



EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA: TWO VIEWS

Property Rights in the Post-Castro Cuban Constitution

by

Oscar M. Garibaldi and John D. Kirby

and

**Alternative Recommendations for Dealing
with Confiscated Property in Post-Castro Cuba**

by

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with a Foreword by

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Foreword

Among the many important reforms undertaken by nations in transition from communism to democracy are market reforms. The shift from a state controlled economy to a market economy requires the re-institution of private property rights and the creation of an environment of stability and predictability with regard to those rights. In many transition countries, the re-institution of property rights and the creation of a legal framework supporting those rights have been accompanied by laws attempting to address the claims of persons or entities whose properties were wrongly expropriated without compensation.

During transition, Cuba will likely also re-establish the right to own private property as part of a broader plan of market reforms. Along with these reforms, and because of the importance of giving finality to any resolution of these claims, Cuba will also develop a program to address claims of corporations or individuals, both foreign and domestic, whose properties were expropriated or confiscated by the Castro government. Whatever form these laws take, it is important that they be well thought out and geared towards establishing an effective and efficient legal framework for resolving this particularly complex issue.

The two studies that follow, *Alternative Recommendations for Dealing with Confiscated Properties in Post-Castro Cuba* by Matias Travieso-Diaz, and *The Treatment of Expropriated Property in a Post-Castro Cuba* by Oscar Garibaldi and John Kirby, address this very complex problem and provide alternatives that may be considered in crafting a restitution/compensation program in a post-Castro Cuba. Both authors address fundamental questions which must be answered before any such restitution/compensation program may be effectively drafted including: 1) what type of property should be restored to former owners? 2) to what extent should property owners be compensated for their properties if property is not restored to former owners? 3) will owners of commercial property be treated differently than owners of residential property? 4) what protections should be provided to persons currently occupying residential properties? 5) what rights should be provided to foreign investors or others who have subsequently acquired property interests in property expropriated by the Castro government? 6) where will Cuba obtain the funds to support any restitution or compensation program?

7) how can the rights of former owners be balanced with Cuba's need to jump start a market economy?

In addressing these issues Travieso-Diaz first makes a distinction between the claims of United States nationals, or rather the claims of persons or entities that were United States nationals at the time of expropriation, and those who were nationals of other countries, including Cuba at the time of expropriation. After making this distinction, Travieso-Diaz provides a thoughtful analysis of how both types of claims may be addressed. An interesting aspect of his analysis involves his determination that, irrespective of whether the expropriations were lawful under international law or Cuban law, the expropriations effected a valid transfer of legal title to the Cuban state.

Travieso-Diaz begins with the premise that the Cuban government has valid title to the expropriated property. In adopting this position, he seeks to eliminate the uncertainty created by competing claims to property and seeks to ensure that the disposition chosen by the Cuban government is as final as possible. This determination further leads to the legal conclusion that while Cuba may opt to restore some property to its owners, restitution of property is not required as a matter of law. Having made this assumption, he explores possible solutions for dealing with expropriated property in Cuba.

Travieso-Diaz proposes different alternatives for resolving the claims of United States nationals and Cuban nationals based on the premise that the claims of those groups are based on different legal principles and require different treatment. With regard to U.S. nationals, whose claims are governed by both International law and Cuban law, the author provides various alternatives.

First, he suggests that the claims of United States nationals be settled by the U.S. State Department in the traditionally accepted manner through a government to government negotiation which does not directly involve claimants. This type of settlement generally results in a compensation award far below the true value of the property.

Another alternative is that the claimants be permitted to opt out of the state to state negotiations and negotiate directly with the Cuban government for either, return of the property, investment or tax credits, or any other settlement regarding the property that the claimant and the Cuban government find mutually acceptable. Under this alternative the Cuban

government might still be required to pay out a lump sum settlement to be disbursed to claimants whose claims may not be capable of being resolved in any way other than through the payment of money. These include claims for expropriation of residential property or small farms.

Travieso-Diaz points out that direct negotiations by claimants who opt out of the state to state settlement procedures could be an attractive option for both claimants and the Cuban government because of the flexibility it provides. Claimants could attempt to negotiate investment concessions, payments in commodities, compensation by means of Cuban government or other alternatives. In order to avoid the application of different standards or procedures to different claimants in resolving expropriation claims, Travieso-Diaz suggests that uniform procedures be adopted for use by a specific body or tribunal in addressing these claims.

The final alternative is for US nationals to participate in any claims resolution process established by Cuba for purposes of resolving domestic claims. These could provide different remedies including direct and substitutional restitution, issuance of state obligations. Providing credits on taxes and duties, or other investment opportunities.

Travieso-Diaz posits that Cuban claimants do not have international law to back up their claims and, therefore, these claims must be resolved as a domestic legal and political issue. The author believes that restitution of residential property and small farms would not be possible. Those claimants would be entitled only to compensation. Such compensation would be determined according to some formula established by Cuba and would likely include other methods of compensation other than cash payments due to Cuba's dire financial straits.

Claims to commercial properties, large businesses, factories or manufacturing plants and large agricultural holdings may be handled differently. Those types of properties may be subject to direct restitution if the property is capable of being returned and under certain conditions such as payment of a transfer tax to fund other aspects of development, restrictions on transfer for a certain period, resolution of issues relating to liabilities that attach to the properties (e.g. environmental clean up).

Substitutional restitution may also be considered when the property has been conveyed to cooperatives or divided among small farmers. In this case, Cuba could offer property that is roughly equivalent in value

and or type in lieu of returning the property that was taken from a particular claimant.

A different view regarding restoration of property is provided by Oscar Garibaldi and John Kirby. Garibaldi and Kirby begin with an analysis of specific provisions of the Cuban Constitution of 1940 regarding ownership of property and the rights and obligations of citizens and the state regarding expropriation and confiscation. The authors begin from the premise that the Cuban Constitution of 1940 prohibits confiscation of private property and permits expropriation only for reasons of public utility or social interest and only upon payment of fair and adequate compensation, in cash, to the property owner, prior to the expropriation. Garibaldi and Kirby point out that the Cuban economy was collectivized not “by orderly takings followed by payment of just compensation, but by “outright destruction of the fabric of private property rights.” The authors conclude that the confiscations and expropriations by the Castro government violated the Cuban Constitution and consequently were unlawful. Garibaldi and Kirby also conclude that specific provisions must be made to restore property rights in Cuba and as part of that restoration, Cuba should establish a mechanism to either return expropriated properties to their rightful owners or compensate owners for the wrongful expropriation of their property.

In this the authors differ from Travieso-Diaz who posits that, despite the fact that the provisions of Article 24 were not met and compensation was never paid to any owner of expropriated property, the takings had legal effect and resulted in a valid transfer of title to the expropriated properties to the Cuban state. The failure to pay compensation is regarded by Travieso-Diaz as only a technical violation of the law and one that apparently can be remedied at any time.

Garibaldi and Kirby propose that Cuba provide remedies to claimants, both U.S. and Cuban, whose properties were expropriated and that those remedies be equivalent even if the Cuban claimant's claims are not protected under international law. The authors suggest that it would be unjust as well as politically unpalatable to provide remedies to foreign/ U.S. claimants that are not provided to Cuban claimants.

Based on these principles, Garibaldi and Kirby make numerous suggestions for the restoration of property rights as a whole through incorporation of certain principles in the new Cuban Constitution and other

legislation and also make specific suggestions as to the type of restoration program that should be adopted. Garibaldi and Kirby suggest a restoration program as opposed to a restitution program because it is designed to provide a flexible combination of remedies that include restoration, monetary compensation and compensation in kind (what Travieso-Diaz calls substitutional restitution).

The program proposed by Garibaldi and Kirby acknowledges that in some cases monetary compensation alone is insufficient to compensate a prior owner. Accordingly, flexibility must be provided in order to balance the equities and provide appropriate relief.

The proposed program, which favors restitution, seeks to weigh numerous factors such as 1) the principles at stake, 2) the feasibility of restitution, 3) the physical condition, legal status and current use of the property, 4) the possibility of intervening transfers, 5) the need to foster the productive use of the property, and 6) the financial resources available to a post Castro Cuba.

Original owners and their heirs or successors in interest would be entitled to pursue claims for restitution and any subsequent bona fide holders of the properties, as secondary beneficiaries of the program, would be entitled to compensation. The program makes ineligible for participation, the Cuban state, any Cuban governmental entity, any individual or entity who obtained property through the exploitation of a position of power in the Castro regime, without paying reasonably equivalent value, or anyone who acquired title from any ineligible party without providing reasonable value in exchange for the property.

A critical component of the program is the inclusion of what the authors call the Investment Priority Exception. This allows the authority administering the program to sell the property by public tender where there is an urgent need to promote the productive use of the property. The claimant could participate in this public tender and would receive a return of the purchase price if the claimant is the buyer or compensation if later the claimant is determined to have been the owner of the property.

Other specifics include the right of claimants who obtain a return of the property to have all encumbrances cancelled, and if necessary additional compensation if the property has been damaged. However, if an encumbrance on the property is cancelled the amount of compensation, if any, will be reduced accordingly.

Business enterprises are treated differently, compensation includes interest and requires calculation of the amount of compensation in Cuban pesos and then payment at the buy free market rate in U.S. Dollars. Payment may be in cash or debt obligations of the Cuban Treasury or a combination of those.

Many more details are included in the plan offered by Garibaldi and Kirby and the draft of the proposed restoration plan is well designed and thought out.

The importance of resolving claims to expropriated property should not be underestimated. Foreign aid from and trade with the United States will be unavailable until the claims of at least United States nationals are resolved. (Under United States law, resolution of the claims of U.S. nationals is a precondition to lifting the embargo and permitting United States aid to Cuba to resume). Moreover, without a resolution of these claims, new investments will be slow to come due to the uncertainty of investing in properties with a cloud on title and competing claims to ownership.

The two studies that follow provide two alternatives for resolving this important issue. There are doubtless many possible variations to these plans and many other views as to how the resolution of these claims may be achieved. The views of these authors should provide a basis for creation of a plan of restitution that will benefit claimants, both United States and Cuban, while at the same time establishing a basis for a new, stronger economy in Cuba that will benefit all Cubans as the country moves to democracy.

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PROPERTY RIGHTS IN THE POST-CASTRO CUBAN CONSTITUTION

By

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This paper and its companion piece, “Outline of a Program for the Restoration of Property Rights by a Democratic Cuban Government,” included here as an appendix, are updated and expanded versions of papers published in the 1995 volume of the University of Miami Yearbook of International Law. The authors thank the Institute for Cuban and Cuban-American Studies of the University of Miami for inviting them to update the 1995 papers as part of the Institute’s Cuba Transition Project. The authors gratefully acknowledge the assistance and suggestions of Elizabeth A. Snodgrass and Raymond Atkins for updating the papers and reiterate their thanks for the comments and suggestions made by Brice M. Clagett, Philip R. Stansbury, William H. Allen, and Michael P. Socarras in respect of the originally published work.

Although Covington & Burling has advised clients that have expropriation claims against Cuba, the views expressed in this work are solely those of the authors and do not necessarily coincide with those of any Covington & Burling client.

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I. Introduction

When the Castro regime comes to an end, the Cuban people will face the monumental task of building a new political and economic system out of the remnants of the old. If the recent history of the Western Hemisphere serves as a guide, they will reject Castro's totalitarian legacy and embrace instead the ideas of democracy, free-market economics, and the rule of law. The development of a new political and economic system based on these ideas will require a new constitution, which will lay the foundation for a resurgent Cuba.

Among the principles of that new constitution, none will be more critical to the success of the rebuilding enterprise than the protection of private property rights. The constitutional protection of private property rights is a matter not only of principle, but also of economic necessity. As a matter of principle, a system of private property rights adequately protected by law and free of excessive restrictions is a necessary condition to the development of free-market democracy.¹ Such a system will also be needed as a matter of economic reality for Cuba to have any hope of attracting sufficient investment capital to rebuild its economy. No capital will flow to Cuba in the amounts that Cuba needs, absent strong and credible guarantees that private property and enterprise will enjoy at least as much protection in Cuba as in the competing capital-importing nations of the hemisphere. Strong legal protections for property rights will also foster the growth of the Cuban economy by creating the incentive to use property efficiently.²

We submit in this article a modest proposal concerning how and how much private property rights ought to be protected in a post-Castro Cuban constitution. It is a modest proposal because we address it, in a spirit of cooperation and deference, to those who will have the historic function of creating a new political and economic system for Cuba. We put forth our proposal almodestly, because we are well aware that the making of a constitution is a matter not only of principle and good sense, but also of the interplay of political forces and the forging of political compromises. We hope that our ideas will serve as a principled foundation for the debate that will surely take place upon the ending of the Castro regime.

In the body of this article, we discuss the protection of private property rights in a new Cuban constitution, using as a starting point the property-related clauses of Cuba's 1940 constitution. In the context of those

provisions, we suggest aspects that need revision, or at least reevaluation, to bring constitutional property protections in line with current political and economic experience and thought. In the appendix we set forth, as a proposal to be adopted by a democratic post-Castro government, a program for the Restoration of Property Rights in Cuba. The proposed program is intended to complement and reinforce the property-protection clauses of the new constitution. The Castro regime collectivized the Cuban economy not by orderly takings followed by payment of just compensation, but by outright destruction of the fabric of private property rights. It will be the new government's responsibility to restore those property rights by providing the dispossessed owners, Cuban and foreign, with adequate economic redress, whether in the form of restitution, compensation, or compensation-in-kind.

The restoration of property rights is an imperative of fundamental fairness. It is also a goal supported by sound political and economic reasons. Politically, a property-restoration program will legitimize the new government in the eyes of the former owners and will show to the international investment community that the protection of property rights in the new constitution is not an empty promise. Economically, the program will provide a means of resolving claims on confiscated property and privatizing enterprises and assets still held by the Cuban state. An orderly and predictable program to resolve conflicting claims to property should encourage capital investment by foreign and exiled entrepreneurs. Rapid privatization of state-owned property, especially by means of restitution to dispossessed owners, should promote efficient use of the property, greater productivity, and economic growth. In sum, we view the redress of the wrongs suffered by the dispossessed owners at the hands of the Castro regime as an essential component of the system of property rights to be defined and protected in the new constitution.

II. The 1940 Constitution

The 1940 Cuban constitution was adopted against the background of four decades of internal political turmoil, a legacy of American overlordship, and frequent military interventions. The constitution of 1901, which was the first constitution of an independent Cuba following the Spanish-American War, incorporated what became known as the Platt Amendment, a series of provisions first enacted into United States law as part of the Military Appropriations Act of 1901. The Platt Amendment proclaimed the right of the United States to intervene on Cuba's behalf to protect Cuban independence and to ensure the maintenance of a government adequate to protect "life, property and individual liberty."³ The Platt Amendment remained in effect until 1934.

During the period in which the Platt Amendment was in effect, the United States frequently intervened in Cuban domestic affairs, often to restore order in the aftermath of a presidential succession. Political instability continued after the U.S. interventions ended. A civilian-military revolution in 1933 was followed by a succession of interim civilian governments, which were gradually eclipsed by the rising power of Colonel Fulgencio Batista and the army.⁴

In 1940, a Constitutional Convention was called to write a new constitution in preparation for a return to representative democracy. The convention, which included among its members representatives of all sectors of Cuban political opinion, undertook to settle all outstanding political disputes by crafting elaborate and detailed compromises and incorporating them in the constitutional text.⁵ The resulting charter, adopted as the Constitution of 1940, is a remarkably lengthy and casuistic document. More like a code than a constitution, it comprises a host of provisions that owe more to history and the peculiar circumstances of the time than to a coherent political doctrine. In the area of property rights, for example, the 1940 constitution contained one of the strongest guarantees found anywhere against expropriation of property without full compensation, but it also contained other clauses that paid obeisance to the "social function" conception of property, prohibited the acquisition of large estates, and restricted the property rights of foreigners and the alienability of property owned by the State.

The 1940 constitution came into force on 8 July 1940, and remained

in effect until 1952. On 4 April 1952, Fulgencio Batista, who had seized power by overthrowing the elected government, replaced the 1940 constitution with a new Constitutional Act designed to serve as the instrument of governance until new elections were held. The elections were won by Batista, the sole candidate who stood, and the 1940 constitution was reinstated on 24 February 1955. Less than two years later, on 2 December 1956, Batista issued a decree suspending the constitutional guarantees in several provinces for 45 days.⁶ That decree was renewed, with two brief respites, every 45 days until 17 May 1958. On that date, a Special Act was passed declaring a state of national emergency, which was still in effect when Batista fled Cuba on 1 January 1959.

When Fidel Castro came to power on 1 January 1959, the 1940 constitution was once again proclaimed the law of the land. Nevertheless, in the three weeks between 13 January and 7 February 1959, the constitution was amended, by revolutionary fiat, no fewer than five times. The amendments primarily had the effect of concentrating power in the hands of Castro, revoking constitutional guarantees against retroactive criminal statutes, and allowing confiscation of property owned by those individuals who were branded as accomplices of the Batista regime. On 7 February 1959, only five weeks after taking power, Castro abandoned all pretenses and discarded the 1940 constitution in favor of a new Fundamental Law.

The 1940 constitution has a strong symbolic value in the eyes of many Cubans, for it is generally regarded as the sole Cuban constitution that was created under a true representative mandate and without undue foreign influence. It was used by Castro as a mantle during the events leading up to the overthrow of Batista in 1959 – only to be cast away as soon as it was no longer needed. The 1940 constitution is still regarded by many Cuban exiles as the last source of political legitimacy in Cuba and the legal foundation of their claims. In dissident circles, the view that the 1940 constitution should form the basis for the first free constitution of a post-Castro Cuba appears to be widely held.

