]hen a servitude is expropriated, the owner of the immovable property is entitled to receive an indemnity for the value of the servitude taken plus severance damages.”). Article 544 of the French Civil Code creates a right of ownership in property to dispose of property “in the most absolute manner.” In sum, civilian notions of property rights are more than adequate to fairly and reasonably dispose of property-based claims.

As to breach of contract, the Spanish Civil Code contains a full panoply of remedies to redress the failure to abide by the terms of an enforceable agreement. See Jianming Shen, *The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules*, 13 *Ariz. J. Int’l & Comp. L.* 253, 281 (1996). See also John Y. Gotanta, *Recovering Lost Profits in International Disputes*, 36 *Geo. J. Int’l L.* 61, 73 (2004) (“the civil codes of Germany, Italy, Japan, and Spain allow for the recovery of lost profits in breach of contract actions.”). Thus, the civilian system is also equipped to redress actions that would be founded upon notions of breach of contract.

As to unjust enrichment theories, they are well-embedded in the civil law. In fact, some such theories were allowed to proceed in the Iran-U.S. Claims Tribunal even without an explicit reference to the specific theory. See Ted L. Stein, *Jurisprudence and the Jurists’ Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 *Am. J. Int’l L.* 1, 52 n. 190 (1984). The idea of compensation for “unjust enrichment” dates back to Roman law and thus is better rooted in the civil law than it is in the common law, though there has been a substantial convergence between the two as of late. See Lionel Smith, *Property, Subsidiarity, and Unjust Enrichment*, 2000 *Oxford U Comp. L Forum* 6.

In sum, the civilian principles as they were received in Cuba from the Spanish tradition are well-equipped to handle fairly the legal problems that will be presented to the Court. Moreover, although lawyers trained in the common law often imagine the civilian system to be rigid, it has always retained a notion of equity to handle new or unanticipated categories of cases. See anuel Rodriguez Ramos, “*Equity in Civil Law*”: *A Comparative Essay*, 44 *Tul. L. Rev.* 720 (1970). Because the civil law is adequate to handle the issues before the Court, some might think it

unnecessary to include specific language regarding fair compensation. But, for purposes of emphasis and to reassure potential expatriate claimants, it is desirable to include a provision that the Court “shall respect basic concepts of fundamental fairness and internationally accepted principles of fair compensation.”

Another advantage of using the civilian tradition, particularly as embodied in the 1889 Spanish Civil Code, is that the Court will have a wide range of jurists from which to choose. The Spanish Civil Code has heavily influenced the law of Puerto Rico (see Tamara York, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, 1997 D.C. L. Rev. 861, 869-70), Mexico (see Calvin G.C. Pang, *Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond*, 20 Haw. L. Rev. 1, n. 30 (1998) (“The Spanish Civil Code provided the rule of law to Mexico and surrounding areas that were settled and colonized by Spain beginning in the 1700s.”)), and a good deal of Latin America, and has also had influence in southern and southwestern border states of the U.S. See, e.g., Joseph Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 La. L. Rev. 42, 54-56 (1941); Pang, *supra*, at n. 30 (noting influence in southwestern and southern border states). Moreover, the 1870 revision of the Louisiana Civil Code had a considerable influence on the Spanish Civil Code of 1889. A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 La. L. Rev. 5 (1992). Thus, finding lawyers and jurists who are familiar with this system will not be difficult.

Finally, application of the civil law before the Court may also have the effect of reinvigorating the civil law tradition within Cuba. A new Cuba will find itself with a host of challenges, including developing and consistently applying the rule of law. The creation of the Court and the infusion of jurists from similar legal traditions to the one that once thrived in Cuba could be a positive and beneficial step.

### **V.(F)(3) Role of Private International Law**

The proposed instruments call for the application of principles of private international law, or the “conflict of laws” as it is usually known in the U.S., by the Court and the Tribunal. While international law provides the general legal framework for the Tribunal, and the civil law provides the framework for the Court, there are several circumstances in which Court and the Tribunal may have to look to other legal systems to provide the relevant legal rules. This “duality” is not unique. In the context of the Iran-U.S. Claims Tribunal, with regard to some claims, “[t]he substantive issues...[were] governed either by municipal law or international law.” See Mapp, *supra*, at 107.

#### **V.(F)(3)(a) Sources of Rules of Private International Law**

The civil law has soundly-developed rules of private international law available to the Court. For the Tribunal, Article 33(1) of the UNCITRAL rules provides that the “arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.” In practice, international arbitral tribunals tend to apply a “cumulative” approach by looking to the conflicts approaches of several different systems. See, e.g., Klaus P. Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 Am. J. Comp. L. 129, 131 (1998); Note, *General Principles of Law in International Arbitration*, 101 Harv. L. Rev. 1816, 1822 (1988); cf. Mapp, *supra*, at 112-13 (noting the Iran-U.S. Tribunal’s propensity to cite to “general” principles of law). In the U.S., the Second Restatement of Conflicts, as well

as other treatises, supplies a general framework. The seminal civilian treatise on private international law was that of German scholar Friedrich Carl von Savigny, 8 *Systems des heutigen Römischen Rechts* (1849), which was translated into English in 1880 by William Guthrie under the title “A Treatise on the Conflict of Laws.” There are also respected modern civil law texts on private international law, including Henri Batiffol & Paul Lagarde’s, *Droit international privé* and Pierre Mayer’s, *Droit international privé*.

What follows is a survey of some of the circumstances in which conflicts rules might be needed and a potential application of the rules.

### **V.(F)(3)(b) Real Estate Issues**

The duty to compensate for expropriated real property is established beyond peradventure both under international law and the civil law. Questions about current title and other possessory and non-possessory interests in expropriated properties may, however, affect the available remedies. To some extent the proposed instruments address the question of remedies directly. In small claims, only monetary compensation is available. But in medium and larger claims specific restitution might be available but only if the claimant asks for this remedy and it can be accomplished without adversely affecting innocent third parties. Questions regarding the present nature of interests in realty could, therefore, impact the availability of this remedy. Whether, for instance, a third party is “innocent” could be affected by whether he has a reasonable claim to title or some possessory interest. In any event, some body of rules must supply the answers.

A well-established rule here is the *lex rei situs* rule which points to the law of the place where the realty is located. This continues to be an entrenched common law rule. See Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon Symeonides, *Conflict of Laws* 1054 (4th ed. 2004). The situs rule is somewhat less fixed in the civil law tradition. See Peter Hay, *The Situs Rule in European and American Conflicts*, in Peter Hay & Michael H. Hoeflich eds., *Essays in Honor of John E. Cribbit* 109 (1988). Even though, however, most civilian systems have rejected strict application of the situs rule, such as the unity of succession principle for estates, it seems likely that most issues regarding questions of title and interests in expropriated properties will still be governed by the law of the situs. Of course, there could remain difficult questions as to the nature of those interests under the *lex situs*. But, it bears repetition, those difficult questions do not include whether compensation in some form is due for the expropriated properties because it clearly is due under any construction of any potentially applicable rule.

### **V.(F)(3)(c) Succession of Claims Through Estates**

Because of the passage of time many claims will have been passed on through wills, trusts and intestate succession. The common law rule governing succession of personal property points to the law of the decedent’s last domicile. Restatement (Second) Conflict of Laws § 260 (1971) (intestate succession of personal property governed by law of decedent’s last domicile); *id.* at § 263 (1971) (same for testate succession). With regard to real property, the common law points to the law of the situs of the real property. Restatement (Second) Conflict of Laws § 236 (1971) (intestate succession of realty governed by situs law); *id.* at § 239 (same for testate succession).

Civil law systems place more emphasis on “unity of succession,” thus often looking to the law of the decedent’s domicile, habitual residency or nationality. See Symeon C. Symeonides, *Exploring the Dismal Swamp: The Revision of Louisiana’s Conflicts Law on Successions*, 47 La. L. Rev. 1029, 1035-36 & nn. 22-23 (1987). Professor Symeonides notes that the common law

adheres to the principle of “scission” of the estate while most civil law systems adhere to the idea of unity of succession. French law is a notable exception to the civilian trend and some other civilian systems will also apply their own law to real estate located in their own country.

All systems, however, have a strong preference for validating testamentary instruments and attempting to fulfill the wishes of the testator. Model U.S. laws have adopted a “rule of validation” approach to wills that allows them to be enforced if valid under the law of any one of several states connected to the testator. *See* Symeonides, *supra*, at 1103.

### **V.(F)(3)(d) Succession of Claims Through Trusts**

Another possibility is that claims to property might have been placed in trust. The ability of a trustee to pursue such a claim must, therefore, be governed by some national (or state) law.

Generally the common law systems have honored an express choice of law made in the trust instrument. *See* Restatement (Second) Conflict of Laws § 268 (1971). These express stipulations are often honored by other legal systems as well. For instance, the Hague Convention on Trusts, which entered into force in 1992 as between several nations of both the civil and common law traditions, expressly honors stipulations to the applicable law. (Article 6). In cases in which there is no applicable law chosen by the settlor of the trust, the Hague Convention applies a “closest connection” test that looks to the place of administration of the trust, the situs of the assets, the place of business or residence of the trustee, and the object and purposes of the trust. (Article 7). This test bears a close similarity to the Second Conflicts Restatement’s “most significant relationship” test and its application to trusts where there is no effective designation of law. Restatement (Second) Conflict of Laws § 270(b) (1971) (referring to the general “most significant relationship” test of § 6).

Therefore, either the Court or the Tribunal should have ample material from which to make a reasonable choice of law if a question is raised as to the effective transfer of a claim to a trust.

### **V.(F)(3)(e) Corporate Succession**

In some cases claims held by corporations or other business entities may have been passed on or succeeded to by other corporations or business entities. Questions might arise as to whether the new claimant validly owns the claim. Under the common law approach, rights and liabilities of successor corporate entities have generally been determined by the state of incorporation. *See, e.g., Ruiz v. Blentech Corp.*, 89 F.3d 320, 326 (7th Cir. 1999) (“California clearly has the most significant contacts with a sale of corporate assets by one California corporation to another.”); *John Q. Hammons Hotels, Inc. v. Acorn Window Sys.*, 2003 U.S. Dist. LEXIS 2062 (N.D. Iowa) (purchase of assets governed by law of state of incorporation of corporation). The civil law tradition has shown more affinity for the “seat” theory for determining corporate law matters, which corresponds to the notion of a principal place of business. *See* Ralph Michaels, *Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge of Europeanization and Globalization* (2005 Duke Working Paper Series, available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1014&context=duke/fs>) (discussing role of “seat” theory in European conflicts law); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 Harv. Int’l L.J. 47, 60 n. 55 (1993) (noting general civilian rejection of the place of incorporation in favor of the “seat” of the corporation to govern its internal affairs).

### **V.(F)(3)(f) Contract Rights**

In some cases, all or part of claims may be founded on contracts. Although all civilized legal

systems share a basic commitment to respecting contractual rights, differences abound as to remedies for breach, questions of formal validity, excusable non-performance and the like. Both the Court and the Tribunal may be required, therefore, to choose a local law to govern those differences. In cases in which the contract contains a choice-of-law clause, the common law approach has a strong preference for honoring the parties' choice. *See* Restatement (Second) Conflict of Laws § 187 (1971). Civil law systems also generally honor the principle of party autonomy. *See* Note, *General Principles of Law in International Commercial Arbitration*, 101 Harv. L. Rev. 1816, 1818 n. 11 (1988).

For contractual issues where the parties have made no effective choice of governing law, the differences between the common law and the civil law systems are not great. Most U.S. courts use the Second Restatement's "most significant relationship" test, *see* Restatement (Second) Conflict of Laws §§ 6, 188 (1971), or something close to it. *See, e.g., Auten v Auten*, 124 N.E.2d 99, 101 (N.Y. 1954) (applying a "grouping of contacts" or "center of gravity" approach). English courts apply a similar test. *See Bonython v. Commonwealth of Australia*, [1951] A.C. 201, 219 (P.C.) ("closest and most real connection"). Europe's Rome Convention borrows the "closest connection" test that was developed mostly on the European continent and thus is generally aligned with the civil law. *See* Rome Convention on the Law Applicable to Contractual Obligations art. 4, 1980 O.J. (L. 266) 1, *reprinted in* 19 I.L.M. 1492 (1980). *See generally* Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 Va. J. Int'l L. 571, 578-83 (1999) (noting the emergence of the closest connection test as the "basic paradigm" and its similarity to the U.S. "significant relationship" test).

Thus, for questions of contract choice of law, both the Court and the Tribunal will have ample sources from which to draw.

### **V.(F)(3)(g) Unjust Enrichment**

Some claims may also sound in a theory of unjust enrichment. Unjust enrichment can present difficult choice-of-law questions because in some circumstances it is a closer cousin to tort theories and in others it more resembles contract theory. *See* Peter Hay, *From Rule-Orientation to "Approach" in German Conflicts Law The Effect of the 1986 and 1999 Codifications*, 47 Am. J. Comp. L. 633, 644 (1999). However, again there is not likely to be a significant difference between the civil and common law approaches. The common law tradition generally falls into the soft rule approach of the English courts that refer to their theory as a "proper law" approach. *See* Stephen Lee, *Review Essay: Choice of Law for Claims in Unjust Enrichment: Restitution in Private International Law*, 26 Melbourne U.L. Rev. 192 (2002); or Restatement (Second) Conflict of Laws § 221 (1971) ("most significant relationship" test). The civil law theories tend to emphasize territorial connections, such as the place where the benefit accrued, *see* Hay, *supra*, but those connections are similar to those that the Second Restatement emphasizes. *See* Restatement (Second) Conflict of Laws § 221(2)(b)(1971).

In sum, there will be a good number of questions before both the Court and the Tribunal that will require reference to the internal or municipal laws of other states or nations. Both bodies, however, will have abundant sources from which they can draw.

### **V.(F)(4) Money Damages in Small Claims**

The small claims procedure may prove attractive to many claimants. Even if some claimants perceive their claims to have a pre-interest value over \$10,000, the lighter burden of proof, the

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limitation of the remedy to monetary payments and more informal procedures may create an incentive for some claimants to plead their claims below the jurisdictional amount for small claims.

Specific restitution of property would be particularly inappropriate for small claims. The transaction costs of specific restitution in this context would generally be higher than those for money damages. See Saul Levmore, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 *Wis. L. Rev.* 483, 498-99. Because of the relatively small size of these claims, the lowest transaction cost solution is prudent. Moreover, numerically the small claims will be by far the most common type, so providing the most efficient resolution possible in this class will help hold down the aggregate costs.

### V.(F)(5) Limited Role of Specific Restitution

One of the most difficult and emotionally charged issues is the possibility of specific restitution of property. In particular, claimants may desire restitution of homes and parcels of agricultural land both before the Court and the Tribunal.

There would likely be, however, a large number of practical and logistical problems with such an approach. First, given the enormous passage of time, the property may be in a radically different condition than it was at the time of taking. Some properties are severely deteriorated and others converted to completely different uses. In fact, even with well-documented claims that were presented to the FCSC, it may be difficult to ascertain what land is and is not part of the claim. During our trip to Cuba in the Spring of 2006, we located the site of four different claims that had been certified by the FCSC. See Section IV.L for more information on these claims: William Powe, Havana Docks Corp., Brothers of the Order of Hermits. In two cases, the claims described either a city block or an intersection in Havana that apparently had undergone significant change since claim certification. Another claim described industrial waterfront property that appeared not to be in active use. In only one case did it appear that the property could be easily identified and had been well-maintained. That claim involved a former residence converted for use by the Cuban government. Assuming that this small sample is representative, specific restitution would not be a practical or realistic remedy in a significant number of cases.

Specific restitution also presents the possibility of conflicting or overlapping claims which could significantly delay the ultimate resolution of claims. This has proved to be a significant impediment to the progress of other claims programs. For example, “[o]ne of the most tangled webs of the property issue in Nicaragua was that of multiple claims on the same properties. . . . The complications of the numerous claims resulted in an over-worked Nicaraguan judiciary.” Tania C. Mastrapa, *Cuba in Transition: Association for the Study of the Cuban Economy, Real Property Restitution: Risks for Claimants and Investors* 137-141, available at <http://info.lanic.utexas.edu/project/asce/pdfs/volume15/pdfs/mastrapa.pdf>. Others agree that restitution in Nicaragua was problematic in part because of the volume of property seized and the lack of maintenance of clear ownership records. See Matias F. Travieso-Diaz & Armando A. Musa, *Courts of Limited Jurisdiction in a Post-Transition Cuba*, 39 *Vand. J. Transnat’l L.* 125, 134 (2006). These problems have a good chance of resurfacing in Cuba if restitution is not carefully and sparingly implemented.

In other countries as well, critics of restitution have noted dramatic economic decline, a rise in property disputes involving former owners and their heirs and the possessors, property abandonment and maintenance neglect because of trial delays, and increased tension between exile communities and local communities. See Juan C. Consuegra-Barquín, *Cuba’s Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 *Rutgers L. Rev.* 873, 893, 923 (1994). In addition, the massive volume of restitution claims in countries

that favored property restitution has allegedly slowed foreign investment and hindered transitioning economies. *Id.* at 893. Germany experienced upwards of two million filed property restitution claims. *Id.* Post-WWII claimants in Poland filed 140,000 restitution claims and claimants in Bulgaria filed 400,000 claims. *Id.*

Finally, the Baltic States also lacked foresight with respect to “the multitude of complex, conflicting claims for the same property” that ultimately created costly delays in the claims resolution process. Francis H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 Colum. J. Transnat’l L. 621, 641-42 (1996). In sum, many agree that restitution has tendencies to create “contentious disputes among a variety of claimants, including former owners, their successors, current occupants, and many others.” Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals’ Expropriation Claims Against Cuba*, 17 U. Pa. J. Int’l Econ. L. 659 (1996).

There is also the significant moral problem presented by the possibility of displacing ordinary Cubans who have been living and working within the existing structure of Cuban society and can hardly be faulted for their current circumstances. It would be highly counterproductive to create a system that would displace these persons. Indeed, the report of the Commission for Assistance to a Free Cuba commissioned by the President and chaired by Secretary of State Rice repeatedly notes the need to assure ordinary Cubans that they will be secure in their homes. Commission for Assistance to a Free Cuba, Report to the President, July 2006, *available at* <http://www.cafc.gov/cafc/rpt/2006/68097.htm> (“For all Cubans, we must underscore that the future is theirs to define and that the U.S. and our citizens pose no threat to their security or their homes,” Ch. 1, Part II; “The Cuban Transition Government will likely and properly wish to reassure the Cuban people that they will be secure in their homes and property, and not subject to arbitrary expulsion,” Ch. 4, Part VI; The U.S. can “[r]eassure the Cuban people that the U.S. Government will not support any arbitrary effort to evict them from their homes,” Ch. 4, Part VI.).

There may be circumstances in which specific restitution is a fair and workable remedy. However, under the proposed instruments, two conditions must be met. First, the claimant in a medium or large claim must ask for specific restitution. This would avoid the problem of restitution of deteriorated properties being forced upon claimants who do not want them and prefer instead compensation.

Second, specific restitution must be possible without adversely impacting innocent third parties. Admittedly, there may be close factual questions as to what constitutes an “innocent” third party. However, the paradigms are clear. At one end of the spectrum, ordinary Cuban citizens living or working in properties subject to a claim would qualify as “innocent” and should not have their possession disturbed. At the other end of the spectrum, a foreign corporation exploiting expropriated property in full knowledge of the prior owner’s claim clearly would not qualify as “innocent.” *See, e.g., Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263 (S.D. Fla. 2005) (claim against French corporation operating a Club Med at site of former owner’s hotel). The need to distinguish between “innocent” and non-innocent owners of property is not a new phenomenon in international law and is one that routinely arises with regard to contested properties. *See, e.g.,* Claudia Fox, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 Am. U.J. Int’l L. & Pol’y 225, 266 (1993) (discussing policy objective of protecting innocent purchasers). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 435 (1963) (“But it is difficult to regard the claim of the original owner, who otherwise may be recompensed through diplomatic

channels, as more demanding of judicial cognizance than the claim of title by the innocent third party purchaser, who, if the property is taken from him, is without any remedy.”).

### V.(F)(6) Alternative Remedies

In the context of small claims, the only available remedy is a monetary payment in the currency of the nationality of the claimant.

In the context of medium and large claims, the dimensions of remedies are broader. Assuming that specific restitution of the property is out of the picture as it often will be, *see supra* Section V.F.5, the question becomes how to compensate these claimants. In some cases, the Government may choose to compensate claimants through monetary payments. However, each Government (more likely Cuba) may wish to construct an alternative compensation scheme such as giving claimants substitute but equivalent property or tax credits. The notion of giving claimants alternative remedies of this sort is not unique to this context and has proved successful if implemented well. *See, e.g.* Gueorgui Prohaski, *Organization for Economic Co-operation and Development: A Review of Bulgarian Privatisation 2-3* (November 1998), available at <http://www.southeasteurope.org/documents/marinov.pdf>; Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. Pa. J. Int'l Econ. L. 659, 681-82 (1996).

Whatever compensation scheme Cuba may design, it must be one that emerges from the democratic processes in a new Cuba. “For all Cubans, we must underscore that the future is theirs to define. . . . A democratically elected Cuban Government will have a number of models to draw upon in devising a strategy for assuring property rights and addressing claims on confiscated properties.” Commission for Assistance to a Free Cuba, *supra*, at Ch. 1, Part II; Ch. 4, Part VI. It is also important here to remember that the claims issues are but one piece of a successful transition to a new Cuba. Laying too heavy a hand on the outcome of these decisions may retard rather than advance the causes of democracy and justice.

There must, of course, be some guarantees of substantive justice or the claimants may rightly have little faith in the Court and the Tribunal. First, a Government's proposed alternative remedy must be one that the Court or the Tribunal, as the case may be, approves. The Court or the Tribunal can approve the remedy only if it finds it to be the “fair equivalent” of the remedy that the claimant would have available under the operative legal principles. There is some intentional elasticity in the term “fair equivalent” but it would not countenance a remedy that is only of a fractional value of the claim. For example, a claimant who lost a parcel of highly productive agricultural land could not be compensated with a parcel that is demonstrably and substantially less productive. Although a “fair equivalent” may prove to be a point of contention between claimants and governments, it is a notion that has long and successfully guided courts. *See, e.g., Nat'l Drying Mach. Co. v. Ackoff*, 245 F.2d 192, 195 (3d Cir. 1957) (“But there can be no ‘equity’ in a compensatory award except as it provides a fair equivalent for some loss.”); *Waesche v. Redevelopment Agency of New London*, 299 A.2d 352, 354 (Conn. 1967) (“the general rule that the constitutional requirement that a condemnee receive just compensation ‘means a fair equivalent. . .’”).

The other external guarantee of fairness is that the Government proposing an alternative remedy (again likely Cuba) may impose only “reasonable” conditions designed to promote investment in the Government's economy. Concededly, some claimants may desire a more precise definition of what would constitute “reasonable” conditions. It would be nearly impossible, however, to project forward to the circumstances of particular claims and anticipate the operation

of the internal political processes in a new Cuba. However, the structural guarantees of fairness in the processes of the Court and the Tribunal are some guarantee that “reasonable” will mean just what it says – “reasonable” and not onerous.

A powerful incentive for Cuba to want to participate in the Tribunal and the Court processes will be the possibility of using them as engines of economic development. In that regard, these processes may present the opportunity for more robust compensation than the tiny percentages of full value claimants usually receive in lump sum settlements, *see* Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriations Claims Against Cuba*, 16 U. Pa. J. Int’l Bus. L. 217, 226 (1995), as well as to stimulate foreign investment in a way that a lump sum payment cannot. Of course, the Government’s incentive will be to condition the compensation as stringently as possible in order to maximize the perceived benefit to the Government. However, conditioning the compensation unreasonably will rob it of its value to the claimant. *See* Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 Int’l & Comp. L.Q. 588, 605-06, 610-11 (1988) (although the required standard of compensation is disputed, State practice has at minimum supported the requirement that compensation be “effective.”). Consequently, the Court or the Tribunal must act as guarantor that the conditions do not pass over the threshold of reasonableness and become too burdensome. Again, this is not an area in which bright lines can be drawn in advance but will depend heavily on context. Both the Court and the Tribunal, which are required to be neutral and relatively insulated from pressure, will be well-positioned to make that determination.



*Monument to José Martí.*

### **V.(F)(7) Role of FCSC Certifications Before the Tribunal**

With regard to claims of U.S. nationals who were U.S. citizens at the time of the taking, an additional layer of process to consider is the certification before the Foreign Claims Settlement Commission (the “FCSC”). If the FCSC-certified claims are settled by a lump sum payment, the certifications would be essentially conclusive to determine a claimant’s pro rata participation in the fund. The 2005 Annual Report of the Commission lists many such programs. For instance, the Commission is currently receiving and adjudicating claims under the Albanian Claims Program which is funded by a lump sum settlement of \$2 million. 2005 FCSC Ann. Rep. at 7. Other past programs noted in the Commission’s Annual Report include programs for Yugoslavia (completed in 1954 and 1969), Panama (1954), Poland (1966), China (1979, 1981), Ethiopia (1991), Egypt (1990) and others. *Id.* at 25-35.

In cases in which there is a lump sum settlement, the U.S. government has unreviewable discretion to “espouse” the claims of its nationals and thus settle them under any terms that are in its interest. Thus, even if the settlement is for a small fraction of the full value of the claim, or the claim is denied, the individual claimant has no effective recourse beyond participating in the settlement, except in rare circumstances where he can show the possibility of a constitutional violation. *See, e.g., Dayton v. Czechoslovakian Socialist Republic*, 834 F.2d 203 (D.C. Cir. 1987) (no recourse for claimant denied claim); *Fraenkel v. United States*, 320 F. Supp. 605 (S.D.N.Y. 1970) (finality statute as to Commission decisions bars judicial review); *Shanghai Power Co. v. United States*, 4 Ct. Cl. 237 (1983) (no collateral attack of lump sum payment of about 10% of value of claim); *but see Ralpho v. Bell*, 569 F.2d 207 (D.C. Cir. 1977) (due process challenge).

In the traditional lump sum setting, the finality of the Commission determinations makes perfect sense. The foreign sovereign's liability is fixed by the amount of the lump sum so the questions of fairness all deal with the relative participation of the claimants in the funds. If the claimants had an equal opportunity to prove their claims before the Commission, no unfairness arises as to any of them. Moreover, the need for finality is pressing because distribution of the funds might well have to wait until the judicial review of all the claims is completed, which could delay everyone's recovery by years. See *Banco Nacional de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412, 449-50 (S.D.N.Y. 1980), aff'd as modified 658 F.2d 875 (2nd Cir. 1981).

For a variety of practical reasons, however, including Cuba's probable lack of resources and the limited utility of a lump sum solution to promote development in Cuba, a process such as that provided by the Tribunal is a more likely and mutually beneficial outcome. Current estimates suggest that claimants would recover no better than a few cents on the dollar in a lump-sum settlement with Cuba. See, e.g., Christina Hoag, *Exiles Should Expect Little Compensation From Post-Castro Cuba, Author Warns*, Cuba News/Miami Herald (February 20, 2003) (estimating compensation in the five-cents-on-the-dollar range); Timothy Ashby, *Taxation of Cuban Confiscated Assets After Restitution*, Focus on Cuba (Issue 71, December 20, 2005). In addition, individualized determinations, particularly of the larger claims, might lead to economic development opportunities for both the claimant and Cuba (under a future government) that would be missed with a lump sum solution.

Under the proposed instruments, a necessary pre-condition to a U.S. national bringing a claim before the Tribunal is that claimant has brought to the FCSC any claim over which that agency had jurisdiction. From the standpoint of U.S. claimants, this is an application of the familiar principle of exhaustion of administrative remedies. See, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). As such, Article 8.1 of the proposed instrument creating the Tribunal defines a "claim" as one that "was duly certified by the Foreign Claims Settlement Commission provided the Commission had jurisdiction to certify the claim." The denial of a claim does not act as a bar if the FCSC concluded that it did not have jurisdiction over the claim or, in particular, if it denied the claim on the grounds that the claimant was not a U.S. national at the time the claim arose. These claimants should have an opportunity to present the substantive merits of their claim even if the FCSC refused to certify it.

Assuming the claimant has obtained FCSC certification of the claim, the effect to give the certification is an important question. At one end of the spectrum, one can imagine a system in which the FCSC findings are conclusive in all respects. At the other end, one can imagine a system in which they are ignored entirely. The proposed instrument chooses a middle ground by providing that the Tribunal "shall give due weight to all legal and factual findings, including those related to valuation...."

Choosing the middle ground is justified because either end of the spectrum seems unfair and unwise. The FCSC certifications, while careful and deliberate, were *ex parte* proceedings that raise the possibility of unfairly binding Cuba as an absent defendant. It is a fundamental fairness principle that a non-participating party cannot be bound by a prior determination in which that non-participating party could not appear or did not, at least, have its interests protected by another party. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989). On the other hand, the FCSC had the advantage of acting at a point closer in time to the underlying events and to ignore its efforts would be an unjustified waste of resources. It therefore makes little sense to throw out the Commission's findings and require the parties to write on an entirely clean slate. The issue is how to balance these competing interests.

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The dynamics in the Tribunal context differ significantly from a lump sum settlement because there is a clear adversary party involved in a Tribunal proceeding (i.e., the Cuban government). In the lump sum context, the foreign sovereign's interest is vindicated by negotiating for the lump sum amount with the espousing government. After that, it is no particular concern of the foreign sovereign how the fund is allocated between claimants. Conversely, with a Tribunal approach the foreign sovereign's total liability is not fixed so it has an interest in how particular claims are valued. *See Banco Nacional de Cuba*, 505 F. Supp. at 449-50.

Congress wrestled with a variant of these issues in determining what effect to give to FCSC proceedings in the (still-suspended) civil causes of action provision under Title III of Libertad. *See* P.L. 104-114, *codified* 22 U.S.C. §§ 6021-6091. Libertad adopted a clear rule that no claim under Title III could go forward on behalf of a claimant who was eligible unless the claim had been certified. Section 302(a)(5)(A) provides that any U.S. national claimant "who was eligible to file a claim with the Foreign Claims Settlement Commission...but did not so file a claim" cannot bring a civil action against a third-party national. Section 302(a)(5)(B) provides that in the case of a denial of a claim that the FCSC's findings are to be treated as "conclusive."

Given how well publicized the FCSC Cuban claims program was, and the *ex parte* nature of the proceedings, it makes sense to hold claimants who had claims falling under the jurisdiction of the FCSC to the relatively minimal burden of having filed a claim and having prevailed in some manner on that claim in order to be eligible to present a claim to the Tribunal. Moreover, in the case of serious injustice, the Executive Branch could re-open the claims program as it did in 2005. *See* 2005 FCSC Ann. Rep. at 15-17. However, although a denial or failure to file a claim ought preclude access to the Tribunal, it ought not necessarily preclude access to the Court. A large number of the claims denied by the FCSC were on the grounds that the claimants were not nationals. In many cases, these probably were expatriate claimants who should be able to proceed before the Court.

Assuming that a claim was certified, the Tribunal will need guidance regarding how much weight to attach to the Commission's findings, particularly the valuation of the claim. Section 303(a)(1) of Libertad gives conclusive effect to the FCSC's finding of ownership under Title III. But the Act did not assign conclusive weight to the Commission's determinations of valuation. Rather, in setting a value for Title III claims, Section 302(a)(1)(A) chooses either the FCSC valuation plus interest or the "fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater."

While Libertad is instructive, the considerations affecting the Tribunal – which will involve Cuba's direct participation as a party – are somewhat different than those affecting the (still hypothetical) civil actions against third-party nationals. Giving the FCSC determinations conclusive weight as to ownership in the Tribunal context and allowing the determinations to set a valuation floor gives them unfair weight.

The key case here, as mentioned in previous sections of this Report, is an extensive District Court opinion in *Banco Nacional de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980) *aff'd as modified* 658 F.2d 875 (2nd Cir. 1981) in which an important issue was the value of various bank branches that were expropriated by the Cuban government. This issue was raised because the National Bank of Cuba (an instrumentality of the government) brought suit in the U.S. against the American owners of the banks for about \$9.8 million in loan proceeds owed to the Cuban bank. The American owners sought to offset their claims under international law for the value of the branches. The District Court ruled that the American owners could assert their claims and proceeded to value the branches under international law.

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One of the primary contentions of the American owners was that the District Court was required to accept the valuation of the FCSC. The District Court ruled that while the FCSC's valuation was of evidentiary value, *id.* at 449, it could not be treated as conclusive. The District Court reasoned:

To hold that the Foreign Claim Settlement Commission's *ex parte* determination of the amount of Citibank's loss in Cuba is binding here against... the Cuban Government would violate a basic principle of our jurisprudence and would represent a denial of due process. Accordingly, it would be inappropriate to apply such a finding as having binding effect in this litigation, and this is so wholly apart from the separate issue of whether an administrative determination can ever have *res judicata* effect.

*Id.* at 451.

The District Court opinion was reversed in part on appeal by the Second Circuit, but not in a way that affects the soundness of this reasoning. In *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981), the court concluded that the District Court erred in awarding over \$1 million in "going concern" value for the branches. The Second Circuit specifically took issue with both the District Court's and the FCSC's interpretation of the international standard of compensation, stating:

The term 'going concern value' generally refers to the proposition that the prospective buyer of a business will be willing to pay a premium over the book value of the assets in the expectation that the earnings of the business will continue.... [The American owners] point...to, *inter alia*, the Foreign Claims Settlement Commission's ruling that [the American owners had] a valid claim for going concern value of [the] Cuban branches.

We believe that this view takes insufficient account of the acknowledged state of the Cuban economy following the revolution.

The court thus gave due weight to the reasoned views of the Commission, but like the District Court did not treat them as conclusive. This is the prudent approach in the Tribunal context as well for the same reasons of fairness. The FCSC certifications and the findings and conclusions therein should therefore be given due weight as evidence. Indeed, in many cases they probably will be the most probative evidence, but they cannot be given conclusive effect before the Tribunal.

### **V.(F)(8) Consolidation of Closely Related Claims Before the Tribunal**

Circumstances might arise in which U.S. national and expatriate claimants have overlapping or closely related claims. Conceivably, for example, claimants from each class might have been co-owners of real property or involved in a joint venture in Cuba.

There are various possible solutions in this situation. One would be to allow each claimant to proceed in the appropriate forum and accept the result reached even if inconsistent with the determination in the other forum. This, however, would be an inefficient endeavor that could undermine the credibility of both the Court and the Tribunal.

Another solution would be to accept the doctrine of international comity known as *lis alibi*

*pendens* which generally requires the court second seized of jurisdiction to suspend its proceedings and await the outcome of the related proceeding before the court first seized of jurisdiction. See, e.g., *Overseas Union Ins. Ltd. v New Hampshire Ins. Co.* (1991) ECR I-3317 (applying the doctrine under the Brussels Convention). This is more attractive than the first alternative but still presents problems. The rule could create an incentive for claimants to race to file to obtain a forum that is perceived as being more favorable to their claim. The doctrine is also discretionary and does not eliminate the possibility of conflicting outcomes.

A third solution, the best approach, is to borrow from Congress's supplemental jurisdiction statute which addresses a similar problem in the case of overlapping state and federal court jurisdiction. In the supplemental jurisdiction statute, 28 U.S.C. § 1367, Congress created federal jurisdiction over state claims that are factually related to federal claims. Thus, analogizing the Tribunal to the more structurally independent federal courts, the proposed instruments create what amounts to supplemental jurisdiction over closely related claims that would otherwise be within the Court's jurisdiction.

### V.(F)(9) Interim Measures of Relief

A common problem in arbitral settings is the availability of interim measures of relief to preserve the status quo so that the award can be effective. These can take many forms including attachments of property, injunction-like preliminary orders or stays of related proceedings. See William Wang, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 Brooklyn J. Int'l L. 1059, 1073 (2003). Generally, an interim measure requires showing that 1) the Tribunal has prima facie jurisdiction; 2) that there is a threat of irreparable harm to property or a right protected by the Tribunal or its jurisdiction and authority; and 3) that there is an "urgent situation." See Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 218 (1998).

It would be most efficient and practicable to give the Tribunal or the Court authority make such orders in the first instance. Probably the most common need will be for stays of pending actions in national courts that involve factual overlap. Because the Tribunal and the Court will be rendering awards that will have the same full faith and credit effect as national court judgments, in order to avoid competing decrees, the Tribunal and the Court need the authority to stay related actions in U.S. or Cuban courts. Article 4.6 (Tribunal) and 4.5 (Court) give those entities the authority to do so. U.S., British and other courts will issue injunctions to protect the Tribunal or Court's jurisdiction, particularly in aid of a forum-selection provision. See, e.g., *E. & J. Gallo Winery v. Andian Licores, S.A.*, 446 F.3d 984 (9th Cir. 2006). Essentially, the instruments would make clear that the Tribunal and the Court have the power to do so and that U.S. and Cuban courts must defer to their authority.

The Iran-U.S. Tribunal attempted to enter a good number of interim relief measures, including stays and injunctions, relying on the Tribunal's inherent powers. *But see* Richard A. Orning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto: Article 46)*, 9 Am. Rev. Int'l Arb. 155, 158 (1998) (stating "[p]remising the exercise of authority to grant interim relief or make other provisional orders on the 'inherent power' of arbitrators is probably viewed by sober business men and women as unsatisfactory.") The Iran-U.S. Tribunal also relied on Article 26 of the UNCITRAL rules (which also would be applicable to the Tribunal and Court). However, it appears that most of the Iran-U.S. Tribunal interim measures "had relatively little practical effect on the conduct of the parties...." Jeff Bleich, *Review: Iran United States Claims Tribunal* by Brower & Brueschke,

39 Va. J. Int'l L. 1221, 1240 (1999). National courts (particularly Iranian ones) continued on summoning parties and in one case awarding a judgment in absentia. See Brower, *supra*, at 239. Part of the difficulty apparently stemmed from less-than-clear language in the Iran-U.S. Declaration which left the Tribunal in the position of having to make “requests” of Iranian courts that they stay parallel proceedings. Brower, *supra*, at 230. Obviously, this “disheartening,” see Bleich, *supra*, at 1240, set of circumstances is not one that deserves to be replicated.

The matter of giving the Court and the Tribunal appropriate authority to enter such interim orders is a simple one and actually unnecessary given that Article 26 of the UNCITRAL rules (and perhaps notions of inherent authority) cover that matter already. The more pressing issue, in light of the Iran-U.S. Tribunal problems, is coming up with something that will actually work to ensure an orderly process with a minimum of inconvenience and inconsistent results.

The proposed instruments (Article 4.5 for the Court and 4.6 for the Tribunal) handle this with the following language: “The Courts of each Government shall aid in the enforcement of and comply with all orders of interim measures of relief, including the staying of closely related proceedings regardless of which of the proceedings was first filed.” This provision, coupled with the general principles of preclusion in Article 9, should avoid the U.S.-Iran Tribunal problem.

Another innovation is the language in Articles 4.5 (Court) and 4.6 (Tribunal) that makes clear that courts may on their own take steps to preserve the status quo pending resolution in the Court or the Tribunal. A common circumstance here might be a preliminary injunction to avoid an irreparable change in the condition of real property within the territorial jurisdiction of a court. U.S. courts are divided on whether they have the authority to take such preliminary measures pending the outcome of an arbitration proceeding. Compare *McCreary Tire & Rubber Co. v. CEAT, Spa*, 501 F.2d 1032 (3rd Cir. 1974) (New York Convention forbids such court awards) with *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977). The language in the proposed instruments would adopt what appears to be the majority view among U.S. courts in favor of the authority to take such interim measures. See *E.A.S.T., Inc. of Stamford, Connecticut v. M/V Alaia*, 876 F.2d 1168 (5th Cir. 1989)(attachment); *James Assoc. (USA) Ltd. v. Anhui Mach. & Equip. Import and Export Corp.*, 171 F. Supp. 2d 1146 (D. Colo. 2001)(injunction to preserve status quo pending arbitration); *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 155 F. Supp. 2d 1174 (C.D. Cal. 2001) (attachment); *Chloe Z Fishing Co., Inc. v. Odyssey RE (London) Ltd.*, 109 F. Supp. 2d 1236 (S.D. Cal. 2000)(stay).

Some might view specific language giving permission to courts to act on their own with regard to interim measures as unnecessary given the grant of authority to the Court and the Tribunal to enter such interim awards and the duty of the courts of Cuba and the U.S. to aid in the enforcement of them. However, there may be circumstances in which it would be desirable to have courts of other nations take note of the interim awards. For example, suppose there was a dispute about a trademark and the Tribunal were to enter an interim order regarding the use of it. Obviously the Tribunal would not be in a position to order a Canadian court to adhere to the interim order, but it seems wise to express the hope that other courts will do so and that they not take the *McCreary Tire* view that they are essentially divorced from arbitral proceedings until there is a final award.

Regarding standards for awarding interim relief, it is unnecessary to spell them out, except for the provisions on stays, which are specific to the need to coordinate the tribunals. See Brower, *supra*, at 229 (noting the need for stays, particularly of Iranian municipal court proceedings). International law is fairly advanced here, and the three-part test developed

in the Iran-U.S. setting is an excellent analogy. The “prima facie” jurisdiction requirement of the test is an important one, even if it did not always require an express finding to that effect. Still, it had the result of avoiding the entry of orders in cases that later proved to be jurisdictionally lacking. *Id.* at 218-22. In sum, the substantive requirements for interim relief (e.g., the nature of the harm, whether it is irreparable, whether a parallel proceeding is truly “parallel” for stay purposes, etc.) are sufficiently context-dependent to let these develop from the rich body of international precedent that exists now.

### V.(F)(10) Evidence Gathering

Another related issue pertains to the gathering of evidence. There will likely be circumstances in which parties need the aid of the Tribunal or the Court to gather the evidence that they require. Official records, third party witnesses, witnesses affiliated with a Government and a host of other sources beyond the control of claimants may be crucial. Although the UNCITRAL rules contain little that is specific on this problem, the IBA rules allow for requests for documents and the attendance of witnesses that a party cannot obtain voluntarily. IBA Arts. 3(8), 4(10). In both circumstances, the requesting party may “ask [the Tribunal] to take whatever steps are legally available to obtain” the requested documents or witnesses.

The additional problem here is that in general the Tribunal cannot do much without the cooperation of a national court that can compel the delivery of documents or the appearance of a witness, *see Note, International Arbitration, supra*, at 1079 (noting that “when a third party witness’ testimony is needed, there are few legal or practical measures for the arbitrators to compel such testimony”), or a specific grant of power to an arbitrator, such as the power to subpoena given under the Federal Arbitration Act. *See* 9 U.S.C. § 7. But even in the setting of a domestic arbitration subject to Section 7, this subpoena authority might not extend to third parties. *See Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005):

The weight of judicial authority favors the view that the Federal Arbitration Act, 9 U.S.C. § 7, does not authorize arbitrators to issue subpoenas for discovery depositions against third parties. *COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269 (4th Cir. 1999); *Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505 (S.D.N.Y. 2004); *Nat’l Union Fire Ins. Co. v. Marsh USA, Inc.* (In re Hawaiian Elec. Indus.), 2004 U.S. Dist. LEXIS 12716, No. M-82, 2004 WL 1542254 (S.D.N.Y. July 9, 2004); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389, No. Civ. 02-4304PAMJSM, 2004 WL 67647 (D. Minn. Jan. 9, 2004); *P&G v. Allianz Ins. Co.*, 2003 U.S. Dist. LEXIS 26025, No. 02 Civ. 5480, unpub. slip. op. (S.D.N.Y. Dec. 2, 2003); *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995). *But see Amgen Inc. v. Kidney Ctr. of Del. Co., Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995), *dismissed on appeal for lack of subject matter jurisdiction*, 101 F.3d 110 (7th Cir. 1996).

It is possible under 28 U.S.C. § 1782 that the Court and the Tribunal would be considered a “foreign or international tribunal” that would allow U.S. courts to enforce a subpoena from either body. However, U.S. courts have often concluded that international arbitral bodies do not fall within the ambit of statutes like 9 U.S.C. § 7. *See, e.g., Republic of Kazakhstan v.*

*Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999) (international commercial arbitration not within the scope of the statute); *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2nd Cir. 1999)(same); *In re Application of Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994)(same).