With due regard for these sentiments, we suggest that the provisions of the 1940 constitution ought not to be accepted uncritically. The political, social, and economic circumstances of post-Castro Cuba and of the world into which the new constitution will be brought are very different from those that existed in 1940. In these circumstances, many of the polit-

ical compromises reflected in the 1940 constitution are no longer relevant and may be inappropriate to post-Castro Cuba. Accordingly, the property provisions contained in the 1940 constitution should be reexamined to assess whether they will comport with the values and needs of Cubans in the post-Castro era.

III. The Protection of Private Property Rights in the 1940 Constitution

The clauses of the 1940 constitution that are more or less directly related to the protection of property rights can be classified, for the purpose of analysis, in two categories: (i) the *core* provisions, which determine the basic extent of the property rights protected by the constitution and the nature of the protection, and (ii) the *non-core* provisions, which further specify or limit the scope of certain property rights in particular circumstances.

The core provisions are:

- Article 24, which prohibits confiscations and lays down the requirements for the constitutional validity of expropriations;
- Article 87, which recognizes the legitimacy of private property and refers to the boundaries of the concept;
- Article 23, which prohibits retroactive laws affecting civil obligations; and
- Article 92, which provides for the protection of intellectual-property rights.

The non-core provisions related to the protection of property rights are the following:

- Article 33, which authorizes the seizure of books, records, motion pictures, or other publications that attack the honor of persons, social order, or public peace;
- Article 43, which guarantees the right of married women to control their own property;
- Article 88, which excludes the subsoil from private ownership and requires that certain assets and businesses be put to economic use in a manner that promotes the general welfare;
- Article 89, which gives the State a preemption right in every forced sale of real estate or securities representing real estate;
- Article 90, which proscribes latifundia and authorizes restrictions on the ownership of land by foreigners;
- Article 91, which allows farmers to set aside certain plots of agricultural land as “family property” (homestead) and restricts

- the alienability of such land;
- Article 93, which prohibits perpetual encumbrances on property for the benefit of private persons;
 - Article 252, which restricts the alienability of property owned by the State;
 - Article 273, which provides that the State is entitled to a portion of any increase, resulting solely from State action, in the value of real estate;
 - Article 274, which regulates leases and other contracts related to agricultural land;
 - Article 275, which authorizes restrictions on the vertical integration of the sugar industry; and
 - Article 276, which proscribes laws and regulations that create or have the effect of creating private monopolies.

In the following sections, we offer a brief analysis and a critical appraisal of the core and non-core provisions listed above.

A. The Core Provisions

1. Article 24

The cornerstone of the system of protection of property rights established by the 1940 constitution is Article 24. This provision, which is included in Title IV of the constitution, under the heading “Fundamental Rights,” reads as follows:

“Confiscation of property is prohibited. No one shall be deprived of his property except by a competent judicial authority, for a justified cause of public utility or social interest, and after payment of the respective indemnification, fixed judicially, in cash. Non-compliance with these requirements shall give rise to the right of the person who has been expropriated to be protected by the courts and, if the case calls for it, to receive restitution of his property.

The genuineness of the cause of public utility or social interest and the need for the expropriation shall be determined by the courts in the event of a challenge.”⁷

The basic guarantee established by this article is that confiscation of property is forbidden. “Confiscation,” in the sense in which this term was used in the constitutional debates, means “every taking of private property by a governmental authority without payment of the required compensation, whether directly or indirectly, through legal procedures or by force, by way of penalty or otherwise.”⁸ A proposal to provide for progressive land taxes was rejected by the Constitutional Convention after spirited debate on the ground that it would amount to indirect confiscation and lead to the collectivization of property.⁹

Article 24 authorizes non-confiscatory takings of property (expropriations) based on reasons of public utility or social interest and preceded by the payment of due indemnification. Although the initiative for an expropriation may lie with the political organs of the government, it is for the judiciary to determine the indemnification to be paid and to decree the transfer of title once the constitutional requirements are met. It is also for the courts to determine whether the reasons of public utility or social

interest invoked by the government are genuine or a mere pretext and whether the expropriation is necessary to achieve the desired ends. Although the measure of compensation is not made explicit, the term “indemnification” (“*indemnización*”) indicates that compensation must be sufficient to leave the owner *indemne*, that is, free of any harm (*damnum*). The indemnification must be paid, in cash, before the expropriation takes place.

Article 24 is one of the strongest guarantees against uncompensated takings that can be found in any constitution, past or present.¹⁰ There is no question that its basic structure and provisions should be preserved in the new Cuban constitution. Nevertheless, since the new constitution will be interpreted and applied by an untested judiciary, it would be wise to introduce a greater degree of precision in this clause, at least as regards the measure of compensation. It should be made explicit that the required indemnification must be equal to the full fair-market value of the property taken, disregarding any diminution in such value resulting from any announcement or threat of expropriation or any other injurious act against the property or against the owner.

2. Article 87

Article 87, the first provision of Section Two (“Property”) of Title VI, contains a further guarantee of the legitimacy of property rights and a rough characterization of the scope of those rights: “The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and with no limitation other than those established by Law for reasons of public necessity or social interest.”¹¹

The guarantee contained in this clause is framed as the recognition by the State of the existence and legitimacy of private property, to the extent specified in the same provision. This formula is unfortunate, because it seems to imply that private property is guaranteed not as a matter of fundamental right but as a gracious concession by the State.¹² In fact, the apologetic tone of this provision accurately reflects the intensity with which left-wing parties opposed it at the Constitutional Convention.¹³ The constitutional protection of private property rights was not a universally accepted political goal in the Cuba of 1940. In a post-Castro constitution, the legitimacy of private property should be proclaimed in the same

emphatic terms as in the case of other fundamental rights.¹⁴

Article 87 protects private property “in its broadest concept as a social function and with no limitation other than those established by law for reasons of public necessity or social interest.”¹⁵ Leaving aside for the moment the reference to property as a “social function,” this clause has the effect of prohibiting limitations on the scope of private property rights other than those that meet two individually necessary and jointly sufficient conditions: (i) that the limitation be established by law, and (ii) that it be adopted for reasons of public necessity or social interest.

The requirement that limitations be established by law (often referred to as the principle of legality) is a fundamental procedural guarantee against unauthorized or arbitrary limitations. In comparable settings, it has been interpreted as the principle that no limitation on property or other rights is valid unless it is based on a substantive law that is (i) reasonably precise, to enable the citizen to foresee the consequences of a given action, and (ii) reasonably nondiscretionary, to protect the citizen against arbitrary interferences by public officials in the citizen’s exercise of those rights.¹⁶ This principle excludes, for example, limitations that have no legal basis, or are imposed at the whim of public officials, or are adopted by *ad hoc* pronouncements aimed at particular persons or groups, or are created by rules so open-ended that the owner cannot know in advance the limits placed upon the use and enjoyment of his or her property.¹⁷ In addition, since the Cuban legal system once was and almost certainly will again be based on statutory law, the phrase “established by law” should be interpreted to require that limitations be based on laws enacted by the Congress, as distinguished from limitations based merely on administrative regulations or judicial precedent.¹⁸ So understood, this requirement should be retained in the new constitution.

The idea that property rights may be limited for reasons of general interest or general utility (to use concepts that are widely used in politico-philosophical discourse), and only for such reasons, is sound as a principle, though it is often subjected to egregious abuses in its application. Some version of this principle should be included in a post-Castro constitution, but it would be prudent to describe with greater precision the reasons that may legitimately be invoked by the State to justify limitations on property rights. In this respect, the concepts used in Article 87 could stand clarification. “Public necessity” appears to be narrower than

“social interest” and also narrower than “public utility” (a concept that appears in Article 24), but it is not clear whether the first concept is subsumed under any of the other two. Nor is it clear whether the concept of “social interest” is coextensive with, or broader than, the traditional notions of “public interest” or “general interest” that are often found in liberal constitutions – liberal, that is, in the classical sense of the term.

In any case, it would be desirable to specify that, beyond a certain threshold at least, any limitation on private property rights amounts to an expropriation and must be subject to the payment of compensation in accordance with the principles of Article 24. Confiscation of property is no less destructive of economic and personal freedom if it is achieved insidiously through regulation. One of the principal reasons for requiring a government to pay compensation for takings asserted to be in the public interest is to prevent that government from abusing the powers it has.¹⁹ The same principle applies to regulatory takings. Most, if not all, regulations passed by any legislative or administrative body will result in a slight diminution in value of someone’s property. It is well beyond the scope of this article to try to offer a coherent doctrine of when and how a post-Castro government should compensate private parties for regulatory takings. There has always been an “uneasy tension between the right of an individual to be secure in their property and the power of the government to regulate property rights.”²⁰ Nevertheless, the framers of the new constitution should find a formula to make it clear that this tension ought not always to be resolved in favor of the government.

Article 87 recognizes the legitimacy of private property “in its broadest concept as a social function.” The doctrine that private property is (or has) a social function, once fashionable and still common in Latin America, derives from the so-called social doctrine of the Roman Catholic Church. According to this doctrine, private property is legitimate only to the extent that it fulfills a social function, i.e., that it is used and enjoyed in such a way that it furthers the common good.²¹ A critique of this conception from a philosophical perspective would exceed the scope of this paper. Suffice it so say that, even if this doctrine were sound as moral theory, it would be unnecessary and potentially dangerous to incorporate it in the new Cuban constitution.

After the fall of Castro, Cuba will desperately need to strengthen the institution of private property to develop markets and to attract outside

investment. To attain these goals, the new constitution must provide for a robust form of protection for private property rights, subject only to such limitations as are prescribed by law and are based on reasonably precise legitimacy criteria set forth in the constitution itself. In contrast, one critical role of the doctrine of the social function of property is to de-legitimize certain ways in which property may be used and enjoyed and, correspondingly, to legitimize restrictions imposed by the State to curtail such use and enjoyment – all on the basis of criteria that are extraneous to the constitution and open-ended, for they depend on the evolving tenets of the “social function” doctrine. If this doctrine were incorporated in the new constitution, particularly if it became, as in Article 87, a component of the definition of the property rights that the constitution protects, it could easily be used (or misused) to justify limitations on property rights, derived from the nebulous notion of “social function,” beyond those established by law for reasons expressly declared legitimate by the constitution.

None of these observations is meant to deny or to preclude the influence of the “social function” doctrine as a moral theory. The legislators in post-Castro Cuba may resort to this theory, or to any other system of moral or political norms, for inspiration or guidance in the crafting of limitations on property rights. In doing so, however, the legislators should abide by the conditions imposed by the constitution for the legitimacy of such limitations.

3. Article 23

Article 23 protects another form of private property: rights that are the correlatives of civil obligations arising out of contracts or other acts or omissions. The protection takes the form of a nearly absolute bar on retroactive legislation affecting those rights.²²

To understand the scope of Article 23, it is necessary to consider Article 22, which authorizes, under severely restrictive conditions, retroactive non-criminal legislation. Under Article 22, non-criminal laws shall have no retroactive effect, unless the following conditions are met: (i) the law itself must provide for such an effect; (ii) the retroactive effect must be based on reasons of public policy, social utility, or national

necessity expressly stated in the law; (iii) the law must be approved by two-thirds of the total membership of each legislative chamber; (iv) the law must provide for compensation for damages that the holders of rights vested under prior law may suffer as a result of the retroactive effect of the law; and (v) the law ceases to be valid if it produces effects contrary to Article 22, that is, if it has confiscatory consequences. In addition, Article 22 provides that the grounds for the retroactivity of the law may be challenged before the Tribunal of Constitutional Guarantees, which cannot decline to rule on the matter for any reason whatsoever.

Article 23 contains a further restriction on the validity of retroactive legislation. The first sentence of that provision reads as follows: “Obligations of a civil nature that arise out of contracts or other acts or omissions that give rise to them cannot be annulled or altered by the Legislative Branch or the Executive Branch and, consequently, no laws shall have retroactive effects in respect of such obligations.”²³

The remainder of Article 23 sets forth a limited exception to the rule just quoted. Under the exception, the State is permitted to suspend the exercise of legal actions based on such civil obligations, but only in a case of a grave national emergency and only for such time as may be reasonably necessary. Any such suspension would also be subject to the first four requirements set forth in Article 22 and could be challenged by the same procedure established in that provision.

The principles of Articles 22 and 23 constitute reasonable compromises between the interests of those who hold property rights derived from contracts and other civil obligations and the legitimate interests of the public. Those principles should be retained in a post-Castro constitution.

4. Article 92

Article 92 extends constitutional protection to intellectual property. It provides, in its first paragraph, that “[e]very author or inventor shall enjoy the exclusive ownership of his work or invention, subject to the limitations determined by Law regarding time and form.”²⁴ It is clear that this principle should be incorporated in the new Cuban constitution.

In contrast, the second paragraph of Article 92, which provides that trademarks used with an indication that the product is of Cuban origin

shall be null and void if used to cover articles manufactured outside Cuban territory, seems better suited to ordinary legislation.^{XXV} In essence, this provision bars one type of trademark fraud. Whatever the merits of the rule, it hardly appears necessary or advisable to include this level of detail in a post-Castro constitution. A constitution should be the expression of the fundamental values and choices of the nation, not a repository of mundane government regulations. Trademark fraud does not rise to the level of fundamental individual rights, nor is it a component of the basic structure of government. We recommend that this topic be left out of the new constitution.

B. The Non-Core Provisions

1. Article 33

The first paragraph of Article 33 guarantees to every person the right to express his or her thoughts, free of prior censorship, in any form, oral or written, and by any available medium of communication.²⁶ This principle is limited by the second paragraph of Article 33, which authorizes the seizure, by court order, of books, phonograph records, films, newspapers, or other publications that “attack the honor of persons, social order, or public peace.”²⁷ This limitation affects not only the freedom of expression guaranteed by the first paragraph of Article 33, but also the property rights of those who own the books, phonographic records, films, newspapers, or other publications that the government is authorized to seize.

The drafters of a democratic post-Castro constitution would be well advised to be wary of these restrictions. While no one can deny that personal honor, social order, and public peace are worthy of legal protection, such protection should not be so intrusive as to become a pretext for the abrogation of freedom of expression, private property, or other fundamental rights. In this respect, the limitation imposed by the second paragraph of Article 33 is on its face exceedingly broad and open to abuse. A provision allowing the seizure of expressive materials on the ground that they attack a person’s honor could very well be used, for example, to support the seizure of a book or newspaper article that criticizes government officials or other persons who play important roles in the life of the nation. Similarly, allowing the seizure of such materials on grounds of

preserving social order or public peace may well lead to the suppression of political speech. Even the potential for such seizures may inhibit freedom of expression as well as the enjoyment of property rights over means of communication.

The difficulties presented by this provision illustrate the intimate relationship between freedom of speech, which is the cornerstone of a democratic system of government, and property rights. In our view, a renascent Cuban democracy should not be burdened with a constitutional provision that broadly constrains both freedom of speech and property rights and in so doing offers to future governments a way back to the totalitarian past.

2. Article 43

Article 43 sets forth basic principles for the legal protection of marriages and the family. It provides, among other things, that every married woman shall have the right to control her own property, including the proceeds of her labor, without her husband's permission.²⁸ This is a special application of the principle, also established in this article, that marriage shall be regulated on a basis of absolute legal equality between the spouses.²⁹

These provisions abolish the ancient disability imposed on married women as regards the management and disposition of their own property. In so doing, they expand the universe of individuals whose property rights enjoy constitutional protection. For reasons of elementary fairness as well as economic efficiency, these principles should unquestionably be retained in a post-Castro constitution.

3. Article 88

The first paragraph of Article 88 provides that all subsoil rights belong to the State, which is authorized to grant concessions for the exploitation of those rights in a manner to be prescribed by law.³⁰ This principle is technically a restriction on the scope of property rights, for it is a departure from the traditional doctrine of vertical property boundaries, under which an owner of land has rights in his property *a coelo usque ad centrum*. But this doctrine has been narrowed in many coun-

tries, especially in the areas of overflight and mineral rights, to the point that private ownership of all subsoil rights may now be the minority rule, particularly in Latin America.³¹ Whether and to what extent subsoil rights in Cuba should belong to the State, as distinguished from the owner of the surface, is a public policy decision that must be made by the Cuban people. If state ownership of subsoil rights is the preferred solution, those rights should be economically exploited by concessions granted to private entities. The constitutional protection of property rights should encompass the rights arising out of such concessions.

The second paragraph of Article 88 sets forth additional restrictions on the use and enjoyment of certain kinds of property. It provides that “[l]and, forests, and concessions for the exploitation of the subsoil, means of transport, and any other public service enterprise shall be exploited in such a manner as to promote the general welfare.”³² To the extent that this mandate exceeds the limitations authorized by Article 87, it is overbroad, because it fails to distinguish cases in which the property or enterprise constitutes a monopoly from cases in which it does not. (Since Article 276 prohibits private monopolies in commerce, industry, and agriculture, the second paragraph of Article 88 may apply only to non-monopoly cases). While it may be sound policy to regulate “natural” monopolies or other permitted monopolies in the name of the general welfare, the control of non-monopolistic enterprises should be left, in principle, to the free market. The framers of the post-Castro constitution should consider discarding this paragraph, relying instead on such limitations as may be adopted under Article 87. Alternatively, the framers should, at least, limit the rule of this paragraph to such monopoly enterprises as they may decide to tolerate notwithstanding the principle of Article 276. Still more useful would be a provision that would require the State to promote competition in the grant of public concessions and in the economy at large.

4. Article 89

Article 89 reserves for the State a preferential right to purchase (*derecho de tanteo*) in any forced sale of real estate or securities representing real estate.³³ The expression *derecho de tanteo* indicates that the State may exercise its preemption right at the same price offered by the highest private bidder in any such sale. This provision amounts to a

restriction on the property rights of both the seller and the frustrated buyer of the property.

The rule of Article 89 was probably aimed at preventing the conclusion of forced sales at artificially low prices resulting from collusion among prospective bidders.³⁴ Whatever the merits of this policy, giving the state preemptive rights would promote public ownership of property at a time when the Cuban State should pursue the opposite goal. Besides, in a noncollusive sale, the existence of the State's right of preemption would tend artificially to depress the price by discouraging potential bidders from participating in the sale. For these reasons, it would be wise to leave this provision out of the new constitution and rely on ordinary legislation to address the problem of collusion in forced sales.

5. Article 90

The first paragraph of Article 90 provides that large estates (*latifundia*) are "proscribed" and that laws shall be passed to break up such estates by specifying the maximum amount of land that a person or entity may hold for each particular type of land use.³⁵ This provision was drafted as a means of combating what was viewed as the excessive accumulation of land in the hand of a few individuals, which had given rise to large landed estates. But while *latifundia* may have been a severe problem in Cuba in 1940, it is neither efficient nor appropriate from the viewpoint of a modern capitalist system to grant the government the ability to exercise such broad control over property ownership. The maximum amount of property that an individual or entity may own for a particular use should be determined by the market return of that use, not by government fiat. Leaving such power in the hands of the government would almost certainly lead to an inefficient use of resources and would retard economic development, something post-Castro Cuba can ill afford.

The second paragraph of Article 90 provides for legislation to restrict the acquisition and possession of land by foreign individuals and companies and to promote reversion to Cuban ownership.³⁶ Given the situation in the years prior to 1940, during which foreign (primarily United States) interests owned or controlled the majority of the land and equipment used in the sugar industry, it is understandable that the drafters of the constitution viewed reacquisition of land from foreign interests as a constitution-

al issue. In post-Castro Cuba, however, such a provision would have the effect of stifling the needed inflow of foreign investment capital.

In sum, the ideas embodied in Article 90 of the 1940 constitution do not seem appropriate for post-Castro Cuba. Economic efficiency, through operation of market forces, should dictate the size of individual land holdings. Foreign investment, as many countries in Latin America discovered after long periods of decline, is not an instrument of economic colonialism (as it was perceived to be in an earlier era), but rather the only available source of much-needed capital to modernize stagnant economies. Cuba, which is geographically closer than any other Latin American country to the United States' large east-coast consumer market, is ideally situated to benefit from foreign investment in manufacturing operations for export to the U.S. market. But to take advantage of this favorable position, potential investors must be assured of equal treatment and freedom from over-regulation of the resources market. For these reasons, neither Article 90 as written nor the ideas it represents should be included in a new Cuban constitution. On the contrary, one of the priorities of a post-Castro government should be to enter into a broad network of bilateral and multilateral treaties for the promotion and protection of foreign investment.³⁷

6. Article 91

Article 91 allows the head of a household who owns a rural property and inhabits, cultivates, and directly exploits such property to designate a portion of it (not exceeding 2,000 pesos in value) as "family property," rendering it exempt from taxes and attachment, but not alienable by him.³⁸ This provision is similar to "homestead" laws adopted in some other countries for the purpose of protecting family farmers and ensuring that they will not be deprived of their means of basic subsistence.

It is important to realize, however, that if this provision applied to land of more than a very modest value, it would become an important barrier to the free alienability of agricultural property, which is critical to the efficient use of land and other resources. At this point in Cuba's history, full utilization of land and a farmer's ability to obtain credit will be of prime importance to Cuba's development. (The possibility of encumbering crops may not be sufficient to obtain financing for capital improve-

ments such as farm machinery.) The drafters of the new Cuban constitution should consider these implications carefully before adopting a “family property” provision that would allow a significant portion of the country’s agricultural land to be withdrawn from the market.

7. Article 93

Article 93 prohibits perpetual encumbrances in the form of *censos*³⁹ or similar restrictions, unless established for the benefit of the State or in favor of public institutions or private charities.⁴⁰ Permanent encumbrances, by their nature, prevent land from being put to its most efficient use. The general prohibition established in this article is therefore sound and should be retained in the post-Castro constitution. As for the exception contemplated in the article, permanent restrictions for the benefit of state entities and private charitable institutions would prevent the most efficient use of property just as much as would do similar restrictions for the benefit of other entities. We perceive of no good reason for such an exception.

8. Article 252

Article 252 contains a set of restrictions on the alienability of State property.⁴¹ It provides that property owned by the State as if it were a private person may not be disposed of or encumbered unless the following conditions are met: (i) The divestiture or encumbrance must be authorized by special act of the Congress, adopted for reasons of social necessity or convenience by a vote of two-thirds of each chamber; (ii) if the divestiture is a sale, it must be carried out by public tender; and (iii) the proceeds of the divestiture must be applied to creating jobs, providing public services, or meeting public needs. As an exception, if the divestiture or encumbrance is carried out pursuant to a national economic plan approved by a special act of the Congress, it may be authorized by ordinary legislation and the requirement of a public tender does not apply.

It is not clear why the drafters of this article sought to put these obstacles in the way of the alienation of State property.⁴² Perhaps this provision reflects a bias toward State ownership or a desire to prevent government corruption. Be that as it may, in a democratic post-Castro Cuba, it

would be perverse to put excessive restrictions on the efforts of the new government to make the most efficient use of the country's resources. In particular, it would be most unwise to obstruct the new government's ability to privatize state enterprises and thus reduce the size of the public sector inherited from the prior regime. With this in mind, it seems a better course to refrain from including a provision such as Article 252 in the new constitution. Instead, the legislature should be expressly authorized to sell or lease State-owned properties through the ordinary legislative process.

9. Article 273

Article 273 provides that an owner of real estate whose property increases in value solely as a result of action by the State, a province, or a municipality must turn over to that entity a portion of that increase as determined by law.⁴³ This article appears to grant to the various levels of government a share of any increment in the value of land resulting from events such as the installation of a water line serving the land, construction or improvement of a nearby public road, or other types of public works directly benefiting the property.

It is uncertain, however, whether Article 273 would apply to increases in value that may be attributable to general infrastructure works, such as a harbor or an airport, which may benefit a region (or the country as a whole), but not necessarily any piece of property in particular. Nor is it clear whether the State could claim a share of increments in land values attributable to its general economic policies. Further, this article leaves open issues such as how the increase in value would be calculated, what the State's share would be, and how it would be paid to the State.

Apart from these uncertainties, the very principle embodied in Article 273 is objectionable. One can imagine a situation in which a municipality may construct a paved road adjacent to the property of several individuals or entities, without the landowners' agreement or even desire for such a road, and then assess them an amount representing the municipality's statutory share of the increment in the property values attributable to the new road. If the properties are subject to property tax and the added values are used to increase the tax base, the owners may end up paying for the added values over and over again.

In sum, the rule of Article 273 is open to substantial abuse. If a piece of property increases in value solely as a result of improvements made by the State, the State should recover the value of the improvements only through taxation, whether in the form of special tax assessments or regular taxes applied to the increased tax base of the property.

10. Articles 274 and 275

Article 274 restricts leasing and farming rights related to rural property.⁴⁴ It does so by providing for the regulation of leases, cane-planting, and sharecropping contracts concerning such properties, and by specifying in considerable detail the matters to be regulated and the nature of the restrictions to be established. Article 275 requires the passage of legislation to regulate planting and grinding of sugar cane by sugar mills, to prevent vertical integration of the sugar industry.⁴⁵

These restrictions reflect the peculiar circumstances existing in Cuba in 1940: the overwhelming role of the cane sugar industry in the Cuban economy, the extent of government intervention in that industry, and the perceived need to protect small lessees and sharecroppers from exploitation by large landowners and sugar mills. Whether or not these provisions were justifiable in 1940, they are now relics of a bygone era. The drafters of the new constitution will have to decide, on the basis of the economic and social conditions left behind by the wreck of the Castro regime, whether small farmers are in need of special protection and whether strict regulation of the sugar industry makes any economic sense. If they so conclude, they may wisely address the problem through ordinary legislation rather than by inflexible constitutional mandate.

11. Article 276

Article 276 renders null and void any statute or other legal provision that creates a private monopoly or that regulates commerce, industry, or agriculture in such a way as to produce the same result.⁴⁶ It also calls for legislation to prevent monopolization of commercial activities in industrial and agricultural establishments.

The principle of competition underlying Article 276 is generally recognized as one of the pillars of a modern capitalist economy. It should

undoubtedly be enshrined in the new Cuban constitution. In drafting an appropriate provision, the framers of the new charter should consider expanding the principle to apply not only to the regulation of commerce, industry, and agriculture, but also to other economic activities such as labor and the professions.⁴⁷

IV. Conclusion

In analyzing how property rights should be protected by a democratic Cuban constitution, it is natural to use as a point of departure the provisions of the 1940 constitution. The 1940 constitution, which is widely regarded as the product of a free and representative political process, still commands respect and enjoys legitimacy among the heirs to the democratic Cuban tradition. For all its legitimacy, however, the 1940 constitution largely reflects the issues, conflicts, ideologies, circumstances, and political compromises of the 1930s. At least in the area of property rights, the 1940 constitution sometimes speaks in accents that, at the dawn of the twenty-first century, are no longer easy to recognize.

That is why we have suggested changes aimed at bringing the provisions of the 1940 constitution into harmony with the democratic, free-market revolution that has swept much of Latin America and Eastern Europe during the last two decades. The regime of Fidel Castro has left Cubans in chains and in tatters. As other Latin American countries have learned, political and economic freedom, not government paternalism, allows individuals and communities to rise from poverty, exercise their creative and entrepreneurial talents, and pursue their own visions of happiness. No political and economic freedom can develop and endure, however, without strong protection for the right to own and to enjoy property under the discipline of the market.

In this light, we suggest that among those provisions of the 1940 constitution related to property rights, what we have called the core provisions (Articles 24, 87, 23, and 97), ought to be incorporated in the new post-Castro constitution subject to a few important changes. The non-core provisions should be approached more selectively. Some of them (Articles 43, 93, and 276), or at least the principles underlying them, are unobjectionable and should be retained. Others (Articles 33, 90, 252, 273,

and the second paragraph of Article 88) are largely inconsistent with the principles of a free market and a free society or with the economic needs of present-day Cuba and should be left out of the new constitution. Still others (Article 91 and the first paragraph of Article 88) may or may not be acceptable, depending on certain basic political decisions to be made by the representatives of the Cuban people. Finally, certain provisions (Articles 89, 274, 275, and the second part of Article 92) should be the subject of ordinary legislation, rather than constitutional mandate.

Deciding what should be recognized as property rights and how much those rights ought to be protected by a post-Castro democratic constitution will involve fundamental political choices which must be made at the appropriate time by the genuine representatives of all Cubans. Those choices will involve not only the application of political and economic theories, but also complex prudential judgments based on the history, traditions, culture, and aspirations of the Cuban people. The authors, as non-Cubans, offer the suggestions contained in this paper in a spirit of modesty and deference to those who will have the monumental task of rebuilding Cuban society and institutions on the rubble left behind by the Castro regime.

Appendix: Outline of a Program for the Restoration of Property Rights by a Democratic Cuban Government

I. Introduction

The collectivization of the Cuban economy was accomplished by the Castro regime primarily through confiscations and forced transfers of private property owned by Cubans and foreigners. Since little or no compensation was paid, a post-Castro government should be prepared for an avalanche of claims from dispossessed owners, Cuban and foreign, for restitution of their properties or payment of just compensation. As long as those claims are left unresolved by the new government, title and other rights to confiscated properties will remain unsettled, and that uncertainty will hinder the development of stable markets and discourage the large-scale investments required for the reconstruction of the Cuban economy.

Therefore, one of the early tasks of a post-Castro government should be to devise a program to resolve, in a definitive manner, the property claims of the dispossessed owners. This paper represents our contribution to that task. We propose, in the form of an outline, a Program for the Restoration of Property Rights to be adopted by a democratic Cuban government. The proposed Program (we shall call it the Program, for short) is *restoration* program, as distinguished from a mere restitution or compensation scheme, because it is designed (i) to provide those who have meritorious claims with a flexible combination of remedies (restitution, compensation, and compensation-in-kind) and (ii) to allow for the possibility of reestablishing, to the extent physically possible and economically feasible, property rights and legal relationships that were destroyed by the Castro regime. The restoration of property rights should be, by its nature, a one-time occurrence. At the completion of the Program, property rights would be finally settled and entitled to full, permanent protection under the new constitution discussed in the first part of this article.

The central purposes of the Program are to return most property to the private sector, to settle contested property rights, and to treat dispossessed owners fairly. We recognize that a simple way of settling contested titles would be to ratify whichever titles exist at the time the Castro regime comes to an end and to give every prior claimant some form of monetary

compensation. Nevertheless, monetary compensation, even that which satisfies the strictest legal requirements, rarely makes a dispossessed owner whole.⁴⁸ Even if the government has sufficient funds to pay fair market value for the property, in some cases (such as a family home or business) that value may be considerably less than the subjective value of that property to the owner.⁴⁹ In those circumstances, monetary compensation alone would be inadequate, in terms of fairness, to compensate those who have been deprived of their property. If a property-settlement program were reduced to a contest between private owners dispossessed by the Castro regime and private owners who took title from the Castro regime (with knowledge or reason to know that the property had been confiscated), we believe that the balance of equities would favor the original owners. The Program does reflect this equitable choice, but as only one element of a complex, balanced scheme.

In devising the Program, we have weighed a multitude of factors such as the principles at stake; the feasibility of restitution; the physical condition, legal status, and current use of the property; the possibility of intervening transfers; the need to foster the productive use of the property; and the financial resources expected to be available to a post-Castro government. We have also considered the experience of other former socialist states in formulating and administering comparable programs.⁵⁰

A primary goal of the Program is to treat Cuban and non-Cuban claimants alike under standards no less favorable than those required for non-Cubans under international law. Under international law, non-Cubans whose properties were taken by the Castro regime without just compensation are entitled to certain standards of protection and certain means of redress, including restitution of the property or, if restitution is not feasible, payment of the fair market value of the property at the time of the taking, with interest at market rates from that time to the time of payment.⁵¹ Cuban claimants whose properties suffered the same fate ought to be entitled, as a matter of fairness and sound policy, to the same standards of protection and means of redress.

The Program is intended to provide a comprehensive legal framework for the orderly restoration of property rights that were confiscated, forcibly transferred, or otherwise taken or seized from the lawful owners by the Castro regime, in violation of the principles of the Cuban constitution of 1940 or those of international law. Within this compass, the

Program would apply to all kinds of property rights, including ownership, other interests in property, contract rights, and intellectual property. The Program would not apply, however, to claims that have been finally settled by international adjudication or agreement between the Cuban State and the State of which the claimant is a national, as long as those settlements have been paid. Nor would it apply to claims for the violation of other rights, such as claims for wrongful death, torture, or imprisonment inflicted by the agents of the Castro regime. These claims raise issues that are not suitable for resolution in a program designed to redress property claims. Compensation for such claims should be provided under a separate program.

The Program is designed to provide a remedy to the dispossessed holders of the covered property rights, regardless of nationality or citizenship. The remedy may be restitution, compensation, or compensation-in-kind. Restitution would be the preferred remedy, unless it is physically impossible, economically impracticable, or injurious to the public interest. (In the case of an occupied residential building or unit, there would be a rebuttable presumption that restitution would not be in the public interest). If restitution were inapplicable, the ordinary substitute remedy would be compensation in an amount equal to the full market value of the property at the time of dispossession, plus interest. As an alternative to restitution or compensation, the authority administering the Program would have the power to offer, subject to the claimant's acceptance, compensation-in-kind. Compensation-in-kind would be another property held by the State, preferably of a kind or value comparable with those of the property in question.

The Program reaffirms the property rights of all beneficiaries, including both original owners who suffered dispossession at the time or in the wake of the revolution and current bona fide holders of property. The former, as primary beneficiaries of the Program, will generally be entitled to restitution of their property. The latter, as secondary beneficiaries, will generally receive compensation. Foreign investors who acquired property from the Castro government in exchange for payment of reasonably equivalent value would be entitled to compensation, a solution that should satisfy Cuba's obligations under any applicable bilateral investment treaty and customary international law.⁵² Individuals and entities that acquired property through exploitation of a position of power or

influence in the Castro regime or that acquired property from the Castro government without paying reasonably equivalent value would be ineligible to claim under the Program.

To prevent the general restoration of property rights from having any adverse impact on the Cuban economy, we have included what we call the Investment Priority Exception as a central feature of the Program. Whenever there is an urgent need to promote the productive use of a piece of property or business subject to the Program, the authority administering the Program would be empowered to sell that property or business to the private sector, by public tender. In such cases, the claimant would have the right to participate in the tender. Should the claim be later adjudicated in his favor, he would be entitled to restitution of the purchase price or to compensation, depending on whether or not he was the successful bidder in the tender.

The Program – indeed any program of its kind – will be workable only if it is provided with an unassailable legal basis, so that its implementation is not tied down in endless legal disputes. Accordingly, it is proposed on the following assumptions:

1. The Program will be adopted by a new post-Castro government as part of a comprehensive process of democratization of the state and liberation of the economy.

2. The Program will be authorized by the new Cuban constitution in such a way that its constitutional validity is unassailable. For example, the constitution could be drafted to include a transitional provision that incorporates the Program by reference, while making sure that no unresolved conflict exists between such transitional provision and the regular provisions of the constitution dealing with property rights.