There might be justifiable concerns that this discovery process may become too “Americanized” with expensive pre-hearing discovery and the like. William Park, “Procedural Evolution in Business Arbitration: Three Studies in Change,” in *Arbitration of International Business Disputes: Studies in Law and Practice* 41-50 (2006). Therefore, the rights of the parties to obtain such information should be left to the discretion of the Tribunal or the Court, which is the approach taken by the IBA rules.

If the Court or the Tribunal decides to order the production of documents or compel the attendance of a third-party witness, it will need some effective way of doing so. This is the motivation for Articles 4.6 (Court) and 4.7 (Tribunal). These Articles provide that “[a]t the request of the [Court or Tribunal], the courts of each Government shall enter any order necessary to assist the [Court or Tribunal] in gathering evidence, including evidence held by non-parties, provided, however, that no court shall be required to enter any order that would violate the sovereignty, public policy or positive law of either Government.” The last clause is a necessary safeguard against orders that overreach. Neither Government will want to submit to an instrument that might require its courts to release information that would be sensitive (for example, national security concerns) or would be an affront to positive limitations it has on the release of such information (for example, evidentiary privileges or proscriptions on compelled self-incrimination).

## **V.(G) Analysis of Article 5 Tribunal Article**

### *5. Small Claims Before the Tribunal*

5.1 A small claim is one over which the Tribunal has jurisdiction and in which recovery of \$10,000.00 or less, exclusive of any claim of interest, is sought and is brought by a national against a Government.

5.2 If necessary for the timely and efficient resolution of small claims, the Tribunal may appoint any number of hearing officers who shall have the power to act for the Tribunal with regard to small claims.

5.3 The Tribunal shall promulgate one or more forms to assist Claimants in providing notice of the arbitration as required under Article 3 of the UNCITRAL arbitration rules. In the case of small claims, the notice of the arbitration shall also constitute the statement of claim under Article 18 of the UNCITRAL arbitration rules. The Government against which the claim is brought shall not be required to submit a statement of defense or appear in opposition to the claim. In the event that Government elects not to submit a statement of defense or appear in opposition to the claim the Tribunal shall treat the material elements of the claim as contested by the Government and shall require the Claimant to meet its burden of proof as set forth in Article 5.4.

5.4 The Claimant shall prevail on a small claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles. The Tribunal shall, however, in all small claims take due regard of difficulties of proof and valuation and shall draw all reasonable inferences in favor of the Claimant.

5.5 The Tribunal shall resolve small claims on the basis of written submissions and documentary evidence and without an oral hearing or live testimony unless the small claim presents

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substantial issues of fact that cannot be resolved without an oral hearing or live testimony. If an oral hearing or live testimony is required, the Tribunal shall take all steps practicable (such as through taking testimony remotely) to minimize inconvenience to the Claimant and any other witnesses. The UNCITRAL arbitration rules concerning the conduct of hearing shall apply in small claims only to the extent consistent with this Article.

5.6 The sole remedy in the case of small claims shall be payment in the national currency of the Claimant.

5.7 In small claims, the decision of the Tribunal in the first instance shall be final with no right of appeal.

## **Court Article**

### *5. Small Claims Before the Court*

5.1 A small claim is one over which the Court has jurisdiction and in which recovery of \$10,000.00 or less, exclusive of any claim of interest, is sought.

5.2 If necessary for the timely and efficient resolution of small claims, the Court may appoint any number of hearing officers who shall have the power to act for the Court with regard to small claims.

5.3 The Court shall promulgate one or more forms to assist Claimants in providing notice of the arbitration as required under Article 3 of the UNCITRAL arbitration rules. In the case of small claims, the notice of the arbitration shall also constitute the statement of claim under Article 18 of the UNCITRAL arbitration rules. Cuba shall not be required to submit a statement of defense or appear in opposition to the claim. In the event that Cuba elects not to submit a statement of defense or appear in opposition to the claim the Court shall treat the material elements of the claim as contested by Cuba and shall require the Claimant to meet its burden of proof as set forth in Article 5.4.

5.4 The Claimant shall prevail on a small claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles. The Court shall, however, in all small claims take due regard of difficulties of proof and valuation and shall draw all reasonable inferences in favor of the Claimant.

5.5 The Court shall resolve small claims on the basis of written submissions and documentary evidence and without an oral hearing or live testimony unless the small claim presents substantial issues of fact that cannot be resolved without an oral hearing or live testimony. If an oral hearing or live testimony is required, the Court shall take all steps practicable (such as through taking testimony remotely) to minimize inconvenience to the Claimant and any other witnesses. The UNCITRAL arbitration rules concerning the conduct of hearing shall apply in small claims only to the extent consistent with this Article.

5.6 The sole remedy in the case of small claims shall be in the form of payment of United States dollars.

5.7 In small claims, the decision of the Court in the first instance shall be final with no right of appeal.

## **V.(G)(1) Definition of a Small Claim**

A small claim is defined for both Court and Tribunal purposes as being one in which \$10,000 or less is sought. It is important to note that this is exclusive of any pre-award interest, thus the ultimate award may exceed the \$10,000 total.

The issue of pre-award interest is left to the Tribunal and the Court to determine. Both

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international law and the civil law tradition may allow for pre-award interest under some circumstances. For instance, the Restatement (Third) of Foreign Relations provides in comment A to Section 712 for interest from the time of taking though it does not define the term interest. The award of interest has varied considerably in actual practice. *See, e.g.,* Matias F. Travieso Diaz, *Alternative Recommendations for Dealing With Confiscated Property in Post Castro Cuba*, p. 64 (2002), available at [http://ctp.iccas.miami.edu/Research\\_Studies/Expropriated%20Properties.pdf](http://ctp.iccas.miami.edu/Research_Studies/Expropriated%20Properties.pdf). (3% simple interest in a 1992 German settlement). However, because of the variety of the claims and the multitude of factors that go into such a determination it is a practical impossibility to provide meaningful parameters in either proposed instrument other than to make clear that pre-award interest may be an element of relief if required by the applicable law. Nevertheless, ease of application and certainty require setting the thresholds for the claim levels by their pre-award value lest claimants be left to a difficult and uncertain calculation of the ultimate value of their claims.



*A 1955 Chevrolet (left), and a 1947 Oldsmobile (right)*

Claimants with a joint or common interest in a property are treated as a single claimant under Articles 8.3. So, for instance, two claimants who were co-owners of a property valued at \$15,000 would exceed the threshold even though the value to each claimant would be only \$7,500. The reason for this is to avoid difficult questions of fractional ownership and the effect of assignments and the like. While those questions will come into play at some point, they ought not determine at the initial stages how a claim will proceed.

It is also a crucial element of the process that it is the claimant's valuation that determines which procedure governs. While at first blush this might seem to give inordinate power to the claimant, the incentive will actually be to avoid inflated estimates of the value of claims. In the case of a claim of doubtful value, the claimant's incentive will be to plead it for an amount that brings it within the class of smaller claims. This is because the burdens on the claimant in terms of proof and the formality of procedures elevate in the medium and large class of claims. Moreover, the small claims procedures guarantee a remedy in the form of money in the claimant's national currency while a substitute remedy may be forthcoming under the medium and large claim procedures.

Therefore it seems likely that many claims of uncertain or difficult valuation will find their way into the relatively less formal avenues of small claims because claimants will elect that route by pleading them for under \$10,000.

### **V.(G)(2) Use of Hearing Officers**

One unique aspect of the small claims is the potential use of hearing officers. Small claims will account for a majority of all claims. In order to ensure timely resolution of the small claims, additional resources will be necessary. Therefore, the proposed instruments allow the Court and Tribunal to appoint hearing officers to act in their stead.

Several aspects of the small claims procedures also make them appropriate for resolution by hearing officers. First, the government against whom the claim is made need not appear in opposition. Therefore the hearing officer's duty will usually be to ensure that the claimant can meet his or her burden of proof giving the claimant the benefit of all reasonable inferences.

Second, the claims will usually be resolved without the need for live testimony. Therefore a

more administrative, as opposed to strictly adversary, process is indicated. The use of hearing officers or persons with a similar role and title is a well-established practice for administrative proceedings. *See, e.g., Ballard v. Commissioner*, 544 U.S. 40, 46 (2005) (use of hearing officers in administrative matters is routine).

Third, the sole remedy will be money in the currency of the claimant's nationality. Large and medium claims have the possibility of other remedies which could give rise to more involved questions of the equivalence of these remedies to the loss proved. Having hearing officers potentially address the small claims will conserve the resources of the Court and the Tribunal for these issues.

### **V.(G)(3) Burden of Proof in Small Claims**

In a strict sense, the question of the burden of proof and presumptions designed to serve policy goals are generally a matter of substantive law governed by the law that governs the underlying transaction. Restatement (Second) Conflict of Laws 133 (1971); Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 Cornell Int'l L.J. 493, 530 (1997) In civil law systems the allocation of burden of proof is considered to be a matter of substantive law so far as concerns choice of law. Thus both the Court and the Tribunal will be required to make a choice-of-law determination as to the applicable burden of proof.

However, recognizing the relatively small stakes involved in small claims – and reflecting a desire to have the costs of resolution remain as low as practicable for small claimants – the claimant receives the benefit of all reasonable inferences. What constitutes a reasonable inference is highly contextual and will vary from case to case. Clearly it would not allow a claimant to prove a claim simply on the basis of speculation or evidence lacking any substantial credibility. Despite the contextual nature of such an inquiry, similar standards have been validated in administrative forums. *See, e.g., National Ass'n of Radiation Survivors v. Walters*, 473 U.S. 305, 310 (1985) (agency must resolve all reasonable doubts in favor of the claimant and no government attorney appears in opposition to claimants for veterans benefits).

The Court and the Tribunal are also required to take due regard of the difficulties of proof and valuation. The enormous passage of time, intervening events and the circumstances under which claimants were forced to leave Cuba will in many cases make traditional substantiation of claims impossible. Moreover, given the relatively modest stakes involved, the costs of proving a small claim could easily exceed the claim's value if claimants are required to get expert appraisals and other support for the claim that might reasonably be demanded with larger claims.

The solicitous standards in small claims may all serve to attract some claims of more doubtful value into this arena. This will allow these claimants to achieve a degree of closure in fairly short order that might not come about in more protracted proceedings.

### **V.(G)(4) Modified Procedural Rules in Small Claims**

The basic philosophy of the small claims procedure is to make them non-adversarial and administrative in nature.

The proposed instruments call on the Court and the Tribunal to create one or more forms to constitute a notice under Article 3 of the UNCITRAL rules. Some U.S. courts have enjoyed success with simple pleading forms which is a model that the Court and Tribunal might consult. *See, e.g., California Judicial Council Law Forms* (available at: <http://www.lawca.com/general.php>).

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Because the notice under Article 3 includes basic information about the claim there is no reason to require small claimants to prepare a separate statement of the claim under Article 18. This will be particularly efficient if the forms prepared are designed to require claimants to give basic information about the claim.

Because of the relatively small stakes involved, Governments will probably elect not to appear in opposition. If they do not appear the allegations of the claim are treated as denied requiring the claimant to thus meet his burden of proof before the Court or Tribunal (or the hearing officer acting for the Court or Tribunal). Again this follows the well-accepted model of holding claimants to their burden of proof without making the proceeding adversarial. *See, e.g., National Ass'n of Radiation Survivors v. Walters*, 473 U.S. 305, 310 (1985).

The proposed instruments also evince a strong preference for having claims resolved on the basis of documentary evidence if reasonably possible. Again, this is in keeping with the philosophy that the costs of resolution should be kept as low as possible consistent with reasonable accuracy and fairness. In the event that live testimony is needed, the proposed instruments also evince a desire to have that testimony taken remotely. The utility of this practice is generally recognized in non-criminal cases. *See, e.g., Fed. R. Civ. P. 43(a)* (“The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.”).

### **V.(G)(5) Currency**

The proposed instruments call for the awards to be made in the currency of the nationality of the claimant. This is a convenience for the claimants. In the case of the Court, this would always be United States dollars. It is an accepted rule that damage is measured in the currency in which the loss is felt. *See, e.g., In re Oil Spill by The Amoco Cadiz*, 954 F.2d 1279, 1328 (7th Cir. 1992); *cf. Unidroit Principles of International Commercial Contracts Art. 6.1.9 (3)* (“Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.”). Claimants are likely to have felt their loss in their national currency. However, there may be circumstances in which this is not so. For instance, a Cuban claimant who had a U.S. bank account frozen would obviously have a loss that would be felt in United States dollars. In that case, a substantive law problem arises in terms of what date to use to convert from the currency in which the loss is felt to the currency of the claimant’s nationality. In that circumstance, the Court or Tribunal will be required to make a choice-of-law determination as to the law to apply to determine the appropriate date of currency conversion. *See, e.g., Amoco Cadiz*, 954 F.2d at 1379 (discussing choice-of-law issue). However, it should not be difficult to arrive at a fair and consistent rule. Certainly, given the currency restrictions that have existed between the U.S. and Cuba and the passage of time it would be unreasonable to assume that claimants (particularly the small ones) have been able to engage in hedging strategies against currency fluctuations.

### **V.(G)(6) Finality**

One of the features of the small claims procedure is the lack of any appeal mechanism. While appeals undoubtedly contribute to accuracy and consistency in the resolution of even small claims, instituting an appeal mechanism for the numerous small claims would not be cost justified. *See, e.g., Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999) (approving of simplified procedures and extremely circumscribed appellate review in claims under \$10,000 on the grounds that more cumbersome procedures would not be cost-justified); *cf. Randall S.*

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Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 Nw. U.L. Rev. 423, 457 (1993) (Undoubtedly, this appeal was expensive and would not be cost justified for any single injured party in the small claim class actions we are discussing here.). See generally Bruce Zucker & Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. Rev. 315 (2003) (concluding that California's small claims courts with a jurisdictional limit of \$5,000 do a reasonably good job of fairly and quickly resolving disputes using informal procedures and temporary judges).

## **V.(H) Analysis of Article 6**

### **Tribunal Article**

#### *6. Medium Claims Before the Tribunal*

6.1 A medium claim is one over which the Tribunal has jurisdiction and in which recovery of more than \$10,000.00 but less than \$250,000.00, exclusive of any claim for interest, is sought and is brought by a national against a Government.

6.2 A single Member shall be assigned at random to hear each medium claim. The nationality of the Member is not grounds for a challenge to the impartiality or independence of the Member under Article 10 of the UNCITRAL arbitration rules. If the claim presents an important question of law or fact, the Member hearing the claim may refer that question to the full Tribunal for resolution.

6.3 The Claimant shall prevail on a medium claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles.

6.4 The Tribunal shall conduct the hearing in accordance with the UNCITRAL arbitration rules and the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules") and shall in all cases conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Tribunal shall in all cases take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

### **Court Article**

#### *6. Medium Claims Before the Court*

6.1 A medium claim is one over which the Court has jurisdiction and in which recovery of more than \$10,000.00 but less than \$250,000.00, exclusive of any claim for interest, is claimed.

6.2 A single Judge shall be assigned at random to hear each medium claim. The nationality of the Judge is not grounds for a challenge to the impartiality or independence of the Judge under Article 10 of the UNCITRAL arbitration rules.

6.3 The Claimant shall prevail on a medium claim if the Claimant proves evidence that the Claimant is entitled to relief under the applicable legal principles.

6.4 The Court acting in the first instance shall conduct the hearing in accordance with the UNCITRAL arbitration rules and the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules") and shall in all cases conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Court shall in all cases take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

6.5 A party who suffers an adverse award by the Court in the first instance in hearing a medium claim may appeal to have the claim heard by the twelve Judges of the full Court. The appeal shall be heard if a majority of the Judges votes to hear the appeal. If the appeal is heard,

the full Court may, as required by applicable legal principles, affirm, reverse or modify the decision of the Court in the first instance. If after hearing the appeal the Court is evenly divided, the decision of the Court in the first instance shall be affirmed.

### **V.(H)(1) Definition of a Medium Claim**

A medium claim is defined for both Court and Tribunal purposes as one in which between \$10,000 and \$250,000 is sought. As with other claims, this amount is exclusive of any interest.

The issue of pre-award interest is left to the Tribunal and the Court to determine. Both international law and the civil law tradition may allow for pre-award interest under some circumstances. For instance, Section 712(1)(c) of the Restatement (Third) of Foreign Relations provides for “interest from the date of taking” though it does not define the term interest. Comment “d” to this section additionally states that “interest must be paid from the time of taking” if compensation for the taking is delayed. Similarly, article 7.4.10 of the UNIDROIT Principles of International Contracts provides that “[u]nless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.” Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 Fordham L. Rev. 281, 344 (1994). This provision effectuates the principle of full compensation under international law. *Id.* at 311-12. Many arbitral tribunal decisions considering compensation have required payment of full value “measured, where possible, by the market price at the time of the taking plus interest from that date.” John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C. J. Int’l L. & Com. Reg. 65, 88 (1995). The award of interest has varied considerably in practice. *See, e.g.*, Matias F. Travieso-Diaz, *Alternative Recommendations for Dealing With Confiscated Property in Post-Castro Cuba*, p. 64 (2002), available at [http://ctp.iccas.miami.edu/Research\\_Studies/Expropriated%20Properties.pdf](http://ctp.iccas.miami.edu/Research_Studies/Expropriated%20Properties.pdf) (3% simple interest in a 1992 German settlement). Because of the variety of the claims and the multitude of factors that go into such a determination, it is a practical impossibility to provide meaningful parameters in either proposed instrument other than to make clear that pre-award interest may be an element of relief if required by the applicable law. Nevertheless, ease of application and certainty require setting the thresholds for the claim levels by their pre-award value lest claimants be left to a difficult and uncertain calculation of the ultimate value of their claims.

Claimants with a joint or common interest in a property are treated as a single claimant under Articles 8.3. So, for instance, two claimants who were co-owners of a property valued at \$15,000 would have a medium claim even though the value to each claimant would be only \$7,500. This avoids difficult questions of fractional ownership and the effect of assignments and the like. While those questions will come into play at some point, they ought not determine at the initial stages how a claim will proceed.

### **V.(H)(2) Single Judge or Member Resolution**

With regard to small claims, the Court or the Tribunal may appoint hearing officers to act for the body. This is appropriate because of the relatively small stakes, the relatively solicitous procedures and the limited remedies for small claims. However, in the medium claim setting the procedures become more formal, the stakes are higher and the possible remedies more numerous and complex. Consequently, direct involvement of a Judge or Member is prudent.

The model of having a single member of a multi-member Tribunal or Court acting for it in some circumstances is well-established. For example, the U.S. Supreme Court assigns its Justices

roles as Circuit Justices with the authority to act for the Court in certain circumstances. 28 U.S.C. § 42; 2A Fed. Proc., L. Ed. § 3:442 (noting assigned Justices have power to grant stays, arrange bails and provide other ancillary relief). Other examples also exist, including the use of single arbiters for discovery issues in securities arbitration. *See* Stuart C. Goldberg, *PIABA'S 2001 Practice Guide to NASD Discovery and Pre-Hearing Proceedings*, PLI Order No. B0-0158, 786 (2001). *See also* Conn. Gen. Stat. § 31-93 (providing for a single member of an arbitration board to arbitrate in a labor dispute as an alternative to a three-member panel).

### V.(H)(3) Burden of Proof

As noted above, *see supra* Section V.G.3, the question of the burden of proof and presumptions designed to serve policy goals are generally matters of substantive law governed by the law that governs the underlying transaction. Restatement (Second) Conflict of Laws § 133 (1971); Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 Cornell Int'l L.J. 493, 530 (1997) (“In civil law systems the allocation of burden of proof is considered to be a matter of substantive law so far as concerns choice of law.”). Thus, both the Court and the Tribunal will be required to make a choice-of-law determination as to the applicable burden of proof.

In one important respect, however, the medium claim standard is less pro-claimant than the small claim standard. While the proposed instruments provide with regard to small claims that the Court or the Tribunal shall take “due regard of difficulties of proof and valuation and shall draw all reasonable inferences in favor of the claimant,” in the context of medium claims they are to draw only “appropriate inferences in favor of the Claimant.” This somewhat stricter standard is befitting the higher stakes and greater formality of proof with regard to medium claims. Still, there is a need to recognize the difficulties of proof that may face claimants even with medium claims. Common law courts recognize that appropriate inferences are a necessary way of carrying the burden of proof especially in cases where elements are difficult to prove. *See, e.g., State v. Eckstein*, 617 N.W.2d 906 (Wis. Ct. App. 2003). Civil law systems similarly recognize the need for inferences. *See, e.g., Vernon V. Palmer, In Quest of a Strict Liability Standard Under the Code*, 56 Tul. L. Rev. 1317 (1982). Of course, what constitutes an “appropriate inference” depends on context and must be resolved case-by-case.

### V.(H)(4) Review of Factual or Legal Issue by Full Tribunal or Court

An important aspect of the medium claim procedure is the discretionary authority of the Member or Judge hearing the case to refer it to the full Tribunal or Court for resolution. Inevitably, common and important factual and legal questions will arise. Having materially differing resolutions of these common questions would be unjust.

This referral procedure also represents a practical compromise between the civil and common law approaches to precedent. While the common law has always accorded a unique status to judicial precedent that is unknown in the civil law, like treatment of like cases remains a goal of both systems. Notably, Latin American countries have accommodated this need to treat like cases alike in their civil law traditions by creating an *en banc* procedure. One commentator explains:

There are, of course, many points of convergence in the [civil and common law] traditions. Judges in Latin America also have the final word in matters in dispute. In some countries of Latin America, judicial decisions are given authoritative force beyond the parties to the dispute.

Thus, the “tesis de jurisprudencia” rendered by Mexican federal circuit courts of appeal and the Mexican Supreme Court under writs of amparo, decisions “en banc” (“plenarios”) rendered by appellate courts (national as well as provincial) in Argentina, and the “sumulas” rendered by Brazilian highest federal courts represent a compromise between the common law doctrine of “stare decisis” and traditional civilian notions that judicial decisions are only binding inter partes. Yet, there are significant differences in the style of writing those judicial decisions, the format in which the judgments become available, and the way in which those judicial opinions are handled by lawyers and judges of Central and South America.

See Alejandro M. Garcio, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 Rev. Jur. U.P.R. 461, 474 (1997)(citations omitted).