3. For purposes of implementing the Program, the new constitution will also confirm legal title to property held by the State under the law existing at the time the constitution takes effect, and it will grant to the agency charged with administering the Program the power to take any and all actions required for such implementation, including the power to expropriate, subject only to the remedies provided for in the Program.

4. The Program (and the decisions taken to implement it) will override general legislation, including the provisions of the Civil Code regarding the acquisition of title by acquisitive prescription (adverse possession).

5. The Program (and the decisions taken to implement it) will override any vested rights and any claims of vested rights.

6. The Program will constitute the sole remedy under Cuban law (foreign claimants will always have remedies under international law) in respect of the claims covered thereby.

7. The decisions of the authority charged with administering the Program (which we call the Adjudicatory Commission) will be final, except for the possibility of an expedited appeal to the Cuban Supreme Court.

These assumptions are necessary (but, of course, not sufficient) conditions for the success of the Program. Other requirements are self-evident, such as the need for an administering agency composed of individuals of unimpeachable probity and unencumbered by ritualistic procedures.

While a good deal of flexibility is desired in the fabric of the Program, we readily acknowledge that its success or failure will depend on the resources available to a post-Castro government, as compared with the number and magnitude of the claims expected to be filed. In that respect, the Program (indeed any program of its kind) may have to be adjusted to the conditions existing at the time the new government takes office. Before knowing the constraints of a future reality, we see no reason to depart from the ideal.

II. The Program

A. Rights Subject to the Restoration Program

1. *General Rule.* All property rights that were the subject of wrongful expropriation by the Castro regime shall be subject to the Program.

2. *Property Rights.* For the purposes of the Program, the term “property rights” shall comprise patrimonial rights of any kind whatsoever, including ownership and other rights *in rem* in movable or immovable things, intellectual property, rights derived from contracts, and other patrimonial rights *in personam*, but shall not include (i) rights corresponding to claims that have been finally settled by agreement between the Cuban State and the State of which the claimant was a national or citizen

at the time the claim arose (or at the time of the agreement), and (ii) rights corresponding to indemnification claims for personal injury or moral damages resulting from the actions or omissions of the Castro regime, including claims for wrongful death, torture, and unjust imprisonment.

3. *Wrongful Expropriation.*

(a) For the purposes of the Program, a property right shall be deemed to have been the subject of wrongful expropriation if (i) it was the subject of expropriation, confiscation, or nationalization, or was otherwise taken, seized, abolished, or extinguished, in whole or in part, by the Castro regime, in each such case in violation of the principles and guarantees set forth in the constitution of 1940 or in violation of international law; or (ii) such right lapsed or was forfeited, lost, extinguished, or transferred to the State, in whole or in part, as a consequence of acts of political persecution by the Castro regime, or criminal or other proceedings conducted during the Castro regime that were contrary to the rule of law.

(b) In particular, and without prejudice to the generality of the foregoing, a property right shall be deemed to have been the subject of wrongful expropriation in any of the following circumstances:

(i) Whenever the right was the subject of expropriation, confiscation, or nationalization, or was otherwise taken, seized, abolished, or extinguished, in whole or in part, by the Castro regime without payment of compensation or with payment of less compensation than that required by the principles set forth in paragraphs (C)(3)(b)(i) and (C)(3)(b)(ii).

(ii) Whenever the right was the subject of expropriation, confiscation, or nationalization, or was otherwise taken, seized, abolished, or extinguished, in whole or in part, by the Castro regime by reason of the owner's nationality or citizenship or condition of alienage, or as a penalty for a political crime, or as a result of criminal or other proceedings that were contrary to the rule of law or aimed at punishing political crimes, or solely as a consequence of a person having left the country.

(iii) Whenever the right lapsed or was forfeited, lost, or extinguished, in whole or in part, by reason of the owner's nationality or citizenship or condition of alienage, or as a result of imprisonment or other punishment imposed by the Castro regime for a political crime, or

as a result of criminal or other proceedings conducted by the Castro regime that were contrary to the rule of law or aimed at punishing political crimes, or solely as a consequence of a person having left the country.

(iv) Whenever the right was transferred or abandoned by the owner to the State as a condition for the owner or his family obtaining permission to leave the country.

(v) As regards the prior owner, whenever the right was acquired, in whole or in part, during the Castro regime by an individual or an entity (governmental or otherwise) through exploitation (including the use of duress or deception) of a position of power in or influence with the Castro regime.

(c) Notwithstanding paragraphs (A)(3)(a) and (A)(3)(b), a property right shall not be deemed to have been the subject of wrongful expropriation if the owner thereof received compensation from the Cuban State in an amount that is not less than the amount that would have been required by the principles set forth in paragraphs (C)(3)(b)(i) and (C)(3)(b)(ii).

4. *Castro Regime.* For the purposes of the Program, the Castro regime shall be understood to be the regime that held power in Cuba between January 1, 1959, and [the date on which the democratic government takes office] and any official or unofficial instrumentality thereof.

B. Beneficiaries of the Restoration Program

1. *Beneficiaries.* The beneficiaries of the Program shall be of two kinds: (i) primary beneficiaries and (ii) secondary beneficiaries.

(a) *Primary Beneficiaries.* The primary beneficiaries of the Program shall be, in respect of each property right subject to the Program, (i) those individuals or entities (other than ineligible parties), regardless of nationality or citizenship, that held, immediately prior to the wrongful expropriation, title to the property right, in whole or in part, and (ii) the successors of such individuals or entities.

(b) *Secondary Beneficiaries.* Any individual or entity (other than an ineligible party), regardless of nationality or citizenship, that is deprived of a property right as a result of the application of the Program, but is entitled to compensation or compensation-in-kind thereunder by

reason of such deprivation, shall be deemed to be a secondary beneficiary of the Program only for the purposes of such compensation or compensation-in-kind.

(c) *Ineligible Parties.* For the purposes of the Program, the following shall be considered ineligible parties: (i) the Cuban State, (ii) any Cuban governmental entity, (iii) any individual or entity that acquired the property right at issue through exploitation (including use of duress or deception) of a position of power in or influence with the Castro regime, and (iv) any individual or entity that acquired the property right at issue from any other ineligible party without giving, in exchange, value (in cash or in kind) that was reasonably equivalent to the value of such property right at the time of the acquisition.

2. *Claims.* Any beneficiary is entitled to make a claim under the Program. In cases of property rights held jointly by more than one individual or entity, before granting the appropriate remedy under the Program to those beneficiaries who have made a claim, the Adjudicatory Commission (hereinafter defined) shall give to other beneficiaries reasonable notice and opportunity to come forward. The same rule shall apply in respect of property rights encumbered by or subject to other property rights held by other beneficiaries.

3. *Priority of Claims.* Other than in the case of property rights held jointly, if two or more primary beneficiaries make claims under the Program with respect to the same property right, the claimant in the chain of title who suffered the earliest wrongful expropriation shall have priority for the purpose of restitution of such right. The other claimants shall receive compensation or compensation-in-kind in accordance with the Program.

4. *Successors.*

(a) For the purposes of the Program, the term “successor” of a beneficiary shall mean any individual or entity to whom the property right at issue, or a claim related thereto, has been transferred, directly or through one or more intermediate transferors, by an act of the beneficiary or by operation of the law, and shall include heirs, legatees, donees, purchasers, assignees, and other transferees *inter vivos* or *mortis causa*. Any such transfer shall be deemed valid and effective if (i) it is valid and effective under Cuban law as it existed prior to the advent of the Castro regime or would have been valid and effective under such law had such law

remained in effect throughout the Castro regime, or (ii) it is valid and effective under Cuban law as it existed under the Castro regime (but without prejudice to the provisions of paragraph (B)(1)(c) regarding ineligible parties), or (iii) it is valid and effective under the law of any country where the transfer took place or the transferor or the transferee was organized or had its domicile or residence or conducted business.

(b) If the beneficiary is a business organization that is no longer in existence and no successor to such organization can be determined under the rule of paragraph (B)(4)(a), a claim under the Program may be brought by those who held at least fifty per centum of the equity of such organization (or their respective successors). In such case, the claimants shall be regarded as successors to the beneficiary for the purposes of the Program. To this end, reasonable notice and opportunity to come forward shall be given to other individuals or entities that held equity in the organization.

C. Remedies

1. *General.* The available remedies under the Program shall be (i) restitution, (ii) compensation, and (iii) compensation-in-kind. Restitution shall be the preferred remedy, except in the cases contemplated in paragraph (C)(5), in which restitution is unfeasible, and the cases contemplated in paragraph (C)(6), which are subject to the investment-priority exception. Whenever restitution is not applicable, the ordinary substitute remedy shall be compensation. In all cases, however, the Adjudicatory Commission may offer to the beneficiary and the beneficiary may accept, in lieu of restitution or compensation, compensation-in-kind.

2. Restitution.

(a) *General rule.* Except as set forth in paragraphs (C)(5) and (C)(6), a primary beneficiary under the Program shall be entitled to restitution in full of the property right that was the subject of a wrongful expropriation (or, in the case of a wrongful expropriation regarding part of a property right, the part that was the subject of such wrongful expropriation), whether such right is currently held by the State or by a third party. To this end, the Adjudicatory Commission shall segregate and/or reconstitute such rights, to the extent possible, and shall transfer them to

the beneficiary. Except as provided in paragraph (C)(2)(b), such property rights shall be transferred free and clear of all encumbrances other than any encumbrances that existed at the time of the wrongful expropriation and (i) are still in existence at the time of the restitution or (ii) are reinstated under the Program. Encumbrances that existed at the time of the wrongful expropriation, but are no longer in existence at the time of the restitution, shall be reinstated (i) in favor of any primary beneficiary that is entitled under the Program to restitution of the corresponding property rights, or (ii) in favor of the State, subject to further application of the Program.

(b) *Restitution of Business Enterprises.* If the property rights that are subject to restitution comprise a business enterprise that is conducting business as a going concern at the time of the restitution, as a general rule (i) those property rights shall be transferred to the primary beneficiary that is entitled to restitution thereof subject to all existing encumbrances and (ii) such primary beneficiary shall assume, as a condition of the restitution, all existing obligations and liabilities of the enterprise, including all existing labor contracts and other contracts that call for further performance. In exceptional circumstances, to encourage the prompt return of the business enterprise to the private sector as a viable concern or otherwise when the interests of the enterprise and the national economy so require, the Adjudicatory Commission shall have the power to cancel such encumbrances, obligations, or liabilities, in whole or in part, and to order the restitution of the enterprise in the resulting condition. In all cases contemplated in this paragraph, the primary beneficiary shall be entitled to additional compensation as provided in paragraph (C)(3)(e), but the amount of such compensation shall be determined by taking into account the benefit to such primary beneficiary arising from any cancelled encumbrance, obligation, or liability. Any party (other than an ineligible party) that was entitled to the benefit of any such cancelled encumbrance, obligation, or liability, shall have the rights specified in paragraph (C)(3)(f).

(c) *Restitution of Property Rights Not Comprising Business Enterprises.* In the case of property rights other than those referred to in paragraph (C)(2)(b), any encumbrance on such property rights that did not exist at the time of the wrongful expropriation shall be cancelled. The primary beneficiary that obtains restitution of such property rights shall

be entitled to additional compensation to the extent provided in paragraph (C)(3)(e). Any party (other than an ineligible party) that was entitled to the benefit of any such cancelled encumbrance shall have the rights specified in paragraph (C)(3)(f).

3. *Compensation.*

(a) *Exclusive Source of Compensation.* A beneficiary entitled to compensation under the Program shall receive compensation from the Compensation Fund, as provided in the Program, to the exclusion of compensation from any other source.

(b) *Measure of Compensation.* Whenever compensation is required under the Program, such compensation shall consist of a principal amount and interest thereon, calculated as follows:

(i) *Business Enterprises.* In the case of property rights in any business enterprise that was conducting business as a going concern at the time of the wrongful expropriation, the principal amount of compensation shall be equal to the going-concern value of such enterprise immediately prior to such expropriation, as measured by the fair market value of such enterprise, or, in the absence of an observable, genuine market for such enterprise, by the discounted-cash-flow method. Such value shall not be deemed to have been reduced by the threat of expropriation or any other action of the Castro regime that was inconsistent with the guarantees provided by the constitution of 1940 or directed against such business enterprise or the owner or owners thereof.

(ii) *Other Property Rights.* In the case of any property right other than those related to the business enterprises referred to in paragraph (C)(3)(b)(i), the principal amount of compensation shall be equal to the fair market value of such right immediately prior to the wrongful expropriation. Such value shall not be deemed to have been reduced by the threat of expropriation or any other action of the Castro regime that was inconsistent with the guarantees provided by the constitution of 1940 or was directed against such property rights or the owner or owners thereof.

(iii) *Currency of Calculation.* To the extent feasible, the principal amount of compensation shall in all cases be calculated in Cuban pesos and shall be converted into United States dollars at the “buy” free-market rate of exchange in effect on the date of the wrongful expropriation. Otherwise, such principal amount shall be calculated in United

States dollars.

(iv) *Interest.* In all cases, the principal amount of compensation shall be augmented by interest thereon from the date of the wrongful expropriation to the date of payment of compensation under the Program. Such interest shall be calculated at such free-market rates for dollar obligations as shall be adequate fairly to compensate the beneficiary for having been deprived of the use and enjoyment of the principal amount during such period.

(c) *Form of Compensation.*

(i) Compensation under the Program shall be paid in the form of cash or debt obligations of the Cuban Treasury, or a combination thereof, as determined by the Adjudicatory Commission taking into account the availability of cash in the Compensation Fund, the compensation awards to be paid, and other appropriate factors.

(ii) Compensation in the form of cash shall consist of United States dollars or the equivalent thereof in Cuban currency at the “buy” free-market rate of exchange in effect on the date of the payment, except that those beneficiaries that are not Cuban citizens shall not be obligated to accept Cuban currency if the currency is not freely convertible into United States dollars at the same rate of exchange.

(iii) In the case of compensation in the form of debt obligations of the Cuban Treasury, the obligations shall be issued at par, shall be denominated in United States dollars, shall bear interest at a fair market rate, shall be freely transferable, and shall be payable in as short a term and under such conditions and with such security or guarantees, as shall be compatible with the financial condition of the Cuban State. The holder of any such debt security shall have the option of applying it, at par, towards payment of the purchase price of any asset of the State that is privatized, whether pursuant to paragraph (C)(6) or otherwise.

(d) *Compensation in Lieu of Restitution.* Any primary beneficiary that is entitled to compensation in lieu of restitution pursuant to paragraph (C)(5) or (C)(6)(c), or whose claim does not have priority pursuant to paragraph (C)(3), shall receive compensation as provided in the preceding paragraphs.

(e) *Additional Compensation in Cases of Restitution.* Any primary beneficiary that obtains restitution of property rights shall be entitled to additional compensation: (i) in an amount that shall approximate

as much as possible the amount (if any) by which the value of such property rights at the time of the wrongful expropriation exceeds the value of such rights at the time of the restitution, and (ii) in an amount, to be equitably determined by the Adjudicatory Commission, designed to compensate the beneficiary for having been deprived of the use and enjoyment of such property rights between the time of dispossession and the time of restitution. For the purposes of clause (i), the value of the property rights at such times shall be determined by applying the appropriate provisions of paragraph (C)(3)(b), *mutatis mutandis*.

(f) *Compensation to Eligible Third Parties.*

(i) Any third party (other than an ineligible party) that is the beneficiary of any encumbrance, obligation, or liability that is cancelled as provided in paragraph (C)(2)(b) shall be deemed to be a secondary beneficiary under the Program and entitled to compensation if such party demonstrates that such encumbrance, obligation, or liability was created in good faith, for reasonably equivalent value, and in the ordinary course of business of the enterprise subject to restitution.

(ii) Any third party (other than an ineligible party) that is the beneficiary of any encumbrance, obligation, or liability that is cancelled as provided in paragraph (C)(2)(c) shall be deemed to be a secondary beneficiary under the Program and entitled to compensation if such party demonstrates that such encumbrance, obligation, or liability was created in good faith and for reasonably equivalent value.

(iii) Any third party (other than an ineligible party) that is dispossessed of any property right as a result of the implementation of this Program shall be deemed to be a secondary beneficiary under the Program and entitled to compensation if such third party demonstrates that, at the time it acquired such property right, that party was not aware, and had no reason to be aware, of the wrongful nature of the expropriation and did not know or have reason to know of the existence of a claim to such property right.

(iv) In all cases contemplated in paragraph (C)(3)(f), the compensation shall approximate as much as possible the value of the property right immediately prior to the cancellation or dispossession (as the case may be), as determined by the appropriate provisions of paragraph (C)(3)(b), *mutatis mutandis*.

4. *Compensation-in-Kind.* Whenever a primary or secondary bene-

fiary is entitled to restitution or compensation (as the case may be) under the Program, the Adjudicatory Commission may offer to such beneficiary compensation-in-kind, in lieu of all or part of such restitution or compensation. Compensation-in-kind shall consist in the transfer to the beneficiary of any property right held by the State, preferably one that is comparable in kind or value with the property right of which the beneficiary was deprived. In making an offer of compensation-in-kind, the Adjudicatory Commission shall take into consideration the qualifications of the beneficiary to put the object of the property right being offered to economically productive use within the shortest possible time. The Adjudicatory Commission shall be free to devise the conditions under which the property rights offered as compensation-in-kind would be transferred to the beneficiary. The beneficiary shall not be required to accept the offer of compensation-in-kind. Unless the offer of compensation-in-kind is made and accepted in satisfaction of the beneficiary's entire claim, the beneficiary shall be entitled to additional compensation representing the amount (if any) by which the value of the property right of which he was deprived exceeds the value of the property right received as compensation-in-kind. Such values shall be determined by applying the appropriate provisions of paragraph (C)(3)(b), *mutatis mutandis*.