An important parallel here is the Iran-U.S. Claims Tribunal. Despite any clear authority in the executive agreement creating that tribunal, Article III and Article VI, cl. 4 of the Iran-U.S. Tribunal’s rules provided that the President would have the authority to refer certain cases to the Full Tribunal for resolution. While this was a rarely-invoked procedure, *see* Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 126 (1998), it was a useful mechanism in some important cases. *See, e.g.* Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 Mich. L. Rev. 597, 598, n.6 (1984).

The referral procedure for medium claims is somewhat different, however, and varies slightly between the Tribunal and the Court. In the context of the Tribunal, the Member hearing the claim has the authority to refer an important factual or legal question to the full Tribunal. Thus, the single Member acts as the gate-keeper to ensure that the full Tribunal is not overwhelmed.

The Court, however, pays homage to the usual idea that a party has a right of appeal from an adverse decision. This is in contrast to the general expectation in arbitration that the initial award will be substantially final. *Lukowski v. Dankert*, 184 Wis.2d 142, 149, 515 N.W.2d 883, 886 (1994) (“When reviewing arbitration award function of courts is essentially supervisory, ensuring that parties received arbitration for which they bargained.”). Thus, a party has a right to seek review before the full Court. However, somewhat like the discretionary authority of high courts to pick and choose their cases, Juan R. Torruella & Michael M. Mihm, *Foreword: To Promote and Strengthen Judicial Independence and the Rule of Law in the Hemisphere*, 40 St. Louis U. L.J. 969, 979 (1996)(noting the authority of Supreme Courts to choose the cases they hear increases the attention the Courts can divert to cases that deserve more of the Courts’ time), the appeal will be heard only if a majority of the Judges agree to hear the appeal. In the event that the Court is evenly divided, it follows the generally accepted rule that the ruling below is affirmed by a tie vote. *Hertz v. Woodman*, 218 U.S. 205, 212-13 (1910)(“It has therefore been the invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause.”).

As such, the procedures both before the Tribunal and the Court seek to strike a balance between decisional consistency and the need to economically resolve claims.

### **V.(H)(5) No Challenges Based Solely on Nationality of Member or Judge**

Article 9 through 12 of the UNCITRAL arbitration rules allow for challenges of decision-makers. Article 10 allows for challenges “if circumstances exist that give rise to justifiable doubts

as to the arbitrator's impartiality or independence." Because of the difficult history of these claims, it may be tempting for claimants to challenge Members or Judges based solely upon their nationality. See, e.g., Nicholas DeWitt, Note, *Online International Arbitration: Nine Issues Crucial to Its Success*, 12 Am. Rev. Int'l Arb. 441, 449-50 (2001).

Allowing challenges based solely on nationality would have the potential for creating tremendous practical problems and undercutting the mission of both the Court and the Tribunal. If nationality were a sufficient ground for raising a credible challenge to a decision-maker, a very large number of challenges might be raised resulting in the realistic possibility of chaotic re-assignment of cases along nationality lines. Creation of the Court and the Tribunal would be a serious effort by both the U.S. and Cuba to advance the cause of national reconciliation and to create a mutually beneficial relationship. Allowing parties to attempt to "select" their decision-makers along national lines would do little to advance these underlying purposes.

Moreover, there are structural guarantees of fairness and independence of both Judges and Members that should ensure the basic integrity of the decisional processes. It is generally accepted that the nationality of a decision-maker is not, by itself, sufficient to raise a credible challenge in the absence of other factors that cast doubt on impartiality. See, e.g., *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1375 (S.D. Fla. 2003).

### **V.(H)(6) Use of the UNCITRAL Arbitration Rules**

Because of the greater level of formality in medium claims, somewhat more formal processes are required. The UNCITRAL arbitration rules adopted in 1976 are a natural choice for multiple reasons.

First, they are well-established, having been adopted by the largest and most important international agency, the United Nations. As a result, the UNCITRAL rules "are widely accepted even among parties from developing countries." See Gabrielle Kaufman-Kohler, *The Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, 1324 (2003). There have been preliminary discussions about updating the UNCITRAL rules. *Id.* at 1324, n. 50. Thus, it is necessary to specify that the instrument indicates the 1976 rules. By allowing the Court and the Tribunal to modify those rules, enough flexibility exists that those entities could essentially adopt the updated UNCITRAL rules if they are promulgated and would facilitate fair and efficient resolution of claims.

Second, and probably more importantly, the UNCITRAL rules were used by the Iran-U.S. Claims Tribunal, an entity that in volume generated more international law than any other entity in the history of the world. As Mapp, *supra* p. 260, states: "[t]he international acceptability and comprehensive nature of the UNCITRAL rules meant that they were the obvious choice for the Rules of Procedure of the Tribunal." As a result, an important model exists for adapting these rules and promulgating more detailed rules of procedure. See Peter Gibson, "Tribunal Rules of Procedure," in *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration* (ASIL March 29, 2006). Moreover, the Iran-U.S. Claims Tribunal produced a large amount of common law related to those rules that has greatly influenced arbitral awards in other arenas. See Christopher R. Drahozal, "The Iran-U.S. Claims Tribunal and Investment Arbitration: A Citation Analysis," in *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration* (ASIL March 29, 2006).

The UNCITRAL rules worked well in the context of a claims tribunal that functioned something akin to a municipal court in the Iran-U.S. dispute, which would also describe both the

Court and the Tribunal in the Cuba-U.S. dispute. The following passage from Mapp, *supra* at 259-60, is important:

Arbitration is usually considered to be a consensual process. Nevertheless, the UNCITRAL rules provide enough powers so that the arbitration cannot be sabotaged by non-participation or delay of one of the parties. These powers were most important for the Iran-United States Claims Tribunal, having such a large number of claims to deal with.... In this respect the Tribunal bears considerable resemblance to a municipal court.... It is a mark of success of the UNCITRAL rules that they have been successfully applied by the Iran-United States Claims Tribunal.

Thus, the UNCITRAL rules provide the fairest and most efficient framework for resolving medium claims.

### V.(H)(7) IBA Rules on Taking Evidence

One potentially difficult issue is the evidentiary rules and principles that will govern both before the Court and the Tribunal. *See generally* Javier Rubenstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 Chi. J. Int'l L. 303 (2004) (noting conflict between civil and common law regarding discovery, evidence gathering and related subjects); William Park, "The Procedural Soft Law of International Arbitration," in *Pervasive Problems in International Arbitration* (2006). Because both entities will involve to a certain degree (particularly the Tribunal) a synthesis of common and civil law traditions, some questions may arise regarding matters such as the acceptability of expert testimony, the reliability of hearsay, the need for oral hearing, the availability of cross-examination and the like. However, the synthesis of these principles is generally in favor of wide admissibility of evidence before international tribunals. Mapp, *supra* at 265 ("International law is recognised as allowing the widest discretion in the admissibility of evidence before international arbitral tribunals.").

The common law and the civil law traditions are not in accord on many of these points. The civil law, for example, depends on the court to drive the case to a larger extent than does the common law. *See, e.g., Philadelphia Gear Co. v. Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983) ("Because the gathering of evidence is a function of a civil law country's courts, the usurpation of this function by the courts and citizens of a foreign nation may be considered a violation of the state's 'judicial sovereignty.' *See Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 852, 176 Cal. Rptr. 874, 881 (1981)"). Some civil law systems are also extremely reluctant to allow interested party testimony, while it is generally allowed in common law systems. *See* Roger Alford, "Evidentiary Practices Before the Iran-United States Claims Tribunal" at 7, in *The Iran-U.S. Claims Tribunal* at 25 (ASIL 2006).

The common law has always accorded a central place to live testimony and the propriety of cross-examination. However, U.S. courts have generally been properly respectful of the divergent civil law tradition. *See, e.g., Bolanos v. Gulf Oil Co.*, 502 F. Supp. 689, 693 (W.D. Pa. 1980):

Based upon the record in this case, we cannot say that the procedures employed in the Guatemalan courts and the judgment rendered therein, should not be respected by this court. We must be careful not to let our

justifiable pride in the English common law system and the protections enjoyed under the United States Constitution obscure the fact that much of Western Europe and other South American countries besides Guatemala are firmly grounded in the Civil Law tradition. Although the plaintiff has objected strenuously to the lack of jury trial in Guatemala, the restraints on cross examination, and the fact that the judge relies on typewritten summaries of the testimony, we are not prepared to say that a fair hearing may not be had under those circumstances.

The UNCITRAL arbitral rules do not address these issues of evidence in any great detail. Article 24 allocates the burden of proof and gives the Tribunal wide discretion over whether to require summaries of evidence and whether to compel any documentary discovery. Article 25 contains some very general language about the nature of oral hearings if one is allowed. Article 27 gives the Tribunal discretion as to whether to appoint experts and provides some basic rules of fairness with regard to the expert's opinion. This generally "open" texture of arbitral evidentiary rules and practices is in accord with the long history of arbitration. *See* Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. Mar. L. & Com. 35 (2003). *See also* William Park, "Procedural Evolution in Business Arbitration: Three Studies in Change," in *Arbitration of International Business Disputes: Studies in Law and Practice* 41-50 (2006) (noting the diversity of approaches on evidentiary issues in international arbitrations).

The relatively wide latitude given the Iran-U.S. Tribunal generally worked well, though there were some notable breakdowns. The most famous and controversial of these breakdowns was the *Avco* arbitration, in which enforcement of an arbitral award from the Iran-U.S. Tribunal was refused by the Second Circuit. *See Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992). In that Tribunal case, the U.S. claimant appeared at a pre-hearing conference before a Swedish judge (Judge Mangard) who later left the Tribunal. A question arose whether *Avco* would be required to produce original invoices or whether an audited summary of them would be preferable and acceptable. Judge Mangard informed *Avco* that "I don't think we will be very, very much enthusiastic getting kilos and kilos of invoices." *Id.* at 143. However, at the actual hearing, the Tribunal demanded that *Avco* prove its case with the original invoices and as a result the Iranian parties prevailed and recovered on their counterclaims in excess of \$3 million, though – as noted above – the U.S. courts refused to enforce the award.

This turn of events was unfortunate on several levels. First, Judge Mangard's original position that an audited summary would be a preferable use of resources over requiring an extended and repetitive hearing producing invoice after invoice seems correct. Second, the unfortunate eliance by *Avco* on Judge Mangard's statements undoubtedly severely prejudiced the fairness of that particular hearing. And third, the refusal to enforce the award under the New York Convention standards must have seemed to the Iranians as a sort of renegeing by the U.S. on its commitments, especially when one considers that Iran was required to maintain a fund balance to honor directly the awards in favor of U.S. claimants. In fact, the Iranians were successful in later obtaining an award against the U.S. in the Tribunal on the theory that its failure to honor the *Avco* award was a breach of the Algiers agreement. *See* Alford, *supra* at 3, n. 4. A similar turn of events in the Cuba situation could become politically very sensitive.

With regard to small claims, as noted *supra* Section V.G., both instruments attempt to set out a fair amount of information regarding the standards of proof and the evidence expected. In general, these provisions are designed to allow claims to proceed upon written submissions

to the maximum extent possible and with the greatest possible solicitude for the claimants. See Brower & Brueschke, *supra* at 190 (endorsing the wide use of affidavit evidence as being “cost effective”). Hence, the Court or Tribunal is required to draw all reasonable inferences in favor of the claimant and to take cognizance of the difficulties of proof and valuation that will undoubtedly exist in claims that are nearly a half-century old and relatively small in size.

With regard to the medium and large claims, something more formal is required, especially to avoid a repeat of the *Avco* situation. Fortunately, there is a well-regarded solution in the form of the International Bar Association’s Rules on the Taking of Evidence in International Commercial Arbitration. These rules, which were the result of the efforts of an impressive working group that represented the major legal traditions, contain sensible provisions designed to avoid problems like the *Avco* one and are “intended to govern in an efficient and economical manner the taking of evidence in international commercial arbitrations, *particularly between parties from different legal traditions.*” IBA Rules, Preamble (emphasis added). See also Catherine A. Rogers, *Emerging Dilemmas in International Economic Arbitration: The Vocation of an Arbitrator*, 20 Am. U. Int’l L. Rev. 957, 1003 (2006) (“the IBA Rules on the Taking of Evidence in International Arbitration...essentially codified the hybridized practices that were already in use in international arbitration.”). The specific problem in *Avco*, that of the Tribunal not making its expectations clear at the outset, is addressed by the IBA Rules. See Alford, *supra* at 3-4 (citing and discussing Articles 3.6 and 9.2 of the IBA Rules).

The IBA Rules also endorse the position of one of the more sensible decisions of the Iran-U.S. Tribunal. See Alford, *supra* at 7 (noting that the decision is in line with Article 4(2) of the IBA Rules). In the *Buckamier v. Iran* decision (Award No. 528-941-3 (March 6, 1992)(noted in Alford, *supra* at 5-8), the Tribunal allowed the claimant to proceed without receipts evidencing bank deposits that were allegedly taken by the Iranians when Buckamier fled Iran. The Tribunal seemed reluctant to give the interested party’s affidavit the same weight as the original documents, however. But it did embrace the use of such affidavits, even if “it [was] a rather cold embrace.” Alford, *supra* at 8. In a like vein, the Iran-U.S. Tribunal did allow for statistical inference to be employed to show that corporations met the 50% nationality requirement among stockholders. See Mapp, *supra* at 270-71; see also *id.* at 277 (“The pragmatic and liberal approach of the Tribunal on the nature of evidence to be presented to the Tribunal to prove corporate nationality is an endorsement of the customary international law in the area.”). Similar issues will present themselves in the context of Cuban claims and the IBA Rules and most of the Iran-U.S. Tribunal precedents represent the best current thinking on how to handle such issues. See generally Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor State Arbitration*, 16 Fla. J. Int’l L. 301, 356-57 (2004) (noting importance of document production issues in BIT arbitration and the use of the IBA Rules).

With regard to documents, the IBA Rules allow the Tribunal to require production of all documents upon which a party will rely and under such circumstances and conditions as it finds to be reasonable. IBA Rules, Art. 3.

Article 4 provides for detailed witness statements for fact witnesses to be submitted in advance and then for the witness to appear for live testimony unless the parties agree otherwise. This general presumption in favor of live oral testimony makes these rules better suited for the medium and large claims.

Article 5 covers party-appointed experts which is likely to be a necessity with regard to issues of valuation and the like in medium and large claims. “The use of experts by international tribunals...is well established in international law.” See Mapp, *supra* at 278.

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Article 6 allows for Tribunal-appointed experts, which may be a desirable feature for disputed claims, again particularly with regard to valuation. Tribunal-appointed experts have been used by international tribunals before, notably the Iran-U.S. Tribunal. *See Mapp, supra* at 278-79.

Article 7 has procedures for on-site inspection which, again, may be a necessity for unique claims, especially disputes regarding real estate that may be hard to value.

Article 8 contains general rules for the presentation of the evidence at an evidentiary hearing.

Finally, Article 9 contains appropriately broad rules on the admissibility and evaluation of evidence.

It is important to note as well that the proposed instruments contain a general statement of philosophy that overrides all specific rules on the gathering of evidence. Both the Court and the Tribunal “shall in all cases conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses.” Even though the medium claims are larger in scope than the small ones, both the Court and the Tribunal have a duty to conduct the hearing in a way that minimizes inconvenience and allows for presentation of the claim. This provision could authorize any number of steps including taking testimony remotely, allowing written submissions where live testimony might normally be heard or other measures depending on the context of the claim.

Thus, for medium claims, the IBA Rules, tempered by the overriding requirement of convenience of the parties and witnesses, appropriately balance flexibility and fairness.

### **V.(H)(8) Modified Remedies**

It is important to note that unlike small claims, medium and large claims may be remedied by something other than a monetary remedy. *See supra* Section V.F.5 and Section V.F.6. However, while the legal standard with regard to the appropriateness of non-monetary remedies does not vary, its practical application may vary with regard to the size and nature of a claim. For instance, a claimant who lost a small parcel of land that has been converted to other uses may have no realistic remedy other than monetary compensation. However, a large corporate claimant that lost realty and which has the means and desire to invest in a new Cuba’s potentially rewarding tourist and other industries may be fairly compensated with another parcel of land and the development rights in it. In all cases, the substantial equivalence of an alternative remedy and the reasonableness of any conditions on it must be judged case-by-case and with an eye to the claimant’s circumstances and means.

### **V.(I) Analysis of Article 7 Tribunal Article**

#### *7. Large Claims Before the Tribunal*

7.1 Large claims are claims over which the Tribunal has jurisdiction and (1) must be claims in which recovery of more than \$250,000, exclusive of any claim for interest, is sought and is brought by a national against a Government, or (2) must be claims of any size brought by one Government against the other.

7.2 To promote the resolution of large claims both before the Tribunal and the Special Claims Court, the United States and Cuba shall jointly select a Claim Resolution Process Facilitator (“CRPF”). If they cannot agree on a CRPF, the Chief Judge of the Special Claims Court and the President of the Tribunal shall jointly submit a list of five proposed names and the Governments shall each strike one name in succession; the remaining person will serve as CRPF. The CRPF may not be a citizen of either the United States or Cuba, must be bilingual

in Spanish and English and must be experienced and knowledgeable in international commercial or property claims dispute resolution. In all large claims, the CRPF shall (1) meet with the parties; (2) assist the parties in identifying suitable alternative dispute resolution processes; (3) facilitate creation or selection of a mutually agreed upon dispute resolution process and persons to assist with the process; (4) assist the parties in identifying any necessary materials to prepare for resolution of the dispute; (5) assist the parties in establishing a timetable for the dispute resolution process; (6) maintain rosters of mediators and other third-party neutral dispute resolution providers as the CRPF deems appropriate; (7) report to the Court, the Tribunal, and to the Governments on aggregate patterns and issues emerging in process selection without disclosing confidential information supplied by the parties. The CRPF may hire such staff and conduct such training, research, and public discussions as may reasonably be appropriate to carry out the duties set forth above.

7.3 A large claim not resolved under Article 7.2 or otherwise shall be heard by three Members of the Tribunal each of a different nationality. The nationality of a Member is not grounds to challenge the impartiality or independence of that Member under Article 10 of the UNCITRAL arbitration rules. If the claim presents an important question of law or fact, the Members hearing the claim may refer that question to the full Tribunal for resolution.

7.4 The Claimant shall prevail on a large claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1.

7.5 The Tribunal shall in all large claims conduct the hearing in accordance with the UNCITRAL arbitration rules and the IBA Rules and shall conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Tribunal shall in all large claims take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

### **Court Article**

7.1 A large claim is one over which the Court has jurisdiction and in which recovery of more than \$250,000.00, exclusive of any claim for interest, is claimed.

7.2 To promote the resolution of large claims both before the Court and the Cuba-United States Claims Tribunal, the United States and Cuba shall jointly select a Claim Resolution Process Facilitator (“CRPF”). If they cannot agree on a CRPF, the Chief Judge of the Special Claims Court and the President of the Tribunal shall jointly submit a list of five proposed names and the Governments shall each strike one name in succession; the remaining person will serve as CRPF. The CRPF may not be a citizen of either the U.S. or Cuba, must be bilingual in Spanish and English and must be experienced and knowledgeable in international commercial or property claims dispute resolution. In all large claims, the CRPF shall (1) meet with the parties; (2) assist the parties in identifying suitable alternative dispute resolution processes; (3) facilitate creation or selection of a mutually agreed upon dispute resolution process and persons to assist with the process; (4) assist the parties in identifying any necessary materials to prepare for resolution of the dispute; (5) assist the parties in establishing a timetable for the dispute resolution process; (6) maintain rosters of mediators and other third-party neutral dispute resolution providers as the CRPF deems appropriate; (7) report to the Court, the Tribunal, and to the Governments on aggregate patterns and issues emerging in process selection without disclosing confidential information supplied by the parties. The CRPF may hire such staff and conduct such training, research, and public discussions as may reasonably be appropriate to carry out the duties set forth above.

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7.3 A large claim not resolved under Article 7.2 or otherwise shall be heard by three Judges no more than two of whom shall be of the same nationality. The nationality of a Judge is not grounds to challenge the impartiality or independence of that Judge under Article 10 of the UNCITRAL arbitration rules.

7.4 The Claimant shall prevail on a large claim if the Claimant proves that the Claimant is entitled to relief under the applicable legal principles set forth in Article 4.1.

7.5 The Court shall in all large claims conduct the hearing in accordance with the UNCITRAL arbitration rules and the IBA Rules and shall conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses. The Court shall in all large claims take due regard of difficulties of proof and valuation and shall draw appropriate inferences in favor of the Claimant.

7.6 A party who suffers an adverse award by the Court hearing a large claim in the first instance may appeal to have the claim heard by the twelve Judges of the full Court. The appeal shall be heard if a majority of the Judges votes to hear the appeal. If the appeal is heard, the full Court may, as required by the applicable legal principles set forth in Article 4.1, affirm, reverse or modify the decision of the Court in the first instance. If after hearing the appeal the Court is evenly divided, the decision of the Court in the first instance shall be affirmed.



*A view of downtown Havana, and the Gulf of Mexico.*

### **V.(I)(1) Definition of a Large Claim**

A large claim is defined for both Court and Tribunal purposes as one in which between \$250,000 or more is sought and includes all intergovernmental claims in the case of the Tribunal. As with other claims, this threshold amount is exclusive of any claim for interest.

The issue of pre-award interest is left to the Tribunal and the Court to determine. Both international law and the civil law tradition may allow for pre-award interest under some circumstances. For instance, Section 712(1)(c) of the Restatement (Third) of Foreign Relations provides for “interest from the date of taking” though it does not specify whether the interest should be compound, simple, or calculated under some other formula. Comment d. to this section additionally states that “interest must be paid from the time of taking” if compensation for the taking is delayed.

Similarly, article 7.4.10 of the UNIDROIT Principles of International Contracts provides that “[u]nless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.” Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 Fordham L. Rev. 281, 344 (1994). This provision effectuates the principle of full compensation under international law. *Id.* at 311-12.

Many arbitral tribunal decisions considering compensation have required payment of full value “measured, where possible, by the market price at the time of the taking plus interest from that date.” John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C. J. Int’l L. & Com. Reg. 65, 88 (1995). But the award of interest has varied considerably in practice. *See, e.g.*, Matias F. Travieso-Diaz, *Alternative Recommendations for Dealing With Confiscated Property in Post-Castro Cuba* 64 (2002),

available at [http://ctp.iccas.miami.edu/Research\\_Studies/Expropriated%20Properties.pdf](http://ctp.iccas.miami.edu/Research_Studies/Expropriated%20Properties.pdf).

Because of the variety of the claims and the multitude of factors that go into an interest determination, it is a practical impossibility to provide meaningful parameters in either proposed instrument other than to make clear that pre-award interest may be an element of relief if required by the applicable law. Nevertheless, ease of application and certainty require setting the thresholds for the claim levels by their pre-interest value lest claimants be left to a difficult and uncertain calculation of the ultimate value of their claims for jurisdictional purposes.

Claimants with a joint or common interest in a property are treated as a single claimant under Articles 8.3. So, for instance, two claimants who were co-owners of a property valued at \$300,000 would have a large claim even though the value to each claimant would be only \$150,000. This avoids difficult questions of fractional ownership and the effect of assignments and the like. While those questions will come into play at some point, they ought not to determine how a claim will proceed at the initial stages.

### **V.(I)(2) Alternative Dispute Resolution (“ADR”) Phase**

Although fairly small in number, the large claims will account for a majority of the value of the total claims. Based upon the data from the Foreign Claims Settlement Commission (“FCSC”), large claims of U.S. nationals represent only a small percentage of the total number of claims but a large fraction of the total value of the claims. While it is impossible to know with as much precision the contours of the claims of Cuban expatriates against Cuba and potential Cuban claims against the U.S., it seems likely their dimensions will at least roughly replicate those of the FCSC-certified claims.

While numerically small, the large claims are likely to be the most complex and controversial. They are also likely to present the best opportunity for economic development and advancement of the mutual prosperity of both a new Cuba and the U.S. Moreover, consensual resolution of large claims is more likely to build a foundation of cooperation beneficial to claimants, the Governments and the non-claimant citizens of each nation. It is therefore critical to provide an opportunity for the parties to structure alternative, collaborative resolution processes in dealing with large claims. Cuba’s experience with international arbitration, mediation, and other ADR methods affirms dispute resolution has great potential for success.

A number of international claims settlement processes, including the Algiers Accords’ Claims Settlement Declaration, have provided that the adjudicative provisions would become effective only for claims not settled within a designated period of time. *See* Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, Art. I (Jan. 19, 1981) (“Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months’ period may be extended once by three months at the request of either party.”); *see also* United Nations Mission in Ethiopia, Algiers Peace Agreement, Art. 5(16) (June 18, 2000) available at [http://www.unmeeonline.org/index.php?option=com\\_content&task=view&id=15&Itemid=50](http://www.unmeeonline.org/index.php?option=com_content&task=view&id=15&Itemid=50) (“The parties may agree at any time to settle outstanding claims, individually or by categories, through direct negotiation or by reference to another mutually agreed settlement mechanism.”). While some claims can be resolved by the parties themselves during a specified negotiating period, there is good reason to believe that with the active assistance of conflict resolution professionals, more of the large claims can be settled on mutually beneficial terms than if the parties are left entirely to their own devices.

Conflict resolution professionals will bring a wide array of potential tools and approaches to the process of resolving claims. In general, they “have special knowledge of the dynamics of conflict, conceptual tools that assist people in developing constructive approaches to conflict, and a range of roles they can play and intervention strategies they can use” in assisting the parties in resolving a dispute. See Bernard Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* 12 (2004).

One overarching principle embodied in, among other contexts, the UNCITRAL Model Law, is that the parties should have the ability to structure ADR proceedings as they deem appropriate. “The Model Law therefore provides a minimum procedural framework, but its provisions are general enough to accommodate different practices.” Jernej Sekolc and Michael Getty, *The UMA and the UNCITRAL Model Law*, 4 Disp. Resol. Mag. 17, 19 (2003). Collaborative ADR processes such as mediation are voluntary, “fundamentally resting on the principle of party self-determination. Mandating participation violates this principle. Exploring viable options that respect self-determination, while increasing participation, are required.” Nancy Erbe, *Appreciating Mediation’s Global Role in Promoting Good Governance*, 11 Harv. Negot. L. Rev. 355, 399 (2005).

The approach recommended prudently takes the principles of voluntariness and party ownership of process selection into account. Rather than requiring the parties to participate in one or another pre-adjudication ADR method, the proposed instruments create a “meta-process” under which the parties can craft a course most likely to result in a mutually acceptable and beneficial outcome. What follows are discussions of possible processes that might be employed.

### V.(I)(2)(a) Mediation

Mediation is potentially a flexible, powerful tool that may be particularly well-designed for the kind of property claim disputes under consideration. There are many forms of mediation, however, and choosing the appropriate form may often prove critical. In general, mediation is understood as a non-binding, voluntary (dispute) settlement process which enhances “the possibility that the parties will settle their dispute by way of mutually acceptable agreement, rather than by a binding third-party order.” Carlos de Vera, *Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 Colum. J. Asian L. 149, 152 (2004). Many in the field of ADR, particularly in North America and Western Europe, view mediation as a procedure properly designed “to attempt to persuade each party to focus on its real interests, rather than on what it conceives to be its contractual or legal entitlement.” *Id.*

While interest-based approaches offer many advantages, caution should be observed in focusing too heavily on individual interests, which may be perceived by Cubans as ignoring social justice and other broader issues. For some cultures, focus on the connection between social justice issues and the community’s well-being is indispensable to the success of a mediation.

For example, Winslade and Monk warn against assuming that satisfying individual needs is a universal goal in all cultures: “[T]he emphasis on individual psychological concepts such as needs and interests does not sit well with cultural traditions that emphasize collective responsibility ahead of individual autonomy.” John Winslade & Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* 36 (2001). Another scholar has similarly expressed concern with emphasis on individual interests in mediation in a society which may not favor individuality. See Morgan Brigg, *Mediation, Power, and Cultural Difference*, 20 Conflict Res. Q. 287, 293 (2003).

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Clauses requiring efforts at mediation prior to arbitration are frequently included in commercial contracts in common law countries. David J.A. Cairns, *Mediating International Commercial Disputes: Differences in U.S. and European Approaches*, 60 *Disp. Resol. J.* 62, 64 (2005). Under such clauses, the parties can move on to arbitration “[o]nly after the failure of mediation.” *Id.* These “multi-tiered or multi-step clauses” sometimes require the parties to negotiate at the chief executive level before mediation begins. *Id.*

### V.(I)(2)(b) Mediation Versus Conciliation

Despite regular use of such mediation clauses, according to some, “the state of development of ADR and mediation in continental Europe is uneven and many years behind the United States.” Cairns, *supra*, at 63. European countries that have long implemented methods encouraging settlement of commercial disputes refer to these procedures as “conciliation” procedures, rather than “mediation.” For example, the International Chamber of Commerce in Paris (“ICC”) has offered conciliation services since 1923. Records indicate 80% of cases before the ICC settled through conciliation prior to World War II, but that conciliation has been used less in recent years. In fact, since 1988, the ICC has received less than 60 conciliation requests compared to 2000 arbitration requests. *Id.* at 65.

Even when the use of conciliation was more common, its use in Europe was substantially different “from the modern U.S. concept of mediation.” *Id.* According to Cairns, conciliation under the ICC is similar to a mini-arbitration with shorter deadlines, settlement proposals rather than awards, and the occasional use of witnesses. These conciliation meetings involve the presence of both parties and are often called “hearings.” In fact, conciliators from the ICC are hesitant to convene with the parties separately during the process, as is regular practice in mediation. These characteristics, including tendencies to conduct hearings with evidence in a formal, legal, and adversarial manner caused one observer to conclude “that parties in ICC conciliation proceedings were ignorant of the potentials of the process and that conciliators ‘need to learn more’ about possible methodologies.” *Id.* at 66. In sum, although many Americans and Europeans think “mediation” and “conciliation” refer to similar proceedings, in practice each process involves different suppositions and methods.

Spain, for example, has broad experience with conciliation but limited experience with what Americans consider mediation. In the past, Spain required that parties attempt conciliation before litigation could proceed; this requirement was apparently considered “useless” by many. Revisions to the Spanish Civil Code in 2000 maintain a moderate commitment to prelitigation conciliation but do not include the word “mediation.” One author explains the hesitancy to mediate in Continental Europe is a result of the predominantly written form of litigation which involves less lawyer-to-lawyer contact and less oral communication from clients. *Id.* at 67. Further, many feel arbitration provides a more convenient framework for multilingual dispute resolution, in part because mediation relies on “language and the search for mutual understanding,” which is difficult when there are language differences. *Id.* at 68.

A proposed Directive of the European Parliament and of the Council regarding civil and commercial mediation, originating with the European Commission, attempts to authorize courts to “refer cases to mediation” and will likely continue to narrow differences between European and American conceptions of mediation. The World Intellectual Property Organization Arbitration and Mediation Center has also promoted mediation in international disputes and administers more mediation procedures than arbitration proceedings “due to [mediation’s] success in eliminating the need for arbitration.” *Id.* at 67. Still, because mediation

is relatively new in Europe, there remains some question regarding whether a contract that requires mediation before arbitration is enforceable in a European court. There is also no precedent regarding whether refusal to mediate will shift costs, limit damages, or entitle a party to interim relief. *Id.*

Due to conceptual differences regarding mediation and conciliation, some suggest that if immediate arbitration is not satisfactory and one party to a dispute is not experienced in or misunderstands mediation, that a more “structured” ADR procedure should be used, such as “dispute boards” or “good faith negotiation” for a definite period. *Id.* at 68. If mediation is nevertheless the best option, co-mediators can be effective when parties speak different languages, and use of an established international institution can increase confidence in a mediator’s aptitude and impartiality.

In sum, these noted differences between European and American notions of mediation and conciliation should be carefully considered in shaping the dimensions of ADR methods in the Court and Tribunal context, particularly in light of significant European – particularly Spanish – influence on the Cuban legal system.

### V.(I)(2)(c) “Med-Arb”

A flexible process that may be appropriate in addressing property claims disputes is an ADR hybrid known as “med-arb” or “same-neutral med-arb.” Same-neutral med-arb is described as “a two-prong process usually beginning with mediation and followed by arbitration, if it becomes necessary to resolve unsettled issues.” Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, 60 Disp. Resol. J. 24, 26 (2005). The process can involve moving from mediation to arbitration and back again with respect to all issues or single unresolved matters. A defining characteristic is that it involves use of the same individual as both mediator and arbitrator. *Id.*

The advantages of same-neutral med-arb include an accelerated arbitration phase because the arbitrator is already versed in all the facts, flexibility in uninterrupted movement from mediation to arbitration and back again, a greater variety of remedies available in mediation, and an atmosphere favorable for settlement (in part because of the perceived immediacy of a binding award when the mediator can also serve as arbitrator). *Id.* at 28. One observer notes parties are more considerate during same-neutral med-arb to avoid antagonizing the med-arbitrator. In addition, same-neutral med-arb has been characterized as “perfect for a dispute over money where there is no doubt that the debt is due but a payment schedule must be provided.” *Id.* at 32. The process facilitates negotiation of payment terms that can then be integrated into an award filed with a court.

Since payment amounts and terms will likely constitute the major issues in many expropriation claims against the Cuban government, same-neutral med-arb could prove an effective ADR method with potential to expedite settlement and increase claimant satisfaction with awards. However, same-neutral med-arb has also been criticized frequently because it risks reducing the candor of the discussions and information learned during mediation could improperly influence the arbitrator. *Id.* at 27.

Med-Arb procedures also raise other important concerns that make it undesirable to some. First, “[i]t is difficult to believe that the Med-Arbitrator will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to confidential, perhaps intimate, emotional, personal, or other ‘legally’ irrelevant information.” de Vera, *supra*, at 157-61. It is also difficult to find professionals who have the requisite skills in both mediation and arbitration to act in a competent manner. As noted earlier, party candor is sometimes lacking due to mistrust of the

mediator. In addition, a mediator who also serves as arbitrator may inadvertently coerce the parties toward settlement. *Id.* Whatever advantages this process may offer, the American Arbitration Association advises against the use of same-neutral med-arb based on these perceived problems. Phillips, *supra*, at 27.

Even so, in the context of a dispute over payment terms rather than liability these risks might be minimized, especially if claimants and mediators have information regarding reasonable award expectations and resource limits. Though some of the concerns are undoubtedly valid, some of the criticisms of med-arb may be baseless simply because North Americans are unaccustomed to such proceedings. A misplaced suspicion may be evidenced by the fact that Hong Kong and China both “have standing arbitration laws enabling a mediator (or ‘conciliator’) to also play the role of arbitrator to the same dispute.” de Vera, *supra*, at 151. Their continued use of this method suggests that its benefits may often outweigh its disadvantages.

As stated, the usefulness of med-arb may be considerable in the Cuban context considering the overwhelming nature of the disputes as over payment terms rather than liability. Nevertheless, it is also important to consider party confidence in such a method whatever its practical utility.

### **V.(I)(2)(d) Increasing Importance of ADR Procedures in International Claims**

Even outside of Europe and North America, mediation and arbitration institutions and procedures are increasingly important tools for economic liberalization in transitioning economies, in part because mediation and arbitration are well-known avenues that avoid the instability of court systems. See Lucy V. Katz, *Arbitration as a Bridge to Global Markets in Transitional Economies: The Republic of Cuba*, 13 Willamette J. Int’l L. & Disp. Resol. 109, 110-11 (2005). This is especially true in countries seeking to increase participation in global markets, including Cuba. *Id.* at 111.

In fact, what Americans consider ADR proceedings have been historically rooted in some Asian countries. For example, in both China and Vietnam mediation and conciliation proceedings are deeply embedded in the legal system and culture. Mediation has been described as “the corner stone of the Chinese system of dispute resolution.” *Id.* at 120. In all disputes, Chinese law requires courts to attempt conciliation, and mediation is often included as a precondition to arbitration or litigation in commercial contracts. To facilitate ADR, the Conciliation Centre of the China Council for the Promotion of International Trade maintains 30 “municipal conciliation centers.” *Id.* The centers are designed to settle commercial disputes in a manner that promotes expanded foreign investment. Chinese arbitration law allows the parties to agree that an arbitrator first act in a mediation role to attempt to resolve a dispute prior to arbitration. *Id.* at 120-21.

Vietnamese Economic Court judges are also required to attempt mediation. *Id.* at 121. Such efforts effectively resolve around half of disputes before the court. However, formal mediation in commercial disputes in Vietnam is rarely brought into play or included as a term in commercial contracts. *Id.* Rather, “conciliation and settlement facilitation are assumed to be part of the contract relationship.” *Id.*

The increased use of ADR methods such as mediation and conciliation in international disputes has important implications for Cuba. Some detect despite using arbitration regularly in international commercial disputes, Cuba exhibits a certain wariness of mediation and arbitration procedures – an attitude also observed in Spain and other Latin American countries. *Id.* This

might not be due to lack of endorsement of the mediation process. Rather, it could be a response to the neutral-based mediation process as commonly used in the U.S. as opposed to a trust-based mediation model which tends to be more accepted in the Caribbean and Latin America.

For example, during the Esquipulas peace process in Central America, the parties preferred an insider-partial mediator “whose acceptability to the conflictants [was] rooted not in distance from the conflict or objectivity regarding the issues, but rather in connectedness and trusted relationships with the conflict parties.” See P. Wehr & J. Lederach, *Mediating Conflict in Central America*, 28(1) *J. of Peace Research* 85, 87 (1991). The trust comes in part from the fact that the mediator is part of the community and must continue to relate to the parties after the mediation ends. *Id.* The key elements to gaining entry and trust are the personal relationship with and closeness to the parties, knowledge of them, and connectedness to them. *Id.* Such an approach is different from the interest-based mediation model as practiced in the U.S. where the mediator gains entry and trust by being neutral, unbiased, and distant from the conflict and legitimacy is vested in the third-party through fairness, efficiency, and effectiveness.

Mediation of commercial disputes is becoming more prevalent in Mexico and other Latin American countries. “[I]n Cuba there is a movement to establish mediation along the U.S. model for community as well as commercial disputes.” Katz, *supra*, at 120-21. This was borne out by our conversations with government officials in Cuba who are currently in the process of incorporating mediation as an alternative for the parties that have access to the Arbitration Court. Although there was awareness of mediation’s utility in other settings, such as employment disputes, family issues, and schools, current efforts seem to be concentrated on promoting mediation in the commercial arena. Cuban officials specifically referred to recent increased interest in ADR. An example given was that the first prize for a 2005 paper competition under the category of “General Law Aspects” was awarded to an attorney who prepared a mediation manual. The Cubans organizing these ADR alternatives manifested that they feel they have been successful in diverting the litigious culture in the commercial setting towards a conflict resolution culture. In fact, at the time of our visit in August of 2006, the Cuban government was in the process of putting together a roster of mediators to mediate commercial disputes. To qualify for inclusion on the roster, the candidate had to be an attorney with at least five years of commercial law experience. Although no mediation law had been enacted as of then, the Cuban government was apparently considering amending the arbitration law to incorporate commercial mediation.

As further evidence of the movement towards embracing ADR, Cuba’s Law 77 affirms that “foreign investment contracts may provide their own framework for dispute resolution.” Katz, *supra*, at 131. Pursuant to this authorization, Cuba now uses international arbitration rules or its own arbitration procedures in commercial contracts. Commonly incorporated rules include the International Chamber of Commerce International Court of Arbitration rules or the UNCITRAL arbitration rules. *Id.* at 132. Many international commercial contracts involving a Cuban party contain clauses that prescribe mediation prior to arbitration.

Bilateral investment treaties (“BITs”) are an especially important area for ADR methods, and Cuba has entered into BITs with at least 40 countries. *Id.* at 133. Most of these BITs include an approximately six-month period of negotiation before a dispute is arbitrated. Cuba’s Corte de Arbitraje de Comercio Exterior (Arbitration Court of Foreign Trade (“ACFT”)), has jurisdiction over foreign trade disputes and disputes arising from different countries’ technical and economic ties to Cuba. The ACFT can also oversee conciliation proceedings pursuant to the parties’ agreement and the resulting agreements “have the effect of formal arbitral awards.” *Id.*

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In one observer's view, the ACFT "has become a robust, sophisticated arbitral organization, with arbitrators thoroughly trained in international commercial law and dispute resolution, who participate extensively in international arbitration organizations." *Id.* However, Cuba has been slow in developing official arbitration procedures for domestic commercial disputes. *Id.* at 135.

### **V.(I)(2)(e) Mediation/Conciliation Under UNCITRAL & Other Rules**

While mediation requirements may often be included in international commercial contracts, such requirements are not common in model international arbitration rules, such as the UNCITRAL arbitration rules. One of the most significant references to mediation is in Rule 9.3(e) of The Center for Public Resources International Arbitration Rules, which provides that a tribunal may consider, among other matters at an initial pre-hearing conference, "[t]he possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator." John J. Kerr, et al, *Comparison of International Arbitration Rules* 91 (2d ed. 2002). The lack of mediation requirements in model international arbitration rules may be due in part to the fact that "arbitration remains, 'the generally accepted method of resolving international business disputes.'" de Vera, *supra*, at 154.

Although the UNCITRAL arbitration rules do not refer to mediation, UNCITRAL has drafted, and recommended for adoption in 2002, a Model Law on International Commercial Conciliation ("Model Law"). Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide*, 80 *Notre Dame L. Rev.* 553, 556 (2005). This effort was based on the UNCITRAL Conciliation Rules and has been attributed to "increasing interest in using mediation for transnational private disputes." *Id.* at 572. In the U.S., the Uniform Mediation Act ("UMA") integrated the UNCITRAL Model Law to accommodate international mediations. *Id.* at 575.

Notably, the UNCITRAL Conciliation Rules continue to use the term "conciliation" which is apparently misunderstood by North Americans. However, the text of the rules show the term is meant to be broader and more flexible than its historical meaning. UNCITRAL Conciliation Rules of 1980, *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1980\\_Conciliation\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980_Conciliation_rules.html). For example, Article 7 of the Conciliation Rules provides for the role of the conciliator. *Id.* According to the Article, the conciliator can (a) impartially assist amicable settlement; (b) conduct proceedings in accord with the parties' wishes, considering rights and obligations, expediency, trade usages, fairness, objectivity, and justice; or (c) propose settlements at any stage of proceedings. *Id.* Other articles provide for the cooperation of the parties, means of communication, costs, disclosure of information and other measures. Article 9 authorizes the conciliator to meet and communicate with the parties both together and separately. As such, the rules may be an attempt to bridge the gap between European conciliation and American mediation. The UNCITRAL Conciliation Rules might therefore be an effective choice for pre-arbitration ADR efforts in Cuba's case.

### **V.(I)(2)(f) Language & Culture**

Some warn that "the problem of language differences in international mediation should not be underestimated." Cairns, *supra*, at 68. As such, it will be essential for the mediator to be "completely fluent in both languages." Alexandra Bowen, *The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships*, 60 *Disp. Res. J.* 59, 61 (2005). Alternatively, co-mediators could be employed, one fluent in English, the other in Spanish. *Id.* Of course, a language difference requires much more than just mastering the other

party's language. "If language is to be a means of communication, there must be agreement in definitions but also in judgments." Ludwig Wittgenstein (1967: 242) (trans. G.E.M. Anscombe) *Philosophical Investigations*. Oxford: Basil Blackwell. Language not only serves as a communication tool but is also embedded in our belief system and shapes our worldview; language constructs human experience. Individuals involved in a mediation endeavor must not only know the language but be versed in the cultural nuances of Cubans, Americans, and Cuban-Americans.

In addition to language, cross-cultural issues frequently assume great importance in the resolution of international claims. Geert Hofstede, a noted social psychologist, famously identified four (later supplemented by a fifth) cultural dimensions that help explain differences in values across cultures. Geert Hofstede, *Culture's Consequences, Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (2001). These differences can have profound implications for negotiation and conflict resolution processes. The first dimension involves "power distance," that is, whether people value hierarchy and status as opposed to equalization of power and the importance of competence. The second dimension is whether the culture emphasizes individualism or collectivism. Third is a gender-based (under Hofstede's typology) dimension: Does the culture value assertiveness and competitiveness ("masculine") or modest, caring, and nurturing relationships ("feminine")? The fourth dimension involves a society's tolerance for uncertainty and ambiguity: Are the people primarily risk takers or risk avoiders? Finally, Hofstede's fifth cultural dimension relates to "long term orientation." Values associated with long-term orientation are thrift and perseverance; values associated with short-term orientation are respect for tradition, fulfilling social obligations, and protecting one's "face."