5. *Unfeasibility of Restitution.* Whenever restitution of wrongfully expropriated property rights is physically impossible, economically impracticable, or injurious to the public interest, it shall be set aside in favor of compensation or, if applicable, compensation-in-kind. Without prejudice to the generality of the foregoing, restitution shall be deemed to be physically impossible, economically impracticable, or injurious to the public interest in the following circumstances:

(a) Whenever the property rights at issue relate to a business enterprise that has ceased to operate and has no reasonable prospect of being restarted.

(b) Whenever the property rights at issue relate to a business enterprise that has been merged into or integrated with a larger business concern and such enterprise cannot be disassociated or disintegrated without serious damage to the business as a whole or the public interest.

(c) Whenever the object of the property rights at issue will be used by the government for a valid public purpose.

(d) Whenever the object of the property rights at issue has been

integrated into a patrimony given over to a business or charitable use and such object cannot be separated without serious damage to such business or charitable use or the public interest.

(e) Whenever the object of the property rights at issue is an occupied residential building or unit, unless the Adjudicatory Commission determines that, taking into account all circumstances of the case, restitution will not be injurious to the public interest. In the case of an occupied residential building or unit, the Adjudicatory Commission may offer, and the primary beneficiary may agree, (i) to postpone restitution until such time as the occupant has vacated the building or unit or for such period as may be designated by [a separate statute addressing the housing problem, hereinafter referred to as “the Housing Law”], during which period the primary beneficiary shall be entitled to compensation for the delay, in an equitable amount determined by the Adjudicatory Commission, or (ii) to make restitution subject to leases granted to the occupant(s) of such building or unit for such term and subject to such conditions as are specified in the Housing Law.

(f) Whenever the object of the property rights at issue has a fair market value, at the time of the inception of the Program, not exceeding [an amount to be specified] in the case of real estate and [an amount to be specified] in the case of other kinds of property.

6. *Investment Priority Exception.*

(a) If, prior to final adjudication of the status of a particular property, business enterprise, or any other property right subject to the Program, the Adjudicatory Commission finds that such property, business enterprise, or other property right is not being put to economically productive use or that the public interest requires immediate transfer of such property, business enterprise, or other property right to the private sector, it may make a public tender for bids to acquire such property, business enterprise, or other property right. Whenever feasible, the public tender shall be conducted in two stages: (i) a qualification stage, at which each bidder shall offer a minimum investment commitment and, in the case of business enterprises, the bidder’s qualifications as an operator of the business; and (ii) a price stage, at which each qualified bidder shall bid on the price. The successful bidder shall enter into an Acquisition and Investment Agreement with the Adjudicatory Commission.

(b) Any individual or entity that has filed a prima facie valid

claim for restitution of the property, business, or other property right subject to the preceding paragraph shall have the right to participate in the public tender, under the same conditions as all other bidders, except that such individual or entity shall be deemed to be fully qualified as an operator of the business. If the successful bidder is the individual or entity that filed the restitution claim and such claim is ultimately resolved in favor of the claimant, the claimant shall be entitled to restitution of the acquisition price.

(c) If the property, business, or other property right is sold to a third party, the beneficiary that would otherwise be entitled to restitution shall receive, in lieu of restitution, compensation pursuant to paragraph (C)(3)(d), or, as applicable, compensation-in-kind pursuant to paragraph (C)(4).

7. *Recoupment by the State.*

(a) The proceeds of the sale of properties, business enterprises, or other property rights under paragraph (C)(6) and any funds recovered by the State pursuant to the following provisions shall be deposited in the Compensation Fund.

(b) If the State is required to pay compensation under the Program by reason of a diminution in the value of any property right, and such diminution was the result of damage to the object of such property right, the State shall be entitled to recover compensation for such damages from any individual or entity (other than an individual or entity entitled to compensation under paragraph (C)(3)(f)) responsible for the damage.

(c) As regards any property right that is the subject of restitution under the Program, if the value at the time of restitution of such property right (or the object of such right) is higher than the corresponding value at the time of the wrongful expropriation, the State shall be entitled to recover from the primary beneficiary that obtained restitution of such property right the portion (if any) of such increase in value that is solely and directly attributable to actions of the State or of any third party that held such property right at any time between the wrongful expropriation and the restitution.

(d) If a primary beneficiary that obtains restitution, compensation, or compensation-in-kind under the Program received partial compensation from the State, by reason of the wrongful expropriation, prior

to the inception of the Program, the State shall be entitled to recover from such beneficiary the amount of such partial compensation, and interest thereon from the date of receipt thereof to the date of recovery, at rates equal to those set forth in subparagraph (C)(3)(b)(iv).

(e) In any case in which the State is entitled, under the Program, to recover monies from an individual or entity that is entitled to compensation (or additional compensation) under the Program, such entitlements and the correlative obligations shall be offset automatically.

(f) The State shall be entitled to the benefit of any encumbrance that (i) is reinstated under the Program, as contemplated in paragraph (C)(2)(a), and (ii) is not transferred to any beneficiary under the Program.

D. Administering Authority and Procedure

A fully developed Program should contain a set of comprehensive rules on the administration of the Program and the procedures to be followed in the course of that administration. For the purposes of this Outline, suffice it to note some of the essential administrative and procedural aspects to be considered:

1. Establishment of the Adjudicatory Commission as the administering authority of the Program.

2. Establishment of the Compensation Fund. The Compensation Fund shall contain (i) monies and financial instruments contributed by the Cuban Treasury, and (ii) the monies referred to in paragraph (C)(7)(a).

3. Established of the procedure for filing and processing of claims, including deadlines for filing claims.

4. Prohibition of transfer or disposal of property rights subject to the Program while a claim is pending, except for dispositions by the Adjudicatory Commission pursuant to paragraph (C)(6) (Investment Priority Exception).

Notes

¹ See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 140 (Gateway ed. 1972); WALTER LIPPMAN, THE METHOD OF FREEDOM (1934); JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS NO. 68 (Walthoe ed. 1754-1755), reprinted in THE ENGLISH LIBERTARIAN HERITAGE (Jacobson ed. 1965); Stanley N. Katz, Thomas Jefferson & the Right to Property in Revolutionary America, 19 J.L. & ECON. 467 (1976); Charles A. Reich, The New Property, 73 YALE L.J. 733, 734 (1964).

² See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, §3.1, pp. 32-33 (4th ed. 1992).

³ 31 Stat. 897, ch. 803 (1901); RAMON INFIESTA, HISTORIA CONSTITUCIONAL DE CUBA, 318-31 (La Habana, 1942). The Platt Amendment also barred Cuba from entering into any treaty that impaired its independence and from assuming any public debt absent adequate means of repayment. It also required the Cuban government to sell or lease to the United States land necessary for establishing naval stations in Cuba.

⁴ See generally Carlos Márquez Sterling, *Prólogo* to NESTOR CARBONELL CORTINA, EL ESPIRITU DE LA CONSTITUCION CUBANA DE 1940, 11-38 (1974) [The Spirit of the Cuban Constitution] [hereinafter CARBONELL CORTINA].

⁵ See MARIFELI PEREZ-STABLE, THE CUBAN REVOLUTION: ORIGINS, COURSE AND LEGACY (1993); INTERNATIONAL COMMISSION OF JURISTS, CUBA AND THE RULE OF LAW 78-112 (1962).

⁶ INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 78-112. The decree was issued on the same day that Fidel Castro arrived by boat on the shore of the province of Oriente. The provinces affected by the decree were Oriente, Camaguey, Las Villas, and Pinar del Río.

⁷ *"Se prohíbe la confiscación de bienes. Nadie podrá ser privado de su propiedad sino por autoridad judicial competente y por causa justificada de utilidad pública o interés social y siempre previo el pago de la correspondiente indemnización en efectivo, fijada judicialmente. La falta de cumplimiento de estos requisitos determinará el derecho del expropiado a ser amparado por los Tribunales de Justicia, y en su caso, reintegrado en su propiedad. La certeza de la causa de utilidad pública o interés social y la necesidad de la expropiación, corresponderá decidirla a los Tribunales de Justicia en caso de impugnación."* 1940 Constitution, art. 24. All translations are by the authors.

⁸ CONSTITUCION DE CUBA 341 (Andrés M. Lazcano y Mazón ed. 1941) (Statement by Jose M. Cortina)[hereinafter CONVENTION RECORDS]; see also

CARBONELL CORTINA, *supra* note 4, at 159.

⁹ See CONSTITUCION DE CUBA 568-88 (Andrés M. Lazcano y Mazón ed. 1941); *see also* CARBONELL CORTINA, *supra* note 4, at 160.

¹⁰ By way of comparison, the Fifth Amendment of the United States Constitution provides that no person shall be “deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONSTITUTION, Amend. V. It has taken two centuries of jurisprudence to develop this clause into the rich fabric of precedent that today defines the practical contours of property-rights protection in the United States. While the resulting system has been generally adequate, some theories it has developed and particular applications of those theories often leave something to be desired. For example, in the United States, the state and federal governments may take property without compensation if the taking is a lawful exercise of the government’s “police power.” *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (All land use laws and regulations “must find their justification in some aspect of the police power, asserted for the public welfare”). Uncompensated takings are justified under the theory that “all property in [the United States] is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” *Mugler v. Kansas*, 123 U.S. 623, 665 (1887). A leading legal U.S. legal scholar, Justice Oliver Wendell Holmes, is said to have privately confessed that distinguishing between the lawful exercise of police power, on the one hand, and a taking subject to compensation, on the other, was a matter of “determining a line between grabber and grabbee that turns on the feeling of the community.” MARK L. POLLOT, *GRAND THEFT AND PETTY LARCENY: PROPERTY RIGHTS IN AMERICA* 78 (1993). It is to be hoped that, in devising a system of constitutional protection of property rights, the Cuban framers will do better than that.

¹¹ “*El Estado Cubano reconoce la existencia y legitimidad de la propiedad privada en su más amplio concepto de función social y sin más limitación que aquéllas que por motivos de necesidad pública o interés social establezca la Ley.*” 1940 Constitution, art. 87.

¹² This statement is independent of the jurisprudential question (which need not detain us here) whether the fundamental rights proclaimed in a given constitution are natural rights that preexist that constitution and are merely recognized by it, or whether they are, *qua* legal rights (and independently of the existence of any moral counterparts), creatures of the constitution, understood as the foundation of the (positive) legal order. Even those who sympathize with the second position (as do the authors of this article) must readily admit that the form given to the constitutional guarantee of property rights has political significance, and that the politico-rhetorical weight carried by that guarantee may affect the way in which it is interpreted and applied by the courts. If fundamental rights such as freedom of expression, assembly, or religion are proclaimed in emphatic terms, the right of private property deserves no less.

¹³ See CONVENTION RECORDS, *supra* note 9, at 337-64.

¹⁴ Cf. CONST. ARG. art. 17 (property is inviolable), and CONSTITUCION DE LA REPUBLICA DEL PERU art. 70 (right to property is inviolable).

¹⁵ 1940 Constitution, art. 87.

¹⁶ See, e.g., *Olsson Case*, 130 Eur. Ct. H.R.(ser. A) at 61 (1988) (interpreting the phrase “in accordance with the law” in one of the provisions of the European Convention on Human Rights and Fundamental Freedoms). For an analysis of this principle as it appears in human rights instruments, see OSCAR M. GARIBALDI, *THE LIMITATION AND DEROGATION CLAUSES* 128, 132-134 (Hurst Hanum and Dana D. Fischer eds., 1993); Oscar M. Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 17 HARV. INT’L L. J. 503 (1976).

¹⁷ See GARIBALDI, *supra* note 16, at 128, 132-34.

¹⁸ For a similar analysis in the context of the interpretation of Article 30 of the American Convention on Human Rights, see (Inter-Am. Ct. H.R.) San Jose 7 HUM. R. L.J. 231 (1986).

¹⁹ See, e.g., STEVEN J. EAGLE, *REGULATORY TAKINGS*, § 2-8(g), p. 191 (2nd ed. 2001). Where one input is essentially free, the government has an incentive to substitute that input for other inputs that are, from the government’s perspective, more costly. For example, instead of constructing a two-story school on a small lot in an expensive residential area where land is scarce, the new government would have the incentive to seize twice as much property to construct a less expensive one-story school with the same square footage on the larger lot. See William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretation of “Just Compensation” Law*, 17 J. Legal Stud. 269, 288 (1988).

²⁰ STEVEN J. EAGLE, *REGULATORY TAKINGS*, § 1-1, p. 2 (2nd ed. 2001).

²¹ For a recent statement of this doctrine, see JOHN PAUL II, *ENCYCLICAL LETTER SOLLICITUDO REI SOCIALIS*, 30 December 1987, ¶ 42. For earlier statements, see LEO XIII, *ENCYCLICAL LETTER RERUM NOVARUM*, 15 May 1891, ¶ 8; PIUS XI, *ENCYCLICAL LETTER QUADRAGESIMO ANNO*, 15 May 1931, ¶¶ 44-48, 69, 88. See also CARBONELL CORTINA, *supra* note 4, at 157-58.

²² “*Las obligaciones de carácter civil que nazcan de los contratos o de otros actos u omisiones que las produzcan no podrán ser anuladas ni alteradas por el Poder Legislativo ni por el Ejecutivo, y por consiguiente, las leyes no podrán tener efecto retroactivo respecto a dichas obligaciones. El ejercicio de las acciones que de éstas se deriven podrá ser suspendido, en caso de grave crisis nacional, por el tiempo que fuere razonablemente necesario mediante los mismos requisitos y sujeto a la impugnabilidad a que se refiere el párrafo primero del artículo anterior.*” (“Obligations of a civil nature that arise out of contracts or other acts or omissions that give rise to them cannot be annulled or altered by the Legislative Branch or the Executive Branch and, consequently, no laws shall have retroactive effect in respect

of such obligations. The exercise of legal actions derived from such obligations may be suspended, in the event of a grave national crisis, for such time as may be reasonably necessary subject to the same requirements and the same possibility of challenge as stated in the first paragraph of the preceding article.”) 1940 Constitution, art. 23.

²³ See note 22.

²⁴ “*Todo autor o inventor disfrutará de la propiedad exclusiva de su obra o invención, con las limitaciones que señale la Ley en cuanto a tiempo y forma.*” 1940 Constitution, art. 92, 1st paragraph.

²⁵ “*Las concesiones de marcas industriales y comerciales y demás reconocimientos de crédito mercantil con indicaciones de procedencia cubana, serán nulos si se usaren, en cualquier forma, para amparar o cubrir artículos manufacturados fuera del territorio nacional.*” (“Grants of industrial or commercial trademarks and other acknowledgments of commercial credit with indications of Cuban origin shall be void if they are used, in any form, to designate or cover products manufactured outside the national territory.”) 1940 Constitution, art. 92, 2nd paragraph.

²⁶ “*Toda persona podrá, sin sujeción a censura previa, emitir libremente su pensamiento de palabra, por escrito o por cualquier otro medio gráfico u oral de expresión, utilizando para ello cualesquiera o todos los procedimientos de difusión disponibles.*” (“Every person may freely express his thoughts, without subjection to prior censorship, orally, in writing, or through any other graphic or oral means of expression, using therefor any or all available means of dissemination.”) 1940 Constitution, art. 33, 1st paragraph.

²⁷ “*Sólo podrá ser recogida la edición de libros, folletos, discos, películas, periódicos o publicaciones de cualquier índole cuando atente contra la honra de personas, el orden social o la paz pública, previa resolución fundada de autoridad judicial competente y sin perjuicio de las responsabilidades que se deduzcan del hecho delictuoso cometido. En los casos a que se refiere este artículo no se podrá ocupar ni impedir el uso y disfrute de los locales, equipos o instrumentos que utilice el órgano de publicidad de que se trate, salvo por responsabilidad civil.*” (“A printing of books, booklets, records, films, periodicals, or publications of any kind may be seized only if it attacks the honor of persons, social order, or public peace, pursuant to a reasoned decision of a competent judicial authority and without prejudice to any liability resulting from the unlawful act committed. In the cases referred to in this article, it shall not be permitted to occupy or prevent the use or enjoyment of the premises, equipment, or instruments used by the publisher in question, except for reasons of civil liability.”) 1940 Constitution, art. 33, 2nd and 3rd paragraphs.

²⁸ “*La mujer casada disfruta de la plenitud de su capacidad civil, sin que necesite de licencia o autorización marital para regir sus bienes, ejercer libremente el comercio, la industria, profesión, oficio o arte, y disponer del producto de su trabajo.*” (“A married woman enjoys full civil capacity and needs no spousal license or authorization to administer her property, to engage in commerce, industry, a profession, skill,

or art freely, and to dispose of the proceeds of her work.”) 1940 Constitution, art. 43, 4th paragraph.

²⁹ 1940 Constitution, art. 43, 3rd paragraph.

³⁰ “*El subsuelo pertenece al Estado, que podrá hacer concesiones para su explotación, conforme a lo que establezca la Ley. La propiedad minera concedida y no explotada dentro del término que fije la Ley será declarada nula y reintegrada al Estado.*” (“The subsoil belongs to the State, which may grant concessions for the exploitation thereof, in accordance with what the Law may establish. Mining property granted in concession and not exploited within the term to be determined by the Law shall be declared void [*sic*; this was probably meant to apply to the concession rights] and revert to the State.”) 1940 Constitution, art. 88, 1st paragraph.