Other experts have also noted the significance of cultural diversity in negotiation and conflict resolution. Jeswald Salacuse specified ten ways that cultural differences could impede reaching a deal: (1) Goals – is there a preference for a contract or a relationship?; (2) Contrasting bargaining style – a win-lose approach vs. a win-win approach; (3) Personal styles – formal as opposed to informal; (4) Communication modes – direct or indirect; (5) Considerations of time – high or low sensitivity to time factors; (6) Emotionalism – some cultures are more emotional than others; (7) Approaches to agreements – preference for detailed contracts as opposed to contracts that merely set forth general principles and rely more on trust; (8) Problem-solving orientation – focus on a series of small problems or on a few general principles; (9) Negotiating team – more emphasis on a group leader with settlement authority or on group consensus within the team; and (10) Views about risk-taking – more or less aversion to risk. See Jeswald Salacuse, *Making Global Deals: What Every Executive Should Know About Negotiating Abroad* 58-70 (1991).

Dealing with this range of cultural factors cannot be formulaic. In addition, awareness of the important role such dimensions may play in resolving claims can help in structuring appropriate processes and in reaching resolutions. One scholar/practitioner describes the preferred approach as placing "the cultural card on the table." Daniel Posin, *Mediating International Business Disputes*, 9 *Fordham J. Corp. & Fin. L.* 449, 471 (2004). Depending on the sophistication of the parties, the key can be raising the parties' consciousness of the cultural issues. *Id.* at 472. The differences in cultural dimensions underscores the importance of avoiding a one-size-fits-all dispute resolution process and instead starting with facilitated process designs to identify an approach that will suit the parties and the situation.

There are those who suggest having third-party neutrals who are culturally similar to the parties may help with these cultural factors. See, e.g., Alexandra Bowen, *The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships*, 60 *Disp. Resol. J.* 59, 61 (2005). Others question this approach. Viswanathan and Ptak researched the culture

matching policy of a mediation program in Canada and found it to have a negative impact on the mediation process. See Hari Viswanathan & Jon Ptak, “Power in Mediation: An Analysis of St. Stephen’s Community House,” in Mark Davidheiser, *Mediation and Multiculturalism: Domestic and International Challenges*, January 2005, [http://www.beyondintractability.org/essay/mediation\\_multiculturalism/](http://www.beyondintractability.org/essay/mediation_multiculturalism/). For example, matching third-party neutrals to the parties could be divisive if the disputants infer that the mediators are representing the party with whom they are ethnically similar. *Id.* In a study of 257 mediations at Community Justice Centers in Australia, Fisher and Long found “lower rates of agreement in those cases where disputants had been matched with mediators of similar backgrounds than when no attempt at matching was made.” Linda Fisher & Jeremy Long, “Cultural Differences and Conflict in the Australian Community,” in Mark Davidheiser, *Mediation and Multiculturalism: Domestic and International Challenges*, January 2005, [http://www.beyondintractability.org/essay/mediation\\_multiculturalism/](http://www.beyondintractability.org/essay/mediation_multiculturalism/).

### V.(I)(2)(g) Matching Claims & ADR Processes

Determining which dispute resolution procedure is most appropriate for a particular matter is one of the greatest challenges in the field of ADR. See Frank Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 Harv. Negot. L. Rev. 1 (2006). The better approach is to match dispute to process by starting

“from the parties’ goals and case characteristics, which are hard to change, and then fitting (tailoring) the most appropriate forum for such a case. . . .” *Id.* at 7. In addition to more commonly known methods of negotiation, mediation, conciliation, and arbitration, there are a variety of other methods that have been developed and applied in both domestic and international settings, including mini-trial, early neutral evaluation, neutral expert fact-finding, and non-binding arbitration, as well as combinations of these such as med-arb (discussed above). “Some of the most relevant new techniques are gradually emerging in the context of international dispute settlement. A case in point is . . . the ICC-ADR procedure that provides not only for mediation but also for neutral evaluation, mini-trial, any other settlement technique, and a combination of techniques.” See Francisco Vicua, *Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation*, 57 Disp. Resol. J. 64, 67-68 (2002).



*The Havana waterfront.*

A key in developing ADR approaches to settlement of large claims that will arise under the scheme envisioned for Cuba is to avoid a straight-jacket that will limit the flexibility of the parties in selecting or designing an appropriate process. It is “a question of bringing to the parties’ attention in an organized way the various choices available to them and how they can take advantage of [those] alternatives.” *Id.* at 70. In matters as complex as those that are likely to present themselves in the context of Cuban property claims settlements, the choice of process will not simply be a selection from among the traditional dispute resolution “menu.” In addition to multiple parties with divergent interests, the “issues may be such that some are amenable to mediation but others require a more evaluative process. Some aspects of the dispute may be ready for resolution, but others may need factual or legal development before there is any realistic chance of resolution.” See Richard Chernick, “Process Mediation”: *Deciding How to Resolve your Dispute*, 41 ALL-ABA 501, 503 (1996).

The timing of ADR processes can be important in a variety of contexts due to the need of

the parties to obtain sufficient information. The international claims resolution setting is no exception. Bowen, *supra*, at 62-63. Issues of timing along with what process to use, how a third-party neutral should be selected, ground rules for the chosen process, and necessary exchange of information before a process can begin are all issues that require careful consideration. The proposed claim resolution process facilitation stage is aimed at addressing the range of issues in process selection and in meeting the enormous challenge of identifying and/or designing dispute resolution processes likely to be most effective for each large claim.

### **V.(I)(3) Three-Member or Judge Resolution**

As the most complicated and high-stakes claims, the large claims demand the most intensive procedures. Thus, unlike any other claims, the proposed instruments call for three members or judges to resolve them.

It has been well-established that the interaction of three judges in a case tends to blunt to some degree their ideological leanings. *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1719 (1997); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 317 (2004). Particularly in these highest stakes cases where questions as to alternative remedies, the scope of compensation and the reasonableness of conditions requiring investment in a government's economy may have far-reaching implications, it is essential to have the decision-making apparatus be as neutral as possible.

The Iran-U.S. Claims Tribunal employed three-member panels with the familiar alignment of one each from Iran and the U.S. and then one from a neutral country. *See* Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, Art. III(1) (January 19, 1981). In international arbitration, this is a common mode with each party choosing an arbitrator and then those two agreeing on a "neutral" third. *See* Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 Harv. L. Rev. 293, 326 (1954) ("Under the umpire system the parties each appoint two arbitrators and agree upon a third who singly disposes of cases the party appointees cannot decide among themselves. That is the predominant system, which was used in about half the arbitrations by party-appointed tribunals in which the United States participated" during the last century and a half.).

Both proposed instruments also ensure diverse nationalities in the composition of the panels. While it would be simplistic to assume that the nationality of the Judge or Member would determine his or her rulings, it is still desirable both from the standpoint of the appearance of impartiality, and ensuring that a full spectrum of views are represented on the panels, to mix nationalities. This is relatively easy to accomplish for the Tribunal simply by following the familiar model of allowing one member from each of the principal nations and then one from a third nation.

For the Court, however, this is a more difficult issue. The Court, as an instrument of the Cuban judiciary, is differently constituted and will apply a form of Cuban law. However, as part of the hoped-for reconciliation process it should integrate judges from other nations and no more than half the judges should be of one nationality. To promote the process of redeveloping the rule of law, as well as maximizing the appearance of impartiality, it is necessary and desirable to prohibit panels in which all three Judges are of the same nationality.

### **V.(I)(4) Burden of Proof**

As noted above, *see supra* Section V.G.3 & Section V.H.3, questions of the burden of proof and presumptions designed to serve policy goals are generally matters of substantive law

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governed by the law that governs the underlying transaction. *See, e.g.*, Restatement (Second) Conflict of Laws § 133 (1971); Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 Cornell Int'l L.J. 493, 530 (1997) (“In civil law systems the allocation of burden of proof is considered to be a matter of substantive law so far as concerns choice of law.”). Thus, both the Court and the Tribunal will be required to make a choice-of-law determination as to the applicable burden of proof.

In one important respect, the large claim (like the medium claim) standard is less pro-claimant than the small claim standard. While the proposed instruments provide with regard to small claims that the Court or the Tribunal shall take “due regard of difficulties of proof and valuation and shall draw all reasonable inferences in favor of the Claimant,” in the context of medium and large claims they are to draw only “appropriate inferences in favor of the Claimant.” This somewhat stricter standard is befitting the higher stakes and greater formality of proof with regard to medium and large claims. Still, there is a need to recognize the difficulties of proof that even claimants with large claims may face. Common law courts recognize that appropriate inferences are a necessary way of carrying the burden of proof especially in cases where elements are difficult to prove. *See, e.g.*, *State v. Eckstein*, 617 N.W.2d 906 (Wis. App. 2003). Civil law systems similarly recognize the need for inferences. *See, e.g.*, Vernon V. Palmer, *In Quest of a Strict Liability Standard Under the Code*, 56 Tul. L. Rev. 1317 (1982). Of course, what constitutes an “appropriate inference” depends on context and must be resolved case-by-case.

### **V.(I)(5) Review of Factual or Legal Issue by Full Tribunal or Court**

The possibility of review of a factual or legal issue by the full Tribunal or Court in large claims closely parallels the procedure for medium claims. *See supra* Section V.H.4. Inevitably, common and important factual and legal questions will arise. Having materially differing resolutions of these common questions would be unjust and the issues will be particularly important in the large claim setting. Thus, the same referral procedure with respect to medium claims outlined in Section V.H.4. (*see* pages 216-218) are recommended for large claims. The rationale for the possibility of full Tribunal or Court review is even more clearly present for large claims.

### **V.(I)(6) No Challenges Based Solely on Nationality of Member or Judge**

For the reasons discussed *supra* Section V.H.5, nationality cannot be the basis for a challenge to a Member or a Judge.

### **V.(I)(7) Full Use of UNCITRAL Rules**

The reasons for employing the UNCITRAL arbitration rules in full are set out extensively *supra* Section V.H.6. The case for employing them is even stronger for large claims than it is for medium claims given that the large claims more closely parallel the claims adjudicated by the Iran-U.S. Claims Tribunal.

It is worth noting, however, that specific application of the rules may vary somewhat as between medium and large claims. The proposed instruments call for the Court and the Tribunal to “conduct the hearing to minimize to the extent reasonably practicable the inconvenience to the parties and witnesses.” The extent to which inconvenience can be practically minimized may be less with large claims, particularly ones involving huge sums and unique properties. It is well established that with higher stakes more formal procedures may be necessary to ensure an

accurate resolution of the matter. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). Therefore, steps – such as viewing property or obtaining expert valuation assistance – that might not be cost-justified for a medium claim might be justifiable for a large claim.

### **V.(I)(8) IBA Rules on Taking Evidence**

For the reasons discussed extensively *supra* Section V.H.7, the IBA Rules on Taking Evidence are the appropriate synthesis of the civil and common law traditions for claims that exceed the small claim threshold. Therefore, the proposed instruments adopt the IBA Rules for both medium and large claims.

### **V.(I)(9) Modified Remedies**

Unlike small claims, medium and large claims may be remedied by something other than a monetary remedy. *See supra* Section V.F.5 and Section V.F.6. This is likely to be a particularly important aspect of large claims in which the size of the claim will leave more room for disagreement about the scope and practical implementation of remedies. Variable remedies are an important reason why the extensive dispute resolution processes, *see supra* Section V.I.2, is so essential for large claims.

## **V.(J) Analysis of Article 8 Tribunal Article**

### *8. Definitions*

8.1 “Claim” means all theories of legal relief set forth in Article 1.1 arising out of a transaction or occurrence. In the case of a claim brought by a United States national, “claim” also means a claim that was duly certified by the Foreign Claims Settlement Commission provided the Commission had jurisdiction to certify the claim. The denial of a claim by the Foreign Claims Settlement Commission on the grounds that the Claimant was not a United States national at the time the claim arose shall not prejudice the Claimant’s right to proceed before the Special Claims Court.

8.2 “Claim of a national” means a claim owned continuously by a national from the time the claim arose through presentation to the Tribunal. A claim continues to be the claim of a national if it was lawfully assigned or succeeded to by another national.

8.3 “Claimant” means a natural or juridical person asserting a claim individually or natural or juridical persons asserting a joint or common interest in a claim.

8.4 “Cuba” or “the Government of Cuba” means any political subdivision of Cuba and any agency, instrumentality, or entity controlled by the Government of Cuba or any political subdivision thereof.

8.5 “The United States of America” or “the Government of the United States of America” means any political subdivision of the United States and any agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof.

8.6 “National” of Cuba or of the United States, as the case may be, means (a) a natural person who is a citizen of Cuba or the United States; and (b) a corporation or other legal entity organized under the laws of Cuba or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock. In the case of partnerships, joint ventures or other non-corporate entities which are comprised of both nationals and non-nationals, such entities shall

be treated as nationals in proportion to the ownership interest of nationals of each nation in such entities. Nationals may also make claims based upon an ownership interest in a juridical person provided the ownership interest was sufficient to control the juridical person at the time the claim arose, the juridical person is not entitled to bring a claim either before the Tribunal or the Special Claims Court and the juridical person has not previously recovered on that claim in any forum.

8.7 “Property” means any tangible or intangible property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest. real property, tangible personal property and intangible property.

8.8 “Proves” means to carry the appropriate burden of proof as determined by the Tribunal.

## **Court Article**

### *8. Definitions*

8.1 “Civil law” means the civilian legal tradition particularly as derived from the Spanish Civil Code of 1889 and includes applicable rules of private international law.

8.2 “Claim” means all theories of legal relief set forth in Article 1.1 arising out of a transaction or occurrence.

8.3 “Claims of Cuban nationals who became nationals of the United States after the date of accrual of such claims but before the date of entry into force of this instrument” include claims that were lawfully assigned or succeeded to by United States nationals.

8.4 “Claimant” means a natural or juridical person asserting a claim or persons asserting a joint or common interest in a claim.

8.5 “Cuba” or “the Government of Cuba” means any political subdivision of Cuba and any agency, instrumentality, or entity controlled by the Government of Cuba or any political subdivision thereof.

8.6 “The United States of America” or “the Government of the United States of America” means any political subdivision of the United States and any agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof.

8.7 “National” of Cuba or of the United States, as the case may be, means (a) a natural person who is a citizen of Cuba or the United States; and (b) a corporation or other legal entity organized under the laws of Cuba or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock. In the case of partnerships, joint ventures or other non-corporate entities which are comprised of both nationals and non-nationals, such entities shall be treated as nationals in proportion to the ownership interest of nationals of each nation in such entities. Nationals may also make claims based upon an ownership interest in a juridical person provided the ownership interest was sufficient to control the juridical person at the time the claim arose, the juridical person is not entitled to bring a claim either before the Court or the Cuba-U.S. Claims Tribunal and the juridical person has not previously recovered on that claim in any forum.

8.8 “Property” means any tangible or intangible property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest. real property, tangible personal property and intangible property.

8.9 “Proves” means to carry the appropriate burden of proof as determined by the Court.

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### V.(J)(1) Civil Law Tradition

In cases before the Court, the applicable substantive law will be that of the civil law tradition, particularly as derived from the Spanish Civil Code of 1889, which was the basis for Cuba's civil code. The reasons for choosing the civil law as the basis for claims before the Court are discussed extensively *supra* Section V.E.2.

### V.(J)(2) Definition of a Claim

The term “claim” is defined broadly in the proposed instruments so as to encompass all legal theories that might arise from any transaction or occurrence. This definition is generally consistent with the prevailing theory of what constitutes a “claim” or “cause of action” in the common law tradition. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482, n. 22 (1982) (“Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes...”); Restatement (Second) of Judgments § 24 (1980). Although the civil law notion of what constitutes a claim proceeds from somewhat different premises, over time it has moved closer to the modern common law notion that each underlying set of facts is entitled to one examination regardless of the legal label applied to it. See, e.g., Comment, David Hoskins, *Litigation Preclusion in Louisiana: Welch v. Crown Zellerbach Corporation and the Death of Collateral Estoppel*, 53 Tul. L. Rev. 875, 900-02 (1979); cf. Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 385 (2003) (civil law preclusion depends more upon the legal theory actually raised than does the common law notion).

International instruments also wrestle with the question of what constitutes the same “claim” or “cause of action” for purposes of application of doctrines such as *lis alibi pendens*. See, e.g., James P. George, *International Parallel Litigation – A Survey of Current Conventions and Model Laws*, 37 Tex. Int'l L.J. 499, 522-23 (2003). Although, again, definitions of what constitutes a claim or cause of action vary, the transactional notion of a claim is commonly employed.

Whatever differences exist between the traditions in terms of what constitutes a claim or cause of action, in the context of the Court and Tribunal it would make little sense to allow the bifurcation of claim processing based upon legal theories. Rather, the interests of consistency and efficiency are both served by having the Court and Tribunal look at each set of facts together in one proceeding regardless of whether, for instance, the party wishes to pursue the matter as a breach of contract, interference with property, unjust enrichment or some combination thereof.

As noted *supra* Section V.E.7, claims by U.S. nationals in the Tribunal are also subject to the requirement of exhaustion of remedies before the Foreign Claims Settlement Commission. However, a denial or dismissal of such a claim on the grounds that the claimant did not satisfy the continuous nationality principle should not preclude that claimant from seeking relief before the Court. The Court's jurisdiction extends beyond that narrow class of claims that qualified for certification before the Foreign Claims Settlement Commission.

### V.(J)(3) Continuous Nationality Principle

For claim eligibility, both proposed instruments adopt a form of the “continuous nationality” principle of international law. Article 8.2 of the Tribunal instrument requires a claim to be held continuously by a claimant of the same nationality and Article 8.3 of the Court instrument provides that claims of expatriate Cubans who are now U.S. nationals may pass only to other U.S. nationals. For example, if a parent left Cuba and has a claim that would have been cognizable before the Court and that claim has passed through a will or trust to the parent's U.S.-born

children, under the proposed instrument those children are permitted to press the claim before the Court. This is both a matter of fairness and practical necessity as given the passage of time a good number of claims will have passed through testate or intestate proceedings, corporate successions and reorganizations and the like. Simply put, under the proposed instruments the claims cannot pass to claimants of a different nationality and subsequently be pursued before the Court or Tribunal.

There is a good deal of debate as to the strength of the continuous nationality principle in international law. Recent trends regarding the principle's application under governing treaties show the rule is not immutable and the rationale may be based more on expediency than principle. Ian Sinclair, *Nationality of Claims: British Practice*, 1950 Brit. Y.B. Int'l Law 125, 131 (1950). On the other hand, mid-20th century agreements relating to expropriation compensation generally included the requirement of continuous nationality from the date of injury to the time of presentation. Sinclair, *supra*, at 143.

Despite some authority suggesting the principle has weakened, many modern scholars adamantly contend it is still universally accepted as a rule of international law. Robert L. Muse, *The Nationality of Claims Principle of Public International Law and the Helms-Burton Act*, 20 Hastings Int'l & Comp. L. Rev. 777, 783 (1997). In support of the conclusiveness of the rule, these commentators cite the continuous nationality requirement of the Foreign Claims Settlement Commission and point out that Congress has repeatedly rejected any attempts to soften the rule in legislation. Muse, *supra*, at 783-85. They also refer to the consistent executive and judicial adherence to the rule. Muse, *supra*, at 795.

Because of the disagreement surrounding the principle it would be inaccurate to describe it as an immutable rule of international law. If the rule were conclusively established, it seems strange that parties would regularly opt out of or modify its application. In addition, if the rule was universally accepted there would be no need to include any provision regarding continuous nationality in a governing treaty, as many treaties have done. In the area of bilateral and multilateral investment treaties, the rule might be almost entirely inapplicable. See Matthew S. Duchesne, *The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes*, 36 Geo. Wash. Int'l L. Rev. 783 (2004). Duchesne's argument that continuous nationality is really a "discretionary practice" that has been repeatedly and mistakenly touted as a "substantive rule," might therefore be an appropriate assessment. Duchesne, *supra*, at 798-99.

Generally speaking, it also appears inaccurate to assert that requiring some variation of continuous nationality has not been customary (or at least regular) practice in international dispute settlement. See, e.g., David J. Bederman, "Nationality of Claims," in *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration 7-10* (2006) (discussing application of the rule). At least in areas where diplomatic protection has traditionally been necessary to bring a claim against a foreign state, the principle may be somewhat of a default practice.

Because of the politically sensitive nature of the claims, the wiser choice is to adhere to the continuous nationality principle even if historical justifications for the rule have weakened. The Cuban property claims context is not the ideal situation in which to test the strength of the continuous nationality principle, whether it is considered a rule of international law, a mere customary practice, or an unjustifiable remnant of discretionary practice in international claims settlement. Moreover, the Court itself represents a partial departure from the principle because it allows for Cuban nationals who changed nationality after the claims arose to press their claims

in a special forum. In that sense, the proposed instrument creating the Court requires only that the claims continue to have been held by U.S. nationals.

#### **V.(J)(4) Joint or Common Interest in a Claim**

The modern common law approach allows parties with related claims to join together in a single action. *See, e.g.*, Fed. R. Civ. Proc. 20; Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Procedural Universe*, 79 Notre Dame L. Rev. 1981, 1991 n. 45 (2004) (discussing joinder under New York's 1848 Field Code); *see also* C. Clark, Code Pleading 434-38 (2d ed. 1947) (claims for recovery of property among those that could be joined under the Field Code). The civil law tradition also provides for joint enforcement of a common obligation. *See, e.g.*, Comment, Gary F. Strickland, *The Liability of Co-Makers of Promissory Notes: Joint or Solidary?*, 49 La. L. Rev. 1107, 1110 (1989); *see also* Comment, Jeanne M. Gravois, *The Revision of the Louisiana Co-Ownership Law*, 65 Tul. L. Rev. 1261, 1270-71 (1991) (civil law concepts allow co-owners to share equally in the benefits of ownership).

Consistency and efficiency are each served by having claimants with joint or common interests in a claim litigate together. Another consequence of defining a claimant in this way relates to the amount-in-controversy rules for determining which level of claim has been presented. So, for instance, two individuals with a common or joint interest in a claim worth \$15,000 would be treated as a single claimant and thus would proceed under the medium claims procedure, even though the value of the claim to each individual would be only \$7,500. This approach will also decrease the incentive to manipulate claim size to gain a perceived procedural advantage.

#### **V.(J)(5) Definitions of Cuba & the United States & Controlled Entities**

The governments are defined broadly in each of the proposed instruments. From the standpoint of a claimant, and as a matter of elementary justice, it matters little if the claim arose from the direct actions of a national government or through a subdivision or other governmental instrumentality. Admittedly, however, some close questions might arise as to what constitutes an “agency, instrumentality or entity controlled” by a government.

Essentially, identical language was used in Article II, section 1 of the Iran-U.S. declaration. The Iran-U.S. Claims Tribunal approached the question of “control” on a case-by-case basis. With regard to formal governmental entities and subdivisions thereof, the question of whether the claim was properly against the government was generally not raised. *See* Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 90-91 (1998). The unavoidably difficult questions arose with respect to corporations that had an identity separate from the government's but clearly were under its influence to some degree. Factors in making this determination included laws relating to the entity, governmental ownership of a controlling interest in the corporation, statements made by governmental officials regarding control and government appointment of corporate managers. Brower & Brueschke, *supra*, at 92-94. However, mere governmental subsidies or assistance to the corporation did not suffice to establish control. *Id.* at 94.

While it is tempting to draw bright-line rules as to what constitutes a “controlled” entity, such an effort would be both futile and counterproductive because of the varied and complex relationships among governmental and quasi-governmental entities in any modern society. Moreover, both the Tribunal and the Court will have a large body of law from which to draw. In addition to the precedents from the Iran-U.S. Tribunal, decisions in other contexts have also evaluated governmental control. In fact, one of the most important precedents is a U.S. Supreme Court case involving a bank owned by the Cuban government.

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In *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), the Supreme Court held that a government-owned Cuban bank created in 1960 was an entity of the Cuban government notwithstanding the presumption of independent status accorded to corporations. In that case, the Supreme Court decided it could provide no “mechanical formula,” that basic “equitable principles” governed the inquiry, and that the bank was, in fact, an instrumentality of the Cuban government. *Id.* at 633. Because the bank’s stock was exclusively held by the Cuban government and officials of the government directed its day-to-day operations, the Court found the bank had no separate existence that was bound to be respected by international law. A similar fact-intensive, case-by-case inquiry will be necessary for a fair determination of such issues before the Court and Tribunal.

### V.(J)(6) Nationals

Both proposed instruments follow the accepted rule that nationality is a critical connecting factor in claims disputes.

The nationality of claims principle provides that a claimant asserting a claim against a foreign government through diplomatic channels must have the citizenship of the espousing state when the alleged injury occurred and also when the claim is presented to an adjudicative tribunal. Claims that do not satisfy the continuous nationality requirement “are dropped at the moment the citizen changes his nationality or assigns his claim to the subject of another state.” Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 352 (1927). Some scholars have labeled the principle a “long settled rule of international law.” Ian Sinclair, *Nationality of Claims: British Practice*, 1950 *Brit. Y.B. Int'l Law* 125 (1950). The rule has traditionally been based on the positivist view (favoring state sovereignty) that only states, and not individuals, can be the subjects of international law. H. Lauterpacht, *The Subjects of the Law of Nations*, 63 *L.Q. Rev.* 438, 439-40 (1947). An injury to a national is deemed an injury to the state and the state has discretion to espouse the claim. For a more complete discussion, see *supra* Section V.J.3.

In the event of claims brought by persons holding dual citizenship, or who are considered citizens by more than one nation, a well-established body of international law governs. The prevailing test in customary international law is that of “dominant and effective” nationality. See Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 289 (1998). The most famous exposition of this principle came about in the *Nottebohm Case*. See *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 *I.C.J.* 4 (Judgment of 6 April). The factors relevant to making this determination include habitual residence, center of interests, family ties, participation in public life, voting records and other objective indicia. See Richard B. Lillich & David J. Bederman, *Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 *Am. J. Int'l L.* 436, 441 (1997).

Citizenship of corporations has been a more difficult question. The main consideration under American law has been the place of incorporation, but the Department of State has often required a “substantial American interest in a corporation before protection is authorized.” Borchard, *supra*, at 621. The definitions in the proposed instruments draw heavily from the Iran-U.S. Claims Tribunal language. A “national” corporation is defined rather broadly as being one that is domestically incorporated and at least half-owned by nationals. This definition caused relatively few problems in the Iran-U.S. setting and reflects prevailing international law notions. In the famous *Barcelona Traction* case (*Barcelona Traction (Belgium v. Spain)* Second Phase, *I.C.J. Rep.* 3 (1970)), the International Court of Justice did not give Belgian protection to a corporation incorporated in Canada but with a majority of Belgian stock owners, but the

case has been the subject of intense criticism. Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years, 1981-1991* 90 (1993). Both the U.S. and U.K. have granted protection to corporations with a substantial national stake.

Difficult and interesting questions also arise with so-called “indirect” claims. Mapp, *supra*, at 80. With regard to nationals who owned stock in corporations (or other “juridical persons” – the general term for legal personalities) who are not otherwise eligible to make claims, the proposed instruments allow for such claims on the basis of ownership in those entities provided that the ownership was enough to allow for “control.” This can be a close factual question and the Iran-U.S. Tribunal did allow for claims based on ownership interests as low as 25% when it determined there was de facto control of the entity. Mapp, *supra*, at 91-93.

With regard to partnerships, joint ventures and the like, which the Iran-U.S. Claims Declaration did not address directly, a “common law” rule allowing for pro rata claims based upon the ownership interests of nationals developed. Mapp, *supra*, at 101. The leading case before the Tribunal was *Hous. and Urban Serv. Int’l Inc. v. Tebran Redevelopment Corp.*, 9 Iran-U.S. C.T.R., 313 (1985). In that case, the claim of the U.S. national was separate and identifiable, but even in cases of claims that are not so obviously separate, it seems desirable not to forbid national claimants from attempting to assert claims for partnership losses. In fact, claims of partnerships involving American citizens and foreign nationals have traditionally been espoused by the U.S., but only to the extent of the American interest in the partnership. See Borchard, *supra*, at 613. The approach of the proposed instruments is therefore consistent with past U.S. practice.

Rather than counting on the Tribunal and the Court to develop these rules on their own, however, it is desirable to address this directly in the instrument as a matter of fundamental fairness. If, for example, a joint venture in Cuba involving American and Mexican national interests had property expropriated, it would be perverse to deny recovery to the American claimant simply because of the form of the business venture, whereas recovery would have been allowed had the entity been incorporated.

### **V.(J)(7) Property**

The definition of property is broad and includes not only tangible and intangible property, but future and non-ownership interests. Such a definition is necessary because a significant amount of the damage to property rights and interests was in the form of interference with these interests.

The definition used in the proposed instruments tracks the definition used in the Libertad Act. See 22 U.S.C. § 6023(12). Libertad, however, excluded from the definition of property most residential real property which was a necessary accommodation to avoid fears of dispossession or incurring liability simply for occupying a residence. Such an express exclusion is not necessary in the proposed instruments because the drafts do not allow for specific restitution of property unless, pursuant to Article 4.3 of each proposed instrument, restitution is requested and can be granted without adversely impacting innocent third parties. Moreover, Libertad imposed liability on non-governmental third parties, while both the Court’s and the Tribunal’s reach extends only to governmental parties. In contrast, under the current versions of the Court and Tribunal instruments, an ordinary Cuban citizen living in a residence previously owned by a claimant faces no risk of dispossession or personal liability.

### **V.(J)(8) Burden of Proof**

As noted above, see *supra* Sections V.G.3, V.H.3, and V.I.4, the question of the burden of proof and presumptions designed to serve policy goals are generally matters of substantive law

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governed by the law that governs the underlying transaction. Restatement (Second) Conflict of Laws § 133 (1971); Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 Cornell Int'l L.J. 493, 530 (1997) ("In civil law systems the allocation of burden of proof is considered to be a matter of substantive law so far as concerns choice of law.").

Rather than attempting to define a specific burden of proof for each element of each claim, the proposed instruments call upon the Court and the Tribunal to make an appropriate choice of law on the issue. Choosing burdens of proof though appropriate conflicts principles in international disputes is commended by at least one leading scholar as being preferable to simply labeling the issue as "procedural" and allowing the forum to always apply its rule. See Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 Tex. J. Int'l L. 413, 419 (1998).

## **V.(K) Analysis of Article 9**

### **Tribunal Article**

#### *9. Other Provisions*

9.1 No claim may be filed more than one year after entry into force of this instrument. No defense of prescription, limitation, laches, sovereign immunity or like defense shall be allowed if the claim that is timely filed under this Article.

9.2 The President of the Tribunal shall determine the location of the Tribunal's seat of the Tribunal shall be determined by the President of the Tribunal. The location of the seat shall not, however, prejudice the ability of the Tribunal to conduct hearings at locations outside the seat so as to minimize any inconvenience to the parties and witnesses.

9.3 The official languages of the Tribunal shall be Spanish and English.

9.4 The expenses of the Tribunal shall be borne equally by the governments of the United States and Cuba two Governments.

9.5 Each Government shall designate an Agent at the seat of the Tribunal to represent the Government to the Tribunal and to receive notices or other communications directed to the Government in connection with proceedings before the Tribunal. The Tribunal shall notify the Agent of all filings against the Government. The filing of any document with the Tribunal by a Claimant shall constitute notice to the Government against which the claim is brought and no separate notice to the Government need be given under Article 2 of the UNCITRAL arbitration rules or any other provision of law. A Government, however, must give separate notice to a Claimant of any filing it makes relative to the Claimant's claim.

9.6 The awards of the Tribunal shall be final, binding and not subject to appeal or collateral attack in any other forum. Any award the Tribunal may render against either Government shall be enforceable against such Government in the courts of any nation in accordance with that nation's laws. Any award of the Tribunal shall be given the same preclusive effect as a judgment of a court of competent jurisdiction.

9.7 If necessary for Cuba to comply with its obligations under this instrument, the United States shall either loan on favorable terms to Cuba, or assist Cuba in obtaining loans of, funds sufficient to allow Cuba to comply with its obligations. These funds shall be held by Cuba in a separate account and used only for the purposes of complying with Cuba's obligations under this instrument.

9.8 Each proceeding before the Tribunal shall be public unless good cause can be shown that the interests of justice would be better served by a closed proceeding.

9.9 The Tribunal shall cease to operate when all claims have been resolved or five years from

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the entry into force of this instrument, whichever is earlier, unless one of the Governments for good cause files a notice with the Tribunal extending the Tribunal's operation for up to one year with successive notices for good cause being permitted.

### **Court Article**

#### *9. Other Provisions*

9.1 No claim may be filed more than two years after creation of the Court. No defense of prescription, limitation, laches, sovereign immunity or like defense shall be allowed if the claim that is timely filed under this Article.

9.2 The location of the seat of the Court shall be determined by the Chief Judge. The location of the seat shall not, however, prejudice the ability of the Court to conduct hearings at locations outside the seat so as to minimize any inconvenience to the parties and witnesses.

9.3 The official language of the Court shall be Spanish though reasonable translation services shall be available to Claimants who wish to present their claims in English.

9.4 The expenses of the Court shall be borne by Cuba.

9.5 The Government of Cuba shall designate an Agent at the seat of the Court to represent Cuba to the Court and to receive notices or other communications directed to Cuba in connection with proceedings before the Court. The Court shall notify the Agent of all filings against Cuba. The filing of any document with the Court by a Claimant shall constitute notice to Cuba and no separate notice to Cuba need be given under Article 2 of the UNCITRAL arbitration rules or any other provision of law. Cuba, however, must give separate notice to a Claimant of any filing it makes relative to the Claimant's claim.

9.6 The awards of the Court shall be final, binding and not subject to appeal or collateral attack in any other forum. Any award the Court may render shall be enforceable in the courts of any nation in accordance with that nation's laws. Any award of the Court shall be given the same preclusive effect as a judgment of a court of competent jurisdiction.

9.7 If necessary for Cuba to comply with its obligations under this instrument, the United States shall either loan on favorable terms to Cuba, or assist Cuba in obtaining loans of, funds sufficient to allow Cuba to comply with its obligations. These funds shall be held by Cuba in a separate account and used only for the purposes of complying with Cuba's obligations under this instrument.

9.8 Each proceeding before the Court shall be public unless good cause can be shown that the interests of justice would be better served by a closed proceeding.

9.9 The Court shall cease to operate when all claims have been resolved or five years from the entry into force of this instrument, whichever is earlier, unless Cuba elects to extend the period of operation. If any claims are left unresolved at the time the Court ceases operation Cuba shall make reasonable provision for their resolution.



*Street scene in Downtown Havana.*

### **V.(K)(1) Time Period for Filing & Waiver of Defenses**

The proposed Tribunal instrument creates a one-year period in which a claim may be filed. This is much like the period selected for the Iran-U.S. Claims Tribunal. *See* Charles N. Brower

& Jason D. Brueschke, *The Iran-United States Claims Tribunal* 86 (1998) (claims must be filed within one year of entry into force or six months after the President of the Tribunal is appointed). Given the amount of publicity the creation of the Court and the Tribunal would generate it is virtually certain that one year from their creation would be a sufficient time for claimants to assemble the basic information needed to file a claim. On the other side of the balance, designating a longer period could inhibit economic planning because of prolonged uncertainty as to property rights and the dimensions of the total obligations.

The Court declaration gives claimants two years, rather than the one in the case of the Tribunal. The chief reason for the longer period is that claimants may face larger obstacles drawing together proof of their claim than would the holders of FCSC-certified claims. Access to records, the condition of those records, securing adequate representation, and assembling a claim are among many reasons mitigating in favor of a longer time horizon for the Court process.

With regard to defenses, it would defeat the purpose of creating the Court and the Tribunal if the Governments were able to raise defenses based on either the passage of time or their sovereign status. A defense of “prescription” and its common law equivalent “limitation period” is therefore prohibited. *See, e.g.,* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 *Pac. L.J.* 453, 496, n.189 (1997). Laches, another common law defense based upon the passage of time, is excluded under both the Tribunal and Court instruments. *See* Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 *Akron L. Rev.* 245, 281 (2003). Defenses based on sovereign immunity or the defendant’s governmental status are known to both the common and civil law systems and thus must be waived in order to have the Court and the Tribunal operate effectively. *See* Charles N. Brower, *Arbitrating Against Foreign Governments*, 6 *J. Transnat’l L. & Pol’y* 189, 194 (1997); *but see* Rodolphe J.A. de Seife, *The King is Dead! Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under the Law*, 24 *Hofstra L. Rev.* 981, 1033 (1996) (noting that the French Civil Code discarded sovereign immunity in favor of a system of administrative courts to handle claims against the government).

In order to avoid possible conflicts in technical terminology the catch-all phrase “or like defense” was included in the list. This makes clear that other “non-merits” defenses may not be raised assuming the claim is timely filed under the proposed instruments.

### **V.(K)(2) Location**

Claims Tribunals as between nations and their nationals have a long history of being located in neutral countries. The Iran-U.S. Claims Tribunal, for instance, is located in The Hague, The Netherlands. Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, Art. VI(3) (Jan. 19, 1981). Other tribunals have also been located in neutral countries. *See, e.g.,* Mark D. Kielsingard, *A Human Rights Approach to Counter-Terrorism*, 36 *Cal. W. Int’l L.J.* 249, 270-71 n.85 (2006) (noting the location of the International Criminal Tribunal for Rwanda in Arusha, Tanzania and noting the location of the International Criminal Tribunal for the former Yugoslavia in The Hague, The Netherlands) and Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 *Va. J. Int’l L.* 675, 728 (2003) (noting the location of the Eritrea-Ethiopia Claims Commission in The Hague, The Netherlands).

It would be imprudent, however, to try to prescribe in advance for either the Court or the Tribunal where it will have its administrative base. The circumstances of a successful transition

to democracy in Cuba might well allow for the Tribunal to have its administrative headquarters either in the U.S. or in Cuba, thus presumably making it more accessible and less costly. The Court as an instrument of the Cuban judiciary seems likely to be located in Cuba, but again, the exact location seems unreasonable to foreordain.

It is also crucial to note that structural aspects of both the Tribunal and the Court are designed to make them as accessible as possible to claimants and witnesses. Taking testimony remotely, use of Internet technologies and a host of other measures should diminish greatly the practical obstacles to claimants obtaining access to justice even if the Court or Tribunal is in a distant location.

### **V.(K)(3) Official Languages & Expenses**

Because of the Tribunal's bi-national character, it is appropriate that it operate in the languages of the participating nations and that the expenses be borne equally. Equal cost-sharing has been the consistent approach for tribunals of this sort. *See, e.g.* Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, Art. VI(3) (January 19, 1981) ("The expenses of the Tribunal shall be borne equally by the two governments"); *see also* United Nations Mission in Ethiopia, Algiers Peace Agreement, Art. 4(17) & Art. 5(15) (June 18, 2000) *available at* [http://www.unmeeonline.org/index.php?option=com\\_content&task=view&id=15&Itemid=50](http://www.unmeeonline.org/index.php?option=com_content&task=view&id=15&Itemid=50) *and* Chilean-American Claims Convention, Art. X (August 7 1892), *available at* <http://www.yale.edu/lawweb/avalon/diplomacy/chile/chile04.htm>.

The Court, as a component of the Cuban judiciary, should operate in Cuba's official language and its expenses should be borne by Cuba. However, given that some claimants may be more comfortable presenting their claims in English, it is a reasonable accommodation to require that English translation be available.

### **V.(K)(4) Governmental Agents**

Both proposed instruments call for the appointment of Agents to represent the interests of the U.S. and Cuba before the Tribunal and the Court. This is a familiar model. *See, e.g.*, Declaration of Algiers Concerning the Settlement of Claims between the United States and Iran, Art. VI(2) (January 19, 1981) ("Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal"); Henry T. King, Jr. & James D. Graham, *Origins of Modern International Arbitration*, 51-MAR Disp. Resol. J. 42, 43 (1996) (noting the governments of the U.S. and Britain appointed agents to represent their interests in front of the commission established by the Jay Treaty).

Recall, however, that in the case of small claims the Governments need not appear in opposition to the claimant and the Tribunal or the Court, probably acting through Hearing Officers, will nevertheless hold the claimants to their burden of proof. *See supra* Section V.G.3 & Section V.G.4. Because small claims will make up the largest volume of claims, the Agents should be able to focus on numerically smaller but higher stakes medium and large claims, thus keeping the administrative costs of maintaining the Agents to a reasonable level.

Article 2 of the UNCITRAL rules requires that separate notice be given to the opposing party. This makes perfect sense in the usual context of arbitration between two private parties. However, given the direct relationship between the Agents and the Court and Tribunal, it will be unnecessary for claimants to separately notify the Agents. Instead, it is more efficient to

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simply require the claimants to file with the Court or Tribunal and then for those bodies to develop a mechanism that ensures prompt notification of the Agents.

### V.(K)(5) Preclusive Effect of Awards

In order to promote confidence in the Tribunal and the Court it is important that the awards be final, enforceable and immune from collateral attack. Although U.S. courts have a generous record of enforcing foreign judgments, *see* Stephen Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 Am. J. Comp. L. 203, 232 (2001) (“The generous recognition treatment of internationally foreign judgments characteristic of American law for more than a century has represented a remarkable act of faith...”), in some circumstances foreign judgments have been subjected to conditions that would not be imposed upon a domestic judgment. *See, e.g., Hilton v. Guyot*, 159 U.S. 113 (1895) (reciprocity requirement). Other nations vary considerably in their respect for foreign judgments. Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 Hastings Int’l & Comp. L. Rev. 115 (2002) (surveying civil and common law approaches).

Most nations, including the U.S. and Cuba, have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38; *see also* Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Contribution of BITs to Cuba’s Foreign Investment Program*, 32 Law & Pol’y Int’l Bus. 529, 570 n. 116 (2001) (noting Cuban accession); 9 U.S.C. § 201 et. seq. (U.S. implementing statutes).

The New York Convention was used in questions of enforcement in U.S. courts of awards from the Iran-U.S. Claims Tribunal. The issues faced there are particularly instructive for our purposes. In the context of the Iran-U.S. Claims Tribunal, the enforcement was “direct” against the Iranians in that they were required to keep a fund balance of at least \$1 billion under the Algiers Accords.

In the case of awards in favor of Iran against U.S. parties, however, the situation was somewhat less clear. Iran argued in the famous case of *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2nd Cir. 1992), that it had a reciprocal right of direct enforcement against U.S. parties. *Id.* at 142 (“The Iranian parties argue that the district court erred in declining to enforce the Award because, as claimed by the Iranian parties, the Tribunal’s awards are ‘directly’ enforceable in United States courts.”). That position was rejected by the *Avco* court, by other U.S. courts and by the Iran-U.S. Tribunal itself. *See, e.g., Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 28 (D.D.C. 1999) (citing *The Islamic Republic of Iran v. United States*, Award No. 586-A27, p. 8 (Iran-U.S. Claims Tribunal, June 5, 1998)).

The view that ultimately emerged is that awards in favor of Iran and against U.S. parties were subject to enforcement under the New York Convention. Thus, despite the finality provision in the Algiers Declarations, the position of U.S. courts has been that “the ‘final and binding’ language in the Accords does not bar consideration of the defenses to enforcement provided for in the New York Convention.” *Avco*, 980 F.2d at 145.

In theory “[d]efenses to enforcement under the New York Convention are construed narrowly, ‘to encourage the recognition and enforcement of commercial arbitration agreements in international contracts...’” *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) ((quoting *Imperial Ethiopian Gov’t v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976)). In practice, however, arbitration confirmation

proceedings under the New York Convention take on a look similar to that of appellate review of the award. In *Avco*, for example, the court denied enforcement because it took the position that the confusion over the necessity of producing the original invoices made the award unenforceable under the New York Convention defense applicable where “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case....” *Avco*, 980 F.2d at 145 (quoting New York Convention Article V(1)(b)). As the *Avco* dissent pointed out, this was a very broad reading of what constitutes a party being “unable” to present its case.