³¹ See, e.g., CONSTITUCION DE LA REPUBLICA DEL PERU art. 66 (natural resources, renewable or not, belong to the nation) and arts. 138-139 (mining rights, as well as rights to oil, gas, and other hydrocarbon resources, inalienably vested in the national government); see also Const. art. 27 (Mex.) (nation the legal owner of all oil and mineral rights).

³² “*La tierra, los bosques y las concesiones para explotación del subsuelo, utilización de aguas, medios de transporte y toda otra empresa de servicio público, habrán de ser explotados de manera que propenda al bienestar social.*” (Translation in the text.) 1940 Constitution, art. 88, 2nd paragraph.

³³ “*El Estado tendrá el derecho de tanteo en toda adjudicación o venta forzosa de propiedades inmuebles y de valores representativos de propiedades inmobiliarias.*” (“The State shall have a *pro tanto* preemption right in every forced sale of real estate or securities representing real estate.”) 1940 Constitution, art. 89.

³⁴ Until recently, French law gave the State a similar right of preemption in respect of all sales of real estate, in order to prevent fraudulent understatement of the purchase price and thus evasion of a tax calculated as a percentage of the purchase price. The European Court of Human Rights has held this right of preemption to be in violation of the right of property protected by Article 1 of Protocol No. 1 to the European Convention on Human Rights. *Hentrich v. France*, 23 Eur. Ct. H.R.(ser. A) at 18 (1994).

³⁵ “*Se proscribe el latifundio y a los efectos de su desaparición, la Ley señalará el máximo de extensión de la propiedad que cada persona o entidad pueda poseer para cada tipo de explotación a que la tierra se dedique y tomando en cuenta las respectivas peculiaridades.*” (“Latifundia are proscribed and, to the end that they disappear, the Law shall determine the maximum extension of property that each person or entity may possess for each type of exploitation to which land may be devoted, taking into account the respective peculiarities thereof.”) 1940 Constitution, art. 90, 1st paragraph.

³⁶ “*La Ley limitará restrictivamente la adquisición y posesión de la tierra por personas y compañías extranjeras y adoptará medidas que tiendan a revertir la tierra al*

cubano.” (“The Law shall restrictively limit the acquisition and possession of land by foreign individuals or companies and shall adopt measures tending to have the land revert to Cuban ownership.”) 1940 Constitution, art. 90, 2nd paragraph.

³⁷ In 1993, the Castro regime began negotiating bilateral investment with several States, and at least three such treaties – those with Spain, Italy, and the United Kingdom – have entered into force. See Jorge F. Pérez-López and Matías F. Travieso-Díaz, *The Contribution of BITs to Cuba’s Foreign Investment Program*, 32 Law & Pol’y Int’l Bus. 529, 540 & n. 38 (2001).

³⁸ “*El padre de familia que habite, cultive y explote directamente una finca rústica de su propiedad, siempre que el valor de ésta no exceda de dos mil pesos, podrá declararla con carácter irrevocable como propiedad familiar, en cuanto fuere imprescindible para su vivienda y subsistencia, y quedará exenta de impuestos y será inembargable e inalienable salvo por responsabilidades anteriores a esta Constitución.... A los efectos de que pueda explotarse dicha propiedad su dueño podrá gravar o dar en garantía siembras, plantaciones, frutos y productos de la misma.*” (“A father of a family who directly inhabits, cultivates, and exploits rural land owned by him, the value of which does not exceed 2,000 pesos, may irrevocably declare it to be family property, to the extent necessary to his housing and subsistence, and [such land] shall be exempt from taxes, shall not be subject to attachment, and shall be inalienable except for liabilities predating this Constitution.... So that the land may be exploited, the owner may encumber or transfer in guarantee seedings, plantings, fruits, and products of the land.”) 1940 Constitution, art. 91 (partial transcription).

³⁹ *Censos* are contracts whereby real property is made subject to payment of an annuity in compensation for money advanced. LOUIS ROBB, *DICCIONARIO DE TERMINOS LEGALES* at 23 (1965).

⁴⁰ “*No se podrán imponer gravámenes perpetuos sobre la propiedad del carácter de los censos y otros de naturaleza análoga, y en tal virtud queda prohibido su establecimiento. . . . Quedan exceptuados de lo prescrito en el párrafo anterior, los censos o gravámenes establecidos o que se establezcan a beneficio del Estado, la Provincia o el Municipio, o a favor de instituciones públicas de toda clase o de instituciones privadas de beneficencia.*” (“No perpetual encumbrances on property in the nature of *censos* and others of an analogous nature shall be imposed and accordingly the establishment thereof is prohibited. . . . There shall be exempt from the provisions of the preceding paragraph the *censos* or encumbrances established or that may be established [in the future] for the benefit of the State, a Province, or a Municipality, or in favor of public institutions of any kind or private charitable institutions.”) 1940 Constitution, art. 93 (partial transcription).

⁴¹ “*Los bienes propios o patrimoniales del Estado sólo podrán enajenarse o gravarse con las siguientes condiciones: a) Que el Congreso lo acuerde en Ley extraordinaria, por razón de necesidad o conveniencia social; y siempre por las dos terceras partes de cada Cuerpo Colegislador. b) Que la venta se realice mediante subasta pública. Si se trata de arrendamiento se procederá según disponga la Ley. c) Que se*

destine el producto a crear trabajo, atender servicios o a satisfacer necesidades públicas. Podrá sin embargo, acordarse la enajenación o gravamen en Ley ordinaria y realizarse sin el requisito de subasta pública, cuando se haga para desarrollar un plan económico-nacional aprobado en Ley extraordinaria.” (“Assets owned by the State as its own property or as patrimonial property may not be alienated or encumbered except under the following conditions: a) That Congress so provides by extraordinary Law by reason of necessity or social convenience and by the vote of two-thirds of each Chamber. b) That the sale be effected through public auction. In the case of leasing, it shall be done as may be provided by the Law. c) That the proceeds be destined to creating jobs, providing services, or satisfying public needs. Nevertheless, the sale or encumbrance may be authorized by ordinary legislation and may be carried out without the requirement of a public auction if done pursuant to a national economic plan approved by an extraordinary Law.” 1940 Constitution, art. 252.

⁴² The records of the Constitutional Convention shed no light on this matter. See 3 CONSTITUCION DE CUBA 227-28 (Andrés M. Lazcano y Mazón ed. 1941).

⁴³ “*El incremento del valor de las tierras y de la propiedad inmueble, que se produzca sin esfuerzo del trabajo o del capital privado y únicamente por causa de la acción del Estado, la Provincia o el Municipio, cederá en beneficio de éstos la parte proporcional que determine la Ley.*” (“The increase in the value of land or real estate that is produced without the effort of labor or private capital and only as a result of the action of the State, a Province, or a Municipality shall yield to the benefit of the latter a share to be determined by the Law.”) 1940 Constitution, art. 273.

⁴⁴ “*Serán nulas las estipulaciones de los contratos de arrendamiento, colonato o aparcería de fincas rústicas que impongan la renuncia de derechos reconocidos en la Constitución o en la Ley, y también cualesquiera otros pactos que ésta o los Tribunales declaren abusivos....*” [There follow detailed provisions concerning the regulation of those contracts.] (“Any provisions in contracts of leasing, colonato, or sharecropping on rural land that impose the waiver of rights recognized in the Constitution or the Law, and also any other provisions that the Law or the Courts may declare abusive, shall be void....” 1940 Constitution, art. 274 (partial transcription).

⁴⁵ “*La Ley regulará la siembra y molienda de la caña por administración, reduciéndolas al límite mínimo impuesto por la necesidad económico-social de mantener la industria azucarera sobre la base de la división de los dos grandes factores que concurren a su desarrollo: industriales o productores de azúcar y agricultores o colonos productores de caña.*” (“The Law shall regulate the planting and grinding of sugar cane by administration, restricting them to the minimum limit imposed by the economic-social need to maintain the sugar industry on the basis of the two great factors that contribute to its development: industrialists or producers of sugar and farmers or colonists who produce sugar cane.”) 1940 Constitution, art. 275.

⁴⁶ “*Serán nulas y carecerán de efecto las leyes y disposiciones creadoras de monopolios privados, o que regulen el comercio, la industria y la agricultura en forma tal que produzca ese resultado. La Ley cuidará especialmente de que no sean monopo-*

lizadas en interés particular las actividades comerciales en los centros de trabajo agrícolas e industriales.” (“Any laws and provisions that create private monopolies or regulate commerce, industry, and agriculture in such a way as to produce that result shall be void and of no effect. The Law shall especially take care that commercial activities in agricultural and industrial labor centers not be monopolized in a private interest.”) 1940 Constitution, art. 276.

⁴⁷ An early draft of Article 276 referred to “commerce, industry, labor, and the professions.” 3 CONVENTION RECORDS at 288. The text was changed to “commerce, industry, and agriculture” for the purpose of excluding private monopolies such as the medical association. The drafters of the new constitution will have an opportunity to subject the professions to the discipline of the market.

⁴⁸ See, e.g., STEVEN J. EAGLE, REGULATORY TAKINGS, § 2-8(g)(2), p. 193 (2nd ed. 2001).

⁴⁹ See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (J. Posner) (“Many owners are ‘intramarginal,’ meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., its not ‘for sale’).”).

⁵⁰ The experience of Central and Eastern Europe countries shows that it is possible to return confiscated property to the original owners without unduly discouraging foreign investment. Dr. Cheryl W. Gray, a principal economist at the World Bank policy research department, studied the way domestic legal regimes in those countries have affected foreign direct investment. She wrote:

“It was initially feared that foreign investment might be obstructed by domestic disputes over property rights, as [Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Slovakia] passed laws providing for restitution of property to pre-communist-era owners. *In most cases, this fear has not materialized.* State-led sales of property combined with mass privatizations in some countries are slowly moving to establish a property market and a workable system of property rights, although restrictions ... and uncertainties remain.”

Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience From Central and Eastern Europe*, 33 Colum. J. Transnat'l L. 1, 22 (1995) (footnotes omitted) (emphasis added).

⁵¹ See Brice M. Clagett, *Public International Legal Standards Applicable to Property Expropriation in Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES, 13-19 (JoAnn Klein ed., 1994) (papers presented at the 1994 Annual Meeting of the American Bar Association).

⁵² See, e.g., Agreement on the promotion and reciprocal protection of investments, May 27, 1994, Spain-Cuba, art. 5, 1902 U.N.T.S. I-32428.

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**ALTERNATIVE
RECOMMENDATIONS FOR
DEALING WITH CONFISCATED
PROPERTY IN POST-CASTRO CUBA**

By

Matias F. Travieso-Diaz

Alternative Recommendations for Dealing with Confiscated Property in Post-Castro Cuba

Executive Summary

Resolution of outstanding claims by U.S. citizens whose properties were expropriated without compensation is one of the most important bilateral issues that will need to be addressed by the United States and the Cuban government in the process of normalizing relations between the two countries.

As both governments are discussing this issue, Cuba will also need to prepare itself to address the expropriation claims of Cuban nationals, whether the claimants are on the island or abroad. While resolving the claims by Cuban nationals is a separate issue from addressing the claims of U.S. nationals, the two are linked for legal, political, and practical reasons. Indeed, one of the claim resolution alternatives considered in this paper is for U.S. claimants to opt out of the government-to-government settlement process and pursue their claims under Cuba's domestic claims program.

The expropriation claims by U.S. nationals and Cuban citizens have different legal foundations. U.S. claims are based on well-recognized international law principles. On the other hand, the legal standards for resolution of the Cuban nationals' claims are found within Cuba's laws, although a colorable argument can be made that international law recognizes the right to property as a human right entitled to domestic as well as international protection. An unresolved issue is whether the U.S. claimants, supported under international and Cuban law principles, would take precedence over Cuban claimants whose rights arise solely (or mainly) under Cuban law. The issue is probably of no practical consequence because in any event Cuba would have to provide roughly equivalent remedies to both groups of claimants.

Cuba has settled expropriation claims with the governments of five countries. Those settlements were the result of prolonged government-to-government negotiations in which the individual claimants were not involved. Payments amounted to only a fraction of the total amounts claimed, were paid in installments, and in some cases (most notably that

of Spain) part of the payment was in trade goods, rather than currency. While Cuba may want to invoke these other settlements as precedent, the United States and the U.S. claimants probably will deem a solution along the lines of these settlements unsatisfactory.

Under traditional U.S. practice, however, a settlement negotiated between the government of the United States and the Cuban government would have elements in common with the other five settlements entered into by Cuba. The settlement would be negotiated solely by the U.S. government without direct participation by the claimants; it would result in a cash payment by Cuba that would be a fraction of the total amount claimed (\$1.8 billion plus interest since 1960); and settlement proceeds would be distributed pro rata among the certified claimants.

Such a settlement probably would be unworkable because Cuba is unlikely to have the means to provide a cash payment that even approximates a significant portion of the principal, let alone the interest. However, a smaller cash payment could be distributed to a subset of the claimants (e.g., to individual – as opposed to corporate – claimants), and the rest of the claimants could be released to obtain on their own a remedy from the Cuban government.

A second resolution alternative (together with, or instead of, the formal government-to-government claim resolution process) would be to allow U.S. claimants to obtain relief directly from Cuba, either through individual negotiations or through participation in Cuba's claim resolution program. A claimant-to-government negotiation process would need to be backed up by some means of ensuring that the U.S. claimants receive fair and equitable treatment by Cuba. One possible way of achieving this result could be for Cuba to agree to submit to binding international arbitration any claim that it was unable to settle with a U.S. national. Such an arbitration would have to be conducted under clear and predictable rules, such as those governing the proceedings before the Iran-United States claims Tribunal.

U.S. citizens also could be allowed to participate in Cuba's domestic claims resolution program. Such a program could include several compensation alternatives. One that some claimants might favor would be the restitution of the expropriated asset or the transfer of other property equivalent in value to the one confiscated. Restitution methods pose a number of difficulties, including potential uncertainty over property

titles, disputes among potential claimants to the same property, and the necessity of balancing the interests of the claimant against those of others currently in possession of the property, whether Cuban nationals or foreign investors. Nonetheless, restitution, where appropriate, may be an important ingredient in the mix of remedies granted to U.S. claimants.

Another form of compensation could use of state-issued instruments (generally referred to as “vouchers”) to provide full or partial compensation to expropriation claimants. The vouchers would not be redeemable for cash, but serve a number of other purposes, including their use as investment instruments. Voucher compensation is potentially attractive because of its flexibility and because it avoids most of the problems associated with restitution, but it has the drawback that the value, security, transferability, and marketability of the instruments are by no means assured and could be undermined by lack of confidence in the ability of the state to make good on its commitments.

Other alternatives could include the granting of economic incentives, such as tax credits, to invest in Cuba and the granting of investment opportunities or beneficial interests in state-owned enterprises. While allowing a large degree of creativity in the formulation of suitable arrangements for those claimants interested in investing in Cuba, the development of ad hoc resolutions could complicate the administration of the claims resolution process and could leave the process open to charges of unfairness and lack of transparency.

Similar approaches, with analogous advantages and drawbacks, would be available in the process of resolving the claims of Cuban nationals, except that cash payments probably would be unavailable and ad hoc methods probably would not be feasible because domestic claimants would lack the means to pursue investment opportunities in Cuba and therefore could not benefit from investment incentives.

All of these alternative claim resolution methods are worth investigating, and perhaps pursuing, because Cuba’s economic conditions are likely to be depressed at the time it negotiates with the United States toward a resolution of the outstanding expropriation claims. Therefore, a traditional lump-sum, government-to-government settlement is likely to be unworkable and would need to be augmented with, or replaced by, a variety of other remedies.

Because of the complexity of the claims settlement issue, the U.S.

government needs to make a number of important policy decisions to prepare itself to discuss with Cuba the potential resolution of U.S. citizen claims. These issues should be examined in the near term by a multi-agency task force, perhaps assisted by outside experts, with a mandate to identify and make recommendations on policy issues and to suggest legislation to be drafted if resolution of the issues requires appropriations or some other form of legislative action.

Introduction

This paper examines one of the most important bilateral issues that will need to be addressed by the United States and a future Cuban government, namely, the resolution of the outstanding claims of U.S. nationals¹ and Cuban citizens for the uncompensated expropriation of their assets in the early years of the Cuban Revolution.

The paper assumes that resolution of the U.S. claims issue will not be practicable while the current socialist regime is in power in Cuba. While Cuban officials have periodically expressed a willingness to discuss settlement of the claims issue with the United States,² such willingness usually is expressed in the context of setting off those claims against Cuba's alleged right to recover from the United States hundreds of billions of dollars in damages due to the U.S. trade embargo and other alleged acts of aggression against Cuba.³ To date, the Cuban government has given no indication that it is prepared to negotiate with the United States in good faith and without preconditions toward a potential settlement of the U.S. expropriation claims.

The expropriation of U.S. assets in Cuba was one of the leading causes of the deterioration in relations between the two countries in the early 1960s and of the imposition of the U.S. embargo on trade with Cuba, which remains in place to this date.⁴ The expropriation claims issue is widely recognized as one of the main obstacles to the reestablishment of normal relations between the United States and Cuba.

While the governments of both countries are discussing this bilateral issue, Cuba also will need to prepare itself to address the expropriation claims of Cuban nationals, whether the claimants are on the island or abroad. Resolving the claims of Cuban nationals is a separate issue from addressing the claims of U.S. nationals, but the two processes have so many political and economic interconnections that one cannot easily be isolated from the other. The facts surrounding both sets of expropriations are similar, as is Cuba's failure to provide compensation to either group of claimants. Both claimant categories also will compete for the very limited resources that the Cuban government will have at its disposal at the time it is called upon to provide remedies to the claimants.⁵ In addition, Cuba may need, for internal political reasons, to give roughly equivalent relief to Cuban nationals and U.S. claimants.⁶ Indeed, one of the potential

alternatives discussed in this paper is to have some U.S. nationals opt out of the formal U.S.-Cuba settlement process and seek resolution of their claims under Cuba's domestic claim resolution program. Therefore, both groups of claimants must receive due consideration when seeking solutions to the claims issue.