The bizarre sequel to *Avco*, however, was that the U.S. was found by the Iran-U.S. Tribunal to be in breach of its obligations under the Algiers Declarations by virtue of the Second Circuit decision refusing to enforce the award. Therefore, the net effect was that the U.S. wound up being required to pay the \$3.6 million dollar award rather than *Avco*. See Roger P. Alford, “Evidentiary Practices Before the Iran-United States Claims Tribunal” at p. 3, n.4, in *The Iran-U.S. Claims Tribunal at 25 (ASIL 2006)* (citing *Iran v. United States*, Award No. 586-A27-FT (June 5, 1998)). Obviously, this is a sequence of events that all would like to avoid in the future.

This is not to say that U.S. courts routinely rejected enforcement of Iran-U.S. Tribunal awards against U.S. parties. In the *Hoffman Export* arbitration, the Ninth Circuit ultimately upheld the award, including, apparently, a portion awarding what amounted to equitable relief. See *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992).

Still, the New York Convention contains some significant defenses that could result in a good deal of litigation over enforcement. Article V of the New York Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties,

- or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

In practice, the “public policy” and the “beyond the scope” exceptions allow parties to recast their substantive arguments and relitigate them in enforcement proceedings. *See, e.g., Celulosa Del Pacifico S.A. v. A. Ahlstrom Corp.*, 1996 U.S. Dist. LEXIS 2747 (S.D.N.Y.). “In the United States, most awards may be vacated for ‘manifest disregard of the law,’ a vague term subject to varying interpretations, some of which allow for judicial tinkering in the substantive merits of a case.” William Park, “Procedural Evolution in Business Arbitration: Three Studies in Change,” in *Arbitration of International Business Disputes: Studies in Law and Practice* (2006), p. 16 (citing Robins, “*Manifest Disregard of the Law*” and *Vacatur of Arbitral Awards in the United States*, 12 *Am. Rev. Int’l Arb.* 837 (2002)).

While scrutiny of foreign arbitral awards is probably necessary and desirable in most circumstances, here – given the intra-Tribunal and intra-Court review provided for in medium and large claims – it is undesirable to add another layer of expense and potential uncertainty by subjecting the awards to possible defenses under the New York Convention. As Park, *supra*, at 18, notes: “The problematic nature of ‘manifest disregard’ lies in its potential for mischief in large international cases, where zealous litigants may be tempted to press the doctrine into service as a proxy for attack on the substantive merits of the award.”

To avoid a repeat of the uncertainty caused by these variables, the proposed instruments contain language that puts awards of the Tribunal and Court on the same footing as a domestic judgment entered by a court of competent jurisdiction. Moreover, putting such awards on equal footing with domestic judgments, and requiring a waiver of sovereign immunity, will help avoid issues of enforcement within the territory of either nation. *See, e.g., Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 126 S. Ct. 1193 (2006) (sovereign immunity prevents attachment of assets of a foreign nation).

Because questions have sometimes arisen as to the enforceability of agreements facilitated through mediation or other consensual processes, claims so resolved are explicitly treated as being “awards” of the Court or Tribunal. Placing mediated, negotiated or other settlements on the same footing as adjudicated or arbitrated awards is seen as the best approach for ensuring enforceability. Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide*, 80 *Notre Dame L. Rev.* 553, 582 (2005).

### **V.(K)(6) Loans to Support Cuban Fulfillment of Instrument Terms**

There is virtually no chance that Cuba will have hard currency reserves to make good on even a small fraction of the Tribunal and Court awards. The terms of Cuba’s settlements

of vastly smaller claims with other countries are compelling evidence of this. Although precise data is scarce, some information is available about Cuba's settlement of such claims with Canada, France, Spain, and Switzerland. All of these settlement agreements were reached in the 1960s and 1970s.

Not surprisingly, these claimant countries settled their property confiscation claims with Cuba for only a fraction of the claims' actual value. Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriations Claims Against Cuba*, 16 U. Pa. J. Int'l Bus. L. 217 (1995). One source estimates that past negotiations with the Cuban government have resulted in average settlement awards of between 15 and 20 cents on the dollar. University of Florida, *Resolving Property Claims in a Post-Socialist Cuba*, n.25, available at [http://www.law.ufl.edu/cgr/publications/resolving\\_property.pdf](http://www.law.ufl.edu/cgr/publications/resolving_property.pdf).

Some of the notable terms of Cuba's settlements with Canada, France, Spain, and Switzerland are as follows:

**Canada:** Cuba did not begin negotiating a property claims settlement agreement with Canada until 1973. Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations Other Than the United States*, 5 Law. Am. 457 (1973). The delay in negotiations may have been because Canadian trade with Cuba did not decrease significantly after the revolution, and therefore Cuba did not have an incentive to negotiate an immediate settlement. *Id.* at 466. Cuba's willingness to eventually enter negotiations was likely due to the feasibility of settling claims for Canada's relatively small amount of investment in Cuba. *Id.* at 458.

Canada's total investment in Cuba was estimated at only \$9.4 million in 1956. Canadian Banks owned \$8.8 million of that total investment value. Two Canadian Banks, the Bank of Nova Scotia and the Royal Bank of Canada, concluded individual settlements with the Cuban government near the time their properties were confiscated and before the Canadian government negotiated any lump sum settlement. The eventual settlement amount and terms that resulted from the initiation of the 1973 negotiations could not be located. *Id.*

**France:** Cuba signed settlement agreements with Spain, Switzerland, and France in March of 1967 within a span of 14 days. *Id.* at 459. France negotiated a lump-sum payment in satisfaction of all French property confiscation claims. *Id.* at 460. The agreement involved no supplemental trade agreement, as did the Swiss-Cuban settlement, and was reached through a process of mutual examination of potential French claims. *Id.* at 463-64.

Under the French-Cuban agreement, Cuba agreed to pay 10,861,532 francs over about five years in 12 relatively equal installments. *Id.* at 465. (The 10,861,532 francs was the equivalent of about USD 2,170,000 at 1967 values). *Id.* at n.42. The agreement obligated the Banco Nacional de Cuba to make the payments "by transfer to the credit of a special account opened in the Bank of France." *Id.* at 465. France was to release Cuba completely from further claims on full payment. In addition, France was given exclusive jurisdiction to distribute the paid funds and was required to provide a guarantee against further "claims of French nationals." Disagreements regarding the settlement process were to be resolved by free information exchange and mutual negotiations. *Id.* In the year following the agreement, Cuba's trade volume with France more than doubled over the previous year's volume. *Id.* at 464.

**Spain:** Cuba reached a property claims settlement agreement with Spain in 1967, but one of the conditions of the agreement was that the terms would remain confidential. *Id.* at 459. One source speculates Cuba desired confidentiality because the settlement amount was larger than Cuban negotiators had hoped or anticipated. The relatively unfavorable terms were

likely a result of Cuba's lack of bargaining power against Spain – Spain was Cuba's largest non-socialist trading partner in the years following the Cuban revolution.

The terms of the Spanish-Cuban agreement may have been eventually released as there is speculation that Spanish claims were settled for around \$40 million. Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriations Claims Against Cuba*, 16 U. Pa. J. Int'l Bus. L. 217, n.15 (1995). The total value of Spanish claims was estimated at about \$350 million. Despite the fractional settlement amount, Cuba reportedly did not fulfill its payment obligations under the agreement until 1994. *Id.*

**Switzerland:** The Swiss government negotiated a settlement agreement in satisfaction of the claims of three Swiss-owned food processing businesses in 1967. Gordon, *supra*, at 460. Under the agreement, Cuba agreed to pay Switzerland 18,039,000 Swiss francs. (The 18,039,000 Swiss francs was the equivalent of about USD 4,140,000 at 1967 values). *Id.* n.42. This settled claims for expropriation, unpaid fees owed to the companies, and illegal use of company brand names following confiscation. *Id.* at 460.

Cuba was to make quarterly payments to Switzerland over eight years. Total yearly payments of 1,752,360 Swiss francs were due for the first three years, with total yearly payments of 2,555,525 Swiss francs due each of the last five years of the agreement. Under the accord terms, if Switzerland reached further settlements with Cuba encompassing other claims, the quarterly payments would increase to accommodate the additional amounts.

As part of the settlement, Switzerland agreed to purchase 40,000 tons of sugar annually from Cuba for eight years. One-third of Swiss payments for the sugar could be used to satisfy Cuba's payment obligations under the settlement. If Cuba delayed in delivery of the sugar, the contract obligations were to extend beyond eight years until all payments were completed. *Id.*

Michael W. Gordon, Law Professor at the University of Florida, characterized the Swiss agreement as “realistic” based on the following assessment:

[The agreement] amounts essentially to a government negotiated settlement for three private firms based primarily on the capacity of those firms, rather than the Swiss government, to absorb Cuban sugar and other agricultural commodities of a sufficient quantity so that Cuba would be allowed to obtain needed foreign exchange, while returning only a portion of that exchange as indemnification.

In order to determine the amount of the settlement, the Swiss predetermined the value of their confiscation claims and the Cuban government accepted the Swiss valuation without objection. *Id.* at 461. For any later-submitted claims, valuation amounts were to be determined mutually after submission of appropriate documents to the Cuban government. *Id.* at 462. Swiss claimants likely received a greater proportion of the total assessed claim value than if they had demanded only cash compensation. *Id.* Swiss government officials referred to the negotiations “as ‘difficult’ and occasionally ‘bitter’ discussions.” *Id.* at 463.

The difficulty of resolving the vastly smaller claims brought by these other nations demonstrates the extreme unlikelihood that any substantial fraction of the claims against Cuba could be resolved with cash payments from Cuba's reserves. Moreover, attempting to resolve the claims through cash payment might contribute to further impoverishment of ordinary Cubans – a morally unacceptable result.

Rather, to help alleviate poverty, the alternative remedies for medium and large claims are an

effort to make the resolution of the claims an engine of economic development for a new Cuba. Alternative remedies and the imposition of reasonable award conditions to generate investment in a new Cuban economy could set the stage for a mutually beneficial relationship between the two nations, thus bolstering the standard of living for ordinary Cubans while providing substantial value for claimants.

Still, even with the alternative remedies, Cuba will undoubtedly need some economic assistance to make good on its obligations. The most realistic hope is for the U.S. to loan on favorable terms, or to assist Cuba in obtaining loans, the hard currency that it will need to fulfill its obligations. This model has worked well in the past to help create a more beneficial relationship between the U.S. and its former adversaries. *See, e.g.*, U.S. Occupation Assistance: Iraq, Germany and Japan Compared, Congressional Research Service Report for Congress 4-6, March 23, 2006, *available at* <http://www.fas.org/sgp/crs/natsec/RL33331.pdf> (noting the U.S. provided billions of dollars to both Germany and Japan after WWII, around two-thirds of the assistance in the form of grants and one-third in the form of loans) *and* U.S. Assistance to Vietnam, Congressional Research Service Report for Congress (Summary), February 11, 2005, *available at* <http://www.au.af.mil/au/awc/awcgate/crs/rl32636.pdf> (“As the normalization process has proceeded, the U.S. has eliminated most of the Cold War era restrictions on U.S. aid to Vietnam, and U.S. assistance has increased markedly from around \$1 million when assistance was resumed in 1991 to nearly \$50 million in FY2004.”).

### **V.(K)(7) Presumption of Open Proceedings**

The tradition in arbitration is that of confidential proceedings. *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 *Am. U. Int'l L. Rev.* 957, 968 (2005). In part, this reflects the desire of parties to avoid revealing trade secrets and other valuable information. *See* Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Arbitration?*, 15 *Am. Rev. Int'l Arb.* 607, 630 (2004) (“[P]arties to an arbitration may want to take positions privately, particularly in the sense that confidentiality protects sensitive business information or trade secrets.”).

Whatever the force of these rationales for arbitration in more ordinary settings, they have little application to either the Court or the Tribunal. The Iran-U.S. Claims Tribunal operated in the open and has become perhaps the greatest source in history of international law precedent. *See, e.g.* John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 *Am. J. Int'l L.* 278, 279 (“Arbitrations are often confidential; published awards are often summarized or heavily edited. However, the growing body of published decisions of the Iran-United States Claims Tribunal provides new opportunities for analyzing the choice of applicable law in international commercial arbitration. . . . The Tribunal is a unique international institution, described as “the most significant body in history”); *see also* Madeline Stone, Note, *NAFTA Article 1110: Environmental Friend or Foe?*, 15 *Geo. Int'l Envtl. L. Rev.* 763, 786 (2003) (“The decisions of the Iran-U.S. Claims Tribunal constitute the largest single source of determinations of claims of expropriation under international law.”); *see generally*, Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* (1998).

The interests of transparency and advancing the cause of mutually beneficial relationships between the U.S. and a new Cuba will be best advanced by presumptively open proceedings before both the Court and the Tribunal. In those circumstances in which potentially sensitive matters are at issue, the Tribunal and the Court may order a closed hearing. But maintaining a presumption of open proceedings is the preferable policy.

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### **V.(K)(8) Five Year Sunset**

Both the Court and the Tribunal presumptively end their work five years after creation. Single-mission entities such as the Court and Tribunal should not exist into perpetuity. Although both bodies can play an important role in the Cuban transition, their limited role means they should cease to exist within a predictable period.

Absent a sunset provision, similar entities have continued to operate well beyond the period rationally contemplated by the parties. The Iran-U.S. Claims Tribunal, for instance, continues to operate more than 25 years after its creation. *See* Iran-U.S. Claims Tribunal, U.S. Department of State, *available at* <http://www.state.gov/s/l/3199.htm> (noting that numerous intergovernmental claims await resolution before the Iran-U.S. Claims Tribunal). Setting some rational end date for the operation of the Court and Tribunal is thus likely to promote efficiency and the fair resolution of claims.

On the other hand, some mechanism must be in place to ensure that neither Government escapes its obligations through delay. Thus, the life of the Tribunal can be extended in one-year increments by either Government by filing a notice of good cause to that effect. The life the Court can be extended unilaterally by Cuba and if the Court ceases to operate before all the claims are resolved Cuba is bound to make reasonable provision for resolution of any remaining claims.

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Section VI

# Conclusion

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# Conclusion

## THE CUBAN-AMERICAN BILATERAL RELATIONSHIP, WHICH HAS REMAINED AT AN IMPASSE

since Fidel Castro seized power in 1959, is now at a crossroads. The ascension of Raúl Castro to the presidency in July 2006 was widely viewed as a succession without transition to democracy. However, it remains too early to pass judgment as to Cuba's eventual course. Dr. Brian Latell and others have surmised that Raúl's natural tendency may be to begin moving toward a Chinese-model of economic development with strong capitalist impulses under a governing elite still bearing a communist label.

Raúl's micro-management of the Cuban economy via his military cohorts may push him in this direction. Moreover, the other post-revolutionary members of Raúl's governing triumvirate (Foreign Minister Felipe Pérez Roque who was born in 1965, and de facto Prime Minister Carlos Lage who was born in 1951) bring a younger perspective to Cuba's future. Nevertheless, Raúl is culturally and politically checked from moving dramatically away from the foundational principles of the revolution while Fidel yet lives.

Once Fidel dies, the new triumvirate may move to embrace economic reform. The Soviet supports of the Cuban economy were kicked away in 1991 with the collapse of the U.S.S.R. Cuba cast

about for solutions in the early to mid-1990s, experimenting with foreign investment and tinkering with currency regulations, all the while pushing ordinary Cubans further into poverty. Cuba's strategy since the late-1990s has been to substitute its old Moscow relationship for new partnerships in Venezuela and China. Fidel personally directed the exchange of Cuban aid in the form of healthcare and literacy initiatives for Venezuelan oil while Roque managed the Chinese angle, leading to new negotiations for the exploitation of oil reserves located in the Gulf of Mexico northwest of Cuba.

Thus, the regimes in China and Venezuela may have some impact on the direction Cuba takes under Raúl. If Venezuela prevails, Havana may be less likely to move very far down the road of economic liberalization, private property rights, and market reform. But if China prevails, those initiatives may be quickly undertaken.

The United States must be prepared for either eventuality. If the Raúl Castro regime, or another successor regime, decides to move in the direction of economic liberalization, private property rights and market reform, the American business community cannot be expected to stand by disengaged, as is required by current U.S. legislation, while foreign firms move in and quickly arrange the best deals with Cuban partners in all sectors of a transforming economy – tourism, agriculture, natural resources, banking, financial, insurance, construction, shipping and transportation, energy, housing, social services, etc. Once the Cuban economy is open for business, even under a nominally communist



*Coco Taxis waiting for passengers.*

regime, foreign corporations will likely no longer heed the warnings of punitive legal action emanating from the Libertad Act, as the rewards for doing business on the island will easily offset those risks.

If Raúl Castro's regime, or another successor regime, wants to engage with the U.S. economically, the property claims issue must be resolved. The method employed by Cuba to resolve outstanding expropriation claims with European states that it sought to do business with was partial lump sum payment. Those funds were then distributed by the receiving states to their nationals. This would be a favorable method of settlement with the U.S. as well; however, the size of the claims and Cuba's current economic situation render this a remote possibility.

Agreement among Cuban specialists is broad that in lieu of a lump sum payment to claimants, an expedited property claims settlement process is a fundamental requirement of successfully opening up a mutually beneficial relationship between the U.S. and Cuba. One commentator sums up the required dynamic succinctly:

Setting up courts of limited jurisdiction will be a virtual necessity during the transition period in Cuba. Many lawsuits can be expected to be initiated during that period. Indeed, Cuba could experience a surge in litigation similar to those that occurred in other countries transitioning from socialism. Unless measures are taken to expedite judicial proceedings, there could be lengthy delays in the adjudication of cases. The growing caseload will likely require that temporary courts and other judicial institutions having limited jurisdiction be established during the early phase of the transition to handle some of the more frequently litigated matters (e.g., disputes involving property ownership issues).

See Matias F. Travieso-Díaz and Armando A. Musa,  
*Courts of Limited Jurisdiction in a Post-Transition Cuba*,  
39 Vanderbilt Journal of Transnational Law 125, 128-129 (2006).

The instruments for a model Cuba-U.S. Claims Tribunal and Special Cuban Court of Claims outline such measures designed to expedite adjudication of property disputes. The Tribunal is designed to resolve claims against Cuba concerning expropriated property of U.S. nationals and the Court is designed to resolve claims against Cuba concerning expropriated property of Cuban nationals that are now U.S. nationals, but whose claims are still governed by Cuban law.

The Tribunal will have international legal capacity as an arbitral body, but limited jurisdiction. It will consist of a minimum of nine members – one-third appointed each by the governments of Cuba and the U.S. and the remaining third appointed by agreement among the selected two thirds. The Tribunal will have interpretive jurisdiction necessary to accomplish its purpose, authority to promulgate rules of procedure, power to order interim measures of relief, and will apply international law to resolve the claims before it.

Valuation of claims certified by the Federal Claims Settlement Commission shall be given due weight by the Tribunal. Small claims shall be compensated monetarily through a streamlined process. Medium and large claims may be compensated monetarily, or by alternative remedies in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment if the Claimant agrees. Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Tribunal. The Tribunal's awards will be final, binding, and fully enforceable. No claims may be filed more than one year after the Tribunal is established. The Tribunal's expenses will be covered equally by the U.S.

and Cuba. The U.S. may find it necessary to assist Cuba in meeting Cuban obligations in the form of a loan on favorable terms or assistance in obtaining loans from international financial institutions.

The Cuban Special Claims Court will be an independent Chamber within the Cuban judicial system consisting of twelve judges appointed by the Cuban government in consultation with the U.S. No more than half of these judges may be of the same nationality. The sole purpose of the Court will be to resolve property claims by Cuban-American exile claimants against Cuba. The Court shall have authority to promulgate its rules of procedure, and will conduct business according to the arbitration rules promulgated in 1976 by the United Nations Commission on International Trade Law. All cases shall be decided on the basis of civil law.

Small claims shall be compensated monetarily through a streamlined process. Medium and large claims may be compensated monetarily, or by alternative remedies. Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Special Court. The Court's awards shall be final, binding and fully enforceable. No claims may be filed more than two years after the Court is established. The Court's expenses will be covered by Cuba. The U.S. may find it necessary to assist a new government in Cuba in meeting Cuban obligations in the form of a loan on favorable terms or assistance in obtaining loans from international financial institutions.

Because of a lack of trust between Havana and Washington, D.C. since 1959, an initial conversation regarding property settlement is likely to break down, with counterclaims of embargo-related injuries being hurled back at the U.S. Using facilitators will be important in preventing a viable and fair claims process from being rejected simply because it was devised by or carried out through a nation considered hostile to Cuba.

Allaying the fears of the Cuban government will play a big role in its decision to interact with the U.S. on this and other issues. If property claims are resolved, economic reform is undertaken in Cuba, and business partnerships can be struck with America, the massive investment potential of American firms can be leveraged to help lift the country and empower the Cuban people to harness their entrepreneurial spirit for the betterment of all Cubans. The property settlement models envisioned in this Report represent a first essential step in trust-building as well as the first step toward normalization of relations and the flowering of economic activity.

Implementing these models for resolution of property claims will require appropriate adjustments in U.S. policy. The Libertad Act prohibits the U.S. government from negotiating with a successor government in Cuba that is not also a transitional government. Section 205 of Title II establishes a variety of precise measures that must be met in order for a government in Havana to be considered a transitional government with which the U.S. can resume relations.

These precise criteria set forth worthwhile and noble goals for achieving political, associational, and expressive freedom for the Cuban people. Nevertheless, the meticulous details of those criteria in U.S. legislative policy may not provide enough flexibility to the Executive Branch when the time comes to address this issue. Consequently, this Report recommends that the Libertad Act, in particular section 205, be amended to give the President more discretion to determine whether dealing with a successor government would be in the mutual interest of the U.S. and Cuba.

The slow demise of Fidel Castro and the full emergence of the post-revolutionary generation together with a yearning to interact by Cubans on both sides of the straits are forces leading to an opportunity. The U.S. can seize this opportunity with appropriate changes in policy. Among those changes in policy should be creation of the bilateral property claim settlement mechanisms recommended in this Report. These processes will, we project, constitute integral aspects of economic engines for a new Cuba and usher in a new era of mutually beneficial relations between our two nations.

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Respectfully submitted September 30, 2007 by:

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# Report On The Resolution Of Outstanding Property Claims Between Cuba & The United States

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