In addition, once Cuba starts making a transition to a free-market economy, it almost undoubtedly will need to provide a remedy to those who had property seized by the Revolutionary government after 1959 and have not yet received compensation for the taking.⁷ Such an assumption is based on the requirements of international and Cuban law, fundamental notions of fairness, and the evident political necessity to settle property disputes before Cuba can achieve stability.

The resolution of outstanding property claims also is a precondition to major foreign capital flow into Cuba. As long as property titles remain unsettled, foreigners will perceive investing in Cuba as a rather risky proposition and may be discouraged from stepping into the country.⁸

Resolution of at least the outstanding property claims of U.S. nationals must be one of the first orders of business of a transition government in Cuba for two additional reasons: 1) U.S. laws require resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted and foreign aid can resume;⁹ and 2) apart from any legal requirements, resolution of U.S. nationals' expropriation claims has been since the days of President Kennedy's administration one of the stated U.S. conditions for the normalization of relations between the United States and Cuba.¹⁰ These factors demand the speedy negotiation of an agreement between the United States and Cuba toward the resolution of the expropriation claims of U.S. nationals.

By contrast, no bilateral issues require that Cuba provide a remedy to domestic claimants for the expropriation of their assets by the government. Therefore, the resolution of the Cuban nationals' expropriation claims should proceed on a separate, but parallel, track, and may be handled by Cuba as a domestic political and legal issue.¹¹

The expropriation claims of U.S. nationals and Cuban citizens also have different legal foundations. U.S. claims are based on well-recognized principles of international law.¹² On the other hand, although a colorable argument can be made that international law is starting to recognize the right to own property as a fundamental "human right" entitled

to domestic, as well as international, protection,¹³ no currently accepted principles of international law assist domestic claimants in obtaining redress for the expropriation of their assets by their government.¹⁴ Therefore, the legal standards for resolution of the Cuban nationals' claims need to be found within Cuba's laws.

The discussion that follows will examine and comment on several potential claim resolution alternatives that can be implemented to address the expropriation claims of U.S. citizens and Cuban nationals. This paper, however, does not offer a specific proposal for handling the outstanding property claims of U.S. nationals and Cuban citizens. Several such proposals already have been developed.¹⁵ The viability of any proposed program will ultimately be determined by the circumstances under which a settlement of outstanding claims is undertaken, including the economic and political conditions in which Cuba finds itself when it decides to deal with the problem.

II Historical Summary

A. Synopsis of Cuba's Expropriations

Cuba seized the properties of U.S. and other foreign nationals on the island starting in 1959, with the bulk of the expropriations taking place in the second half of 1960.¹⁶ The process started in 1959 with the takeover of agricultural and cattle ranches under the Agrarian Reform Law;¹⁷ reached a critical stage in July 1960 with the promulgation of Law 851, which authorized the expropriation of the property of U.S. nationals;¹⁸ was carried out through several resolutions in the second half of 1960, again directed mainly against properties owned by U.S. nationals although those of other foreign nationals also were taken;¹⁹ and continued through 1963, when the last U.S. companies still in private hands were expropriated.²⁰ In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items were seized at various times between 1959 and 1968.²¹

The laws issued by the Cuban government to implement expropriation of the holdings of U.S. nationals contained undertakings by the state to provide compensation to the owners.²² Nevertheless, in almost all

cases, no compensation was ever paid.

The expropriation claims by nationals of other countries were considerably smaller than those of U.S. and Cuban nationals, and for the most part have been settled through agreements between Cuba and the respective countries (e.g., Spain, France, Switzerland, United Kingdom, and Canada).²³ Claims have been settled at a fraction of the assessed value of the expropriated assets.²⁴

B. The U.S. Claims Certification Program

In 1964, the U.S. Congress amended the International Claims Settlement Act to establish a Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States (“FCSC”) was given authority to determine the validity and amount of claims by U.S. nationals against the government of Cuba for the taking of their property since January 1, 1959.²⁵ The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims by U.S. corporations (1,146) and individual citizens (7,670).²⁶ It certified 5,911 of those claims, worth an aggregate amount of \$1.8 billion;²⁷ denied 1,195 claims, worth an aggregate amount of \$1.5 billion; and dismissed without consideration (or saw withdrawn) 1, 710 other claims.²⁸

Of the \$1.8 billion in certified claims, more than 85 percent (about \$1.58 billion) corresponded to 898 corporate claimants, and the rest (about \$220 million) was spread among 5,013 individual claimants.²⁹ Only 131 claimants – 92 corporations and 39 individuals – had certified claims of \$1 million or more; only 48 claimants, all but five of them corporations, had certified claims in excess of \$5 million.³⁰ These figures show that the U.S. claimants fall into two general categories: a small number of claimants (mostly corporations) with large claims, and a large number of claimants (mainly individuals) with small claims.

Although the Cuban Claims Act did not expressly authorize the inclusion of interest in the amount allowed, the FCSC determined that simple interest at a 6 percent rate should be included as part of the value of the claims it certified. Applying such interest rate on the outstanding \$1.8 billion principal yields a present value, as of April 2002, of approximately \$6.4 billion.³¹ This amount does not include the value of the claims that

were disallowed for lack of adequate proof, nor of those that were not submitted to the FCSC during the period specified in the statute.

III Legal Bases for U.S. Nationals' Expropriation Claims

The expropriation claims by U.S. nationals are based on well-established principles of international law, which recognize the sovereign right of states to expropriate the assets of foreign nationals in the states' territory, but require "prompt, adequate, and effective" compensation to aliens whose property is expropriated.³² The "prompt, adequate, and effective" compensation formulation was coined in 1938 by U.S. Secretary of State Cordell Hull.³³ Under current practice, the "prompt" element of the Hull formula means payment without delay.³⁴ The "adequate" element means that the payment should reflect the "fair market value" or "value as a going concern" of the expropriated property.³⁵ The "effective" element is satisfied when the payment is made in the currency of the alien's home country, in a convertible currency (as designated by the International Monetary Fund), or in any other currency acceptable to the party whose property is being expropriated.³⁶ Cuba clearly has failed to satisfy its obligations under international law with respect to providing compensation for the properties it seized from U.S. nationals.³⁷

Domestic Cuban law in effect at the time of the takings also dictates that the U.S. property owners (like their Cuban national counterparts) should receive adequate compensation for the expropriations. It is unclear whether under Cuban law the claims of U.S. citizens, supported under international as well as Cuban law principles, should have priority over those of Cuban nationals, whose rights rest solely or mainly upon Cuban law. The distinction, if any, may as a practical matter be inconsequential because, as discussed earlier, political considerations dictate that the claims of both groups should be addressed fairly and in a similar manner.

IV Alternative Recommendations for Dealing with U.S. Nationals' Claims

A. Introduction

Any proposal for the resolution of the U.S. nationals' expropriation

claims against Cuba must recognize the objectives that a claims resolution program needs to achieve, the fundamental differences between the various types of property subject to claims, and the practical limitations that will be encountered by the Cuban government as it seeks to provide remedies to both U.S. and domestic expropriation victims. The interaction among these factors adds a significant degree of complexity to the problem.

Fundamental differences exist among the property interests covered by the claims, which suggests that certain remedies may be better suited for some types of property than for others. For example, restitution of residential property may be extremely difficult, from both legal and political standpoints;³⁸ and monetary compensation may be an inadequate remedy when the property is unique, as in the case of beachfront real estate in a resort area.

Cuba will also be confronted with political, as well as financial, limitations to its ability to provide certain remedies. A settlement that involves huge financial obligations over a long period of time may be resisted politically by, among others, the generation that came of age after the expropriations were carried out.³⁹

In the discussion that follows, we will seek to identify how these limiting factors come into play with regard to the different remedies that may be provided.

B. Cuban Claims Settlement Precedents

It is instructive to examine the precedent of the settlement agreements that Cuba has negotiated with other countries for the expropriation of the assets of their nationals. According to a Cuban summary, those agreements have five important facts in common: (1) They were negotiated over long periods of time; (2) none adhered to the “Hull Formula,” and in particular none implemented the “adequacy” standard, in that they were lump-sum, country-to-country settlements not taking into account either individually or collectively the amounts claimed by the nationals for the loss of their properties; (3) the payments were made in installments, rather than all at once; (4) payments were either in the currency of the country advancing the claims or, as was the case with Spain and Switzerland, in trade goods as well as currency; and (5) all agreements

were negotiated between Cuba and the state that representing the claimants, without claimant participation.⁴⁰

While these precedents are not controlling, they are indicative of the kinds of terms Cuba may seek if monetary compensation is the standard used for the negotiations. Clearly, an agreement with the United States patterned after these historical precedents would provide only a fraction – perhaps a small fraction – of the amounts sought by the claimants.

C. Alternative 1: Government-to-Government Negotiations

1. Discussion of Alternative

The president of the United States has wide, but not plenary, power to settle claims against foreign governments for the uncompensated taking of property belonging to U.S. citizens.⁴¹ The U.S. Department of State, under authority delegated by the president, acts on behalf of U.S. claimants in the negotiation of their claims with an expropriating foreign country.⁴² Under the “doctrine of espousal,” the negotiations conducted by the Department of State are binding on the claimants, and the settlement that is reached constitutes their sole remedy.⁴³

In most agreements negotiated in the past, the United States and the expropriating country have arrived at a settlement involving payment by the expropriating country to the United States of an amount that is a fraction of the total estimated value of the confiscated assets.⁴⁴ The settlement proceeds were then distributed among the claimants in proportion to their losses. In most cases, the settlement did not include accrued interest, although a 1992 settlement with Germany over East Germany’s expropriations of the assets of U.S. nationals did include the payment of simple interest at the approximate annual rate of 3 percent from the time the U.S. properties were taken.⁴⁵

Under standard practice, U.S. claimants may not opt out of the settlement reached by the U.S. government. Dissatisfied claimants are barred from pursuing their claims before U.S. courts or in the settling country.⁴⁶

2. Comments on Government-to-Government Negotiations Alternative

The above-described traditional settlement agreement would not appear, in itself, to be adequate to satisfy the needs of the parties in the Cuban situation. The amount of the outstanding certified claims by U.S. nationals is so large that it would likely outstrip Cuba's ability to pay a significant portion of the principal, let alone the interest. In addition, Cuba's transition government will be burdened already by a very large external debt: Cuba owes more than \$11 billion to international private and public lenders in the West, and has defaulted on its loan obligations.⁴⁷ Also, Cuba owes Russia, as successor to the Soviet Union, 15 to 20 billion U.S. dollars in loans that it has never repaid.⁴⁸ Any additional obligations to U.S. claimants would only exacerbate Cuba's debt situation.

For those reasons, a traditional settlement involving the payment of a large sum of money, even if payment is spread out over time, would be likely to place Cuba in difficult financial straits. Such a settlement could also have adverse political repercussions.⁴⁹

This is not to say that, even if other settlement alternatives were considered (see *infra*), Cuba would not need to make a lump-sum payment. Such a payment (in the order of, say, \$200 million) could be set aside to satisfy the claims of those for whom other alternative remedies would not be desirable or practicable. Lump-sum settlement proceeds could, for example, provide limited monetary compensation to all claimants to the extent of their certified losses involving residential and small farm properties.⁵⁰ Alternatively, a lump-sum payment of \$200 million would provide more than 50 percent principal recovery (but no interest) to the 5,013 certified claimants who are individuals.⁵¹

One potential source of funds for such lump-sum payments could be the blocked Cuban assets under the control of the U.S. government. However, some, if not all, of these assets are likely to be unavailable because they have been made eligible, through legislation passed in 1996 and 2000, for recovery by those raising claims of personal injury or death as the result of actions by the Cuban government.⁵² Therefore, Cuba will need to identify some other source of funds to satisfy the lump-sum payment portion of any settlement of U.S. national expropriation claims.

D. Alternative Methods Not Involving Government-to-Government Negotiations

1. Introduction

Whether as part of a government-to-government settlement or independently of it, U.S. claimants could be authorized to obtain relief directly from Cuba for their expropriation claims. This relief could result from private, individual negotiations with the Cuban government or through participation by U.S. claimants in Cuba's formal claim resolution program. This section examines those alternatives.

2. Alternative 2: Direct Negotiations Between the Claimants and the Cuban Government

a. Discussion of Alternative

It would be possible for the United States and Cuba to arrive at a negotiated settlement allowing alternative remedies beyond the up-front payment of money and including the possibility that individual claimants would waive their right to receive a share of the lump-sum settlement proceeds. Instead, claimants would negotiate directly with the Cuban government for restitution of their expropriated assets, investment concessions, payments in commodities other than cash, or compensation by means of Cuban government obligations.⁵³ While no direct precedent supports such a procedure and the courts have ruled that individual claimants have no right to negotiate directly with the debtor government,⁵⁴ in the case of Cuba such a flexible settlement may prove to be in the best interest of all parties.⁵⁵

b. Comments on Direct Claimant Negotiations with Cuba

A direct settlement between a U.S. claimant and Cuba, if successful, should satisfy the claimant in that it would represent the best resolution that he or she could obtain through bargaining with Cuba. Such a settlement attempt, however, might not be successful. Therefore, if the direct

negotiations alternative were authorized, the United States and Cuba would have to agree on a mechanism for assuring that those claimants who waived the right to be represented by the U.S. government in the negotiations with Cuba would receive fair and equitable treatment by Cuba, and that if such negotiations failed the claimant would not be left without a remedy.

One way of protecting the rights of the U.S. claimants who choose to negotiate directly with Cuba could be for the Cuban government to agree to submit to binding international arbitration any claim that it could not settle with a U.S. national. Historically, however, arbitration of disputes between private citizens and states has resulted in inconsistent decisions on key issues. In Saudi Arabia v. Arabian American Oil Co. (ARAMCO), reprinted in 27 ILR 117 (1958), for example, the arbitration tribunal refused to apply the law of Switzerland, where the tribunal was located, even though Saudi Arabia had agreed to place the seat of the tribunal in Switzerland. By contrast, the arbitrator in Sapphire International Petroleum v. National Iranian Oil Co., reprinted in 35 ILR 136 (1963), decided that the legal system of the place of arbitration would govern the arbitration. Likewise, inconsistent results on this issue were achieved in three other arbitrations between Libya and the nationals of foreign states, which arose out of the nationalization of Libyan oil in the early 1970s.⁵⁶ This lack of uniformity and predictability in the outcomes underscores the need to establish clearly and in advance the legal regime that would govern the arbitration of disputes between U.S. citizens and the Cuban government.

Predictability of applicable rules could be achieved if the United States and Cuba agreed in advance to a procedure analogous to that used by the Iran-United States Claims Tribunal set up to resolve the expropriation claims of U.S. nationals against Iran.⁵⁷ The Tribunal has three jurisdictional grants of power: (1) It may hear the “claims of nationals of the United States against Iran and claims of nationals of Iran against the United States;”⁵⁸ (2) it may hear “official claims of the United States and Iran against each other arising out of contractual arrangements between them;”⁵⁹ and (3) it may hear disputes between the United States and Iran regarding the interpretation or performance of any provision of the General Declaration⁶⁰ or the claims of their nationals.⁶¹ One important aspect of the Tribunal’s framework is the adoption of the United Nations

Commission on International Trade Law's (UNCITRAL) Arbitration Rules, which are designed to address international commercial arbitration.⁶² This choice of rules allowed supervisory jurisdiction to the legal system of the Netherlands, where the Tribunal was seated.⁶³

The Tribunal has taken the view that the claims of nationals are the claims of a private party on one side and a government or government-controlled entity on the other.⁶⁴ In accord with this view, the procedures set up by the Tribunal require exhaustion of local remedies and provide that the private claimants themselves will present their claims to the Tribunal.⁶⁵ The nationals themselves thus both file the claims and present them, and also decide whether to withdraw or accept any settlement offer.

One of the most innovative structural elements of the Tribunal is that a security account held in trust by the Algerian government – consisting of a portion of frozen Iranian assets – has been established for the purpose of guaranteeing that the awards of the Tribunal are capable of being satisfied. This account is available only to satisfy the claims of U. S. nationals and cannot be used for awards in favor of Iranian nationals or for Iranian governmental counterclaims.⁶⁶

The structure of the Tribunal is thus largely self-contained in both its procedural operation and its ability to satisfy successful claims.⁶⁷ However, in some areas, the Tribunal's relationship to the external world may need to be considered. For example, should the security account become depleted, enforcement of Tribunal decisions would become a significant issue.

The main area of potential divergence between the Tribunal and a counterpart tribunal set up to adjudicate disputes between a U.S. claimant and Cuba is that, in the case of Iran, significant Iranian assets frozen in the United States were made available to satisfy arbitration awards in favor of private claimants. As discussed above, no such funds are likely to exist in the case of Cuba, so provisions would have to be made to set up an independent source of funds to satisfy tribunal awards – or else a victory by a U.S. claimant in arbitration could prove Pyrrhic because no funds might be available from which to satisfy the award.

3. Alternative 3: Participation in Cuba's Claim Resolution Program

a. Introduction

Assuming that it would not be feasible to have direct negotiations between U.S. claimants and Cuba, another alternative could be to allow U.S. nationals to participate in Cuba's domestic claims resolution program. Under such a program, several alternative forms of compensation could be made available to U.S. claimants (and to Cuban claimants). These alternative remedies are discussed next.

b. Restitution Methods

(1) Direct Restitution

Restitution of the actual property that was confiscated ("direct restitution") would be the solution that many U.S. corporate claimants might prefer, assuming such a choice was available under Cuba's claims resolution program.⁶⁸ Some types of expropriated property, for example, large industrial installations, may lend themselves readily to direct restitution since the identity of the former owners is likely to be uncontested and the extent of the ownership rights may be relatively easy to establish.⁶⁹

Restitution, however, may in many instances prove difficult to implement even for readily identifiable property because the ability to grant restitution of the actual property seized by the Cuban government may be negated by a variety of circumstances. The property may have been destroyed or be substantially deteriorated; it may have been subject to transformation, merger, subdivision, improvement, or other substantial changes; it may have been devoted to a use not easily reversed or of substantial public utility; or its character may be such that the state decides for policy reasons not to return to its former owners. In such cases, some form of compensation would need to be granted.

In addition, in the past decade, Cuba (through state-owned enterprises) has entered into a number of joint ventures with foreign, non-U.S. investors. Many of these ventures involve property that was expropriated from U.S. and Cuban nationals. In deciding whether to provide direct restitution of those properties to the U.S. claimants, the Cuban government will have to balance the rights and interests of the former owners against those of third parties who have invested in Cuba. Likewise, the rights of any other lessors, occupants, or users of the property would have to be taken into account in deciding whether direct restitution should be

granted.

Where direct restitution is the appropriate remedy, a number of matters will have to be worked out between Cuba and the U.S. claimants. For example, Cuba may want to impose restrictions or requirements on the claimants' use of the property or on their ability to transfer title for a certain period of time after restitution. Also, a potentially complex valuation process may need to be undertaken if the property has been improved since being expropriated. In some instances, an agreement will need to be reached in advance on the recovering owner's responsibility for the environmental reclamation of the property, to the extent that ecological impacts from operation of the facility have occurred or are expected to occur in the future. Many other issues are likely to come up in individual cases.

Cuba may also decide to impose a "transfer tax" or equivalent fee on the restitution transaction. The purposes of such a tax would be to raise funds for other aspects of the program and to ensure that settlement of the claim by restitution does not leave a claimant in a better position than that of other claimants who have availed themselves of other forms of recovery, such as partial compensation.

(2) Substitutional Restitution

Instances may arise in which direct restitution will be impractical, but both Cuba and the U.S. claimant still wish to apply a restitution-type remedy. Such circumstances may dictate restitution of substitute property (that is, the transfer to the claimant of other property, equivalent in value to the property confiscated). When restitution of substitute property is proposed, it will be necessary to set rules on, among other things, how the equivalence of the properties is to be defined and established.

Substitutional restitution may be appropriate, for example, in cases in which the confiscated property is farmland that has been conveyed to cooperatives or divided among small farmers. Rather than dispossessing the current occupants, Cuba may offer to convey to the U.S. claimants agricultural or other lands in state hands that may be equivalent to those expropriated.

(3) Comment on Restitution Methods

Direct and substitutional restitution programs implemented in certain

Eastern European countries have been criticized on economic grounds.⁷⁰ In addition, some analysts have concluded that the use of restitution in Cuba would be fraught with peril.⁷¹ The restitution of properties in Cuba to U.S. claimants has also been specifically opposed because it would “lock the country back into a sugar-dominated structure of production” and “would be tantamount to insisting that nationalistic feelings in Cuba due to foreign ownership of the country’s principal assets never had a basis in fact.”⁷²

Despite these concerns and criticisms, restitution – whether direct or substitutional – is likely to be an important ingredient in the mix of remedies granted to U.S. claimants under Cuba’s claims settlement program. It will be inappropriate in many instances, and even where appropriate, its use should be tempered by the realization that restitution will often be a slow and difficult process, and one subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others.⁷³ In addition, if a variety of remedies are offered, care must be taken to assure that the value of the benefits received by those availing themselves of the restitution alternative is neither greater nor less than the benefits received by claimants who use other remedies.

c. Issuance of State Obligations

(1) Discussion of Alternative

A number of Eastern European countries have used state-issued instruments, which will be generally referred to here as “vouchers,” to provide full or partial compensation to expropriation claimants.⁷⁴ The vouchers may not be redeemed for cash, but can be used, among other things, as collateral for loans; to pay (fully or in part) for property sold by the state, including shares in privatized enterprises; to purchase real estate put up for sale by the state; to exchange for annuities; or as investment instruments.⁷⁵

The voucher system provides a potential way of resolving many of the U.S. nationals’ expropriation claims in Cuba, particularly those of the former owners of small and medium-sized enterprises who may not be interested in recovering the properties they once owned because of the

obsolescence or physical deterioration of the facilities.⁷⁶ The system recognizes the limits of the country's ability to pay compensation claims, and avoids the dislocation costs and disputes associated with direct restitution systems. As with restitution remedies, an issue needing resolution at the outset would be the level of compensation to be offered in proportion to the loss.

The system has potentially great flexibility since the vouchers could be used for a variety of purposes, of which some could be more attractive than others to individual claimants. Also, in addition to vouchers, other state-issued instruments could be used as means of compensating U.S. claimants. These include annuities, bonds, promissory notes, stock certificates in privatized enterprises, and other debt or equity instruments.

(2) Comments on Issuance of State Obligations

Several potential drawbacks can accompany a system of vouchers or other state-issued instruments.⁷⁷ The instruments will fluctuate in value and are likely to depreciate if Cuba's economic recovery falters.⁷⁸ In addition, to the extent the instruments are used as income-generating devices (e.g., for the collection of annuities), the rate of return is likely to be very low.⁷⁹ Also, the basic underpinning of a voucher system is confidence in the state's ability to make good on its commitments. Therefore, the security, transferability, and marketability of the compensation instruments is a serious concern that the Cuban government will need to overcome in order for the remedy to have acceptability with the claimants.

d. Other Compensation Mechanisms

(1) Discussion of Alternative

Other remedies that might be utilized in Cuba, and have not yet been tried elsewhere, could consist of economic incentives to invest in the country. These remedies could include, for example, giving credits on taxes and duties to the extent of all or part of the claim amount; permitting exchange of the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, or preferences in government contracting; and conferring other benefits.

Each claimant might be interested in a different “package”; so ad hoc, case-by-case negotiations would be needed, at least to resolve the most significant claims.⁸⁰

(2) Comments on Other Compensation Mechanisms

While allowing a large degree of creativity in the development of claims resolution arrangements suitable for individual claimants, retention of the ability to create ad hoc resolutions could potentially complicate the claims process to the point of making it unwieldy. An even more significant risk is the possible development of a perception that the process lacks fairness and transparency, since comparison of the economic benefit of one “deal” to another might be difficult and open to a variety of interpretations. Thus, extreme care will have to be exercised if this alternative is utilized.

V Alternative Recommendations for Dealing with Cuban Nationals’ Claims

Resolution of the Cuban nationals’ expropriation claims is a political as well as legal issue. From the legal standpoint, the main area of inquiry is the validity and legal effectiveness of the expropriations under applicable Cuban law at the time they took place. If the expropriations were lawful, or at least legally effective, the problem is reduced to determining what remedy the former property owners should be given for the taking of their assets. On the other hand, if the expropriations were unlawful and legally ineffective, the Cuban government may be said to have enriched itself unjustly at the expense of the owners and may be holding the properties in the equivalent of a “constructive trust” for the benefit of the owners, with the obligation eventually to return them.⁸¹

From the political standpoint, the handling of the claims depends on a number of domestic and international factors that will come into play at the time the issue is addressed.⁸² One important factor that will shape the process is Cuba’s ability to provide restitution of the expropriated assets or pay (either immediately or in the long run) compensation to the claimants, given the vast sums at stake.⁸³

A. Right to Private Property Ownership Under Cuban Law

Since Cuba's independence from Spain in 1902, the country has constitutionally recognized private property rights to some degree or another, although the form and extent of the recognition has varied. The Cuban constitution in effect at the time of the Revolution, which had been enacted in July 1940, gave broad recognition to private property rights. Art. 87 of the 1940 Constitution stated:

Art. 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, may be established by law.⁸⁴

Throughout the period during which the Revolutionary government was taking measures to expropriate the assets of Cubans and foreign nationals, it left unmodified this broad constitutional declaration of private property rights. Art. 87 was not deleted until Cuba enacted a new constitution in 1976, by which time all the expropriations had been accomplished. Even then, ownership of private property was not abolished, but only curtailed. The 1976 Constitution still recognized the right of small farmers to own their lands and other means of production (Art. 20), the right of farmers to band together in cooperatives to own land (Art. 21), and the right of individuals to own personal property (Art. 22).

The recognition of private property rights remains embedded in Cuba's legal framework, including the Constitution.⁸⁵ Articles 19, 20, and 21 of Cuba's current Constitution are essentially equivalent to Articles 20, 21, and 22 of the 1976 Constitution. Art. 23 of the 1992 Constitution recognizes the further right of private property ownership by joint ventures and other economic enterprises:

Art. 23. The State recognizes the right to property by mixed enterprises, corporations, and economic associations established in accordance with the law.

The use, enjoyment and disposition of the assets which are the property of the above mentioned enterprises shall be governed by provisions of the laws and treaties, as well as by the enterprises' own articles of incorporation and bylaws.⁸⁶

This uninterrupted constitutional recognition of private property rights means that the state may not deprive individuals of their property except as provided by law. Indeed, although the Revolutionary government has ignored this constitutional mandate and has violated the intent of the Constitution by taking the property of both Cuban nationals and foreigners, in most cases without providing any compensation, the government has continued to pay lip service to the constitutional mandate and has recognized (at least with respect to foreign nationals) its obligation eventually to provide redress to the former owners.

B. Limitations on the State's Ability to Invade Private Property Rights

The state can interfere with the individual's right to own private property in a number of ways. The two most common and, for purposes of this discussion, most important forms of interference are confiscation and expropriation of assets from private owners.

Confiscation is the seizure of private property by the state without compensation, usually to punish the person whose property is seized for who he is or for what he has done. Confiscations are ordered for political, religious, legal, or other reasons related to the person subjected to the taking, not to the property itself.⁸⁷ Expropriation, on the other hand, is the taking by the state, subject to compensation, of specified property for some public purpose, with the taking being independent of the acts or identity of the owner.⁸⁸

1. Confiscation

Confiscation of private property had always been prohibited by the Cuban constitutions prior to 1959. Art. 24 of the 1940 Constitution declared, in relevant part: "Confiscation of property is prohibited." A few weeks after the triumph of the Revolution, however, the new government issued a Fundamental Law to replace the 1940 Constitution.⁸⁹ The Fundamental Law created an exception to the prohibition against confiscation. Art. 24 of the Fundamental Law of 1959 read in relevant part:

Art. 24. Confiscation of property is prohibited, but it is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasury, or who are enriching themselves, or who have enriched themselves, unlawfully under the protection of the public authorities.⁹⁰

Thereafter, Cuba's Revolutionary government created increasingly wide exceptions to the prohibition against the confiscation of private property. Nonetheless, Cuba has continued to recognize explicitly that the state does not have an unfettered right to seize private property, but must do so, if at all, in accordance with the law.⁹¹

2. Expropriation

Cuban constitutions have always recognized the right of the state to expropriate private property, provided the taking is for a legitimate public purpose and compensation is paid to the owner. In the 1940 Constitution, the state's right to expropriate private property is defined in Art. 24 in the following terms:

Art. 24. Confiscation of property is prohibited. No one can be deprived of his property except by competent judicial authority and for a justified cause of public utility or social interest, and always after the payment of cash indemnification, as set by the courts. Failure to comply with these requirements will give rise to the right of the expropriated party to the protection of the courts and, if the case calls for it, to have the property returned to him.

The reality of the public utility or social interest cause for the expropriation, and the need for it, will be decided by the courts in the event of a challenge.

When the Revolutionary government issued a Fundamental Law in 1959 to replace the 1940 Constitution, it retained unchanged the text of Art. 24 as it referred to the state's limited expropriation rights. However, Art. 24 was amended on July 5, 1960, to authorize the massive takings of

the properties of U.S., and later of Cuban, citizens.⁹² The state's right to expropriate private property was made even more explicit in the 1976 Constitution, which declared in Art. 25:

Art. 25. The expropriation of property for reasons of public utility or social interest and with due compensation is authorized.

The law establishes the procedure for the expropriation and the bases on which the need for and the utility of this action is to be determined, as well as the form of the compensation considering the interests and economic and social needs of the owner.⁹³

It is evident that the Fundamental Law of 1959 (as amended) and the 1976 and 1992 constitutions diminished, if not eliminated, the guarantees that private property owners would receive prompt, adequate, and effective compensation in the event of expropriation. Yet, these constitutions still recognize two fundamental requirements of a valid expropriation: private property can be taken by the state only for some legitimate public purpose, and such taking must be accompanied or followed by the payment of compensation. Such principles therefore remain part of Cuba's legal system.

3. Legal Validity and Effectiveness of Cuba's Takings of Property of Cuban Nationals

Cuba's takings of the property of its nationals proceeded by three means: (1) confiscations of the property of alleged officials of the Batista government and collaborators with that government, and subsequent confiscations of the property of alleged counterrevolutionaries; (2) expropriations pursuant to major economic reform laws, such as the Agrarian Reform Law of 1959 and the Urban Reform Law of 1960; and (3) takings of the property of individuals leaving the country as "abandoned property." The first category of property takings was carried out in 1959 and 1960. During those years, the government seized, brought under the control of a newly created Ministry for the Recovery of Stolen Property, and ultimately confiscated the assets of hundreds of individuals charged with being government officials during the 1952-1958 period, or with having benefited from graft during the Batista years. These seizures were accomplished summarily, and the burden was placed on the subject of the con-

fiscation to prove that he or she had not improperly benefited from an association with the former government.⁹⁴ An estimated \$200 million worth of property was confiscated in this manner.⁹⁵

The second, and probably most significant, category of takings occurred between 1959 and 1961 through a series of laws intended to transform Cuba's economic structure to that of a socialist nation. The most important of these were (1) the Agrarian Reform Law of 1959, which expropriated land holdings in excess of 30 *caballerias* (1,000 acres);⁹⁶ (2) Law 890 of October 1960, which expropriated a wide range of Cuban-owned industries and businesses;⁹⁷ (3) the Urban Reform Law of October 1960, which ordained the forced sale to the state of all the rental residential property in private hands,⁹⁸ and a directive issued in March 1968 taking over all remaining small, privately owned businesses.⁹⁹

The third class of takings was conducted pursuant to the "abandoned property" law of December 1961.¹⁰⁰ This law confiscated all properties of those who left Cuba and did not return within a brief period of time.¹⁰¹ Such properties were deemed "abandoned" by the owners and were seized by the state.

The effects of the property takings by Cuba's Revolutionary government must be assessed from two standpoints: (1) Were the takings lawful under the laws in effect at the time the takings took place, or under pre-existing laws if the laws in place at the time of the takings were invalid? (2) Assuming the laws in effect at the time of the takings were invalid, were the takings nonetheless legally effective in terms of passing title to the state?¹⁰²

4. Validity of the Property Takings Under Existing Laws

The methods used by the Revolutionary government for its takings of property in the 1959-1968 period were founded on changes to the 1940 Constitution that were made in the Fundamental Law of February 1959. One such change was the above-cited modification to Art. 24 that allowed the confiscation of the property of officials in the Batista government and others. Another important change to the Constitution was the inclusion in the Fundamental Law of a new article 232 that gave the Council of Ministers (the Cabinet) the power to amend the Constitution, with the

approval of the president, without needing to follow the amendment procedures set forth in articles 285 and 286 of the 1940 Constitution.¹⁰³ This provision was the constitutional source of power for later legislation issued by the Cabinet which directly (and sometimes indirectly) amended the Constitution.¹⁰⁴

It has been argued that the 1940 Constitution was never effectively repealed, and that the Fundamental Law of 1959 and subsequent constitutions are invalid since they were enacted without following the procedures set forth in articles 285 and 286 of the 1940 Constitution.¹⁰⁵ As a result, the argument goes, laws deriving their authority from the Fundamental Law of 1959 (such as the Agrarian Reform Law) are invalid.¹⁰⁶

This argument is based on the implicit assumption that the Revolutionary government lacked the power to overturn the existing legal norms, including the Constitution. It is generally accepted, however, that a successful revolution has the power under certain conditions to annul an existing constitution and create a new set of fundamental legal norms.¹⁰⁷ These conditions have been variously stated, but essentially boil down to political control over the country and acceptance (or at least acquiescence) by the population to both the revolutionary regime and its changes to the constitution and laws.¹⁰⁸

Little doubt exists that the requirements cited in the cases for validating the acts of revolutionary regimes have been met in Cuba. The Revolutionary government has been in firm control of the country for more than 43 years, and throughout that period the population has generally acquiesced to legal changes made by the government, including the enactment of two constitutions and the passage of legislation that drastically changed the island's political and economic structure. The people's acquiescence in the government's actions validates them.¹⁰⁹

From this result follows that the expropriation laws founded on, and consistent with, the Fundamental Law of 1959 are valid. For example, the Agrarian Reform Law of 1959 would be valid under Art. 24 of the Fundamental Law because the properties were taken for an asserted public purpose (i.e., to eliminate large landholdings, which were said to be an obstacle to the development of the national economy);¹¹⁰ the state's obligation to provide compensation to the owners of the expropriated lands was expressly acknowledged;¹¹¹ and mechanisms for providing such

compensation were established.¹¹² Similar features were contained in the Urban Reform Law of 1960 and some of the other expropriation laws.¹¹³

Another argument raised occasionally against the validity of the Revolution's constitutional changes and property expropriation laws contends that all the laws enacted by the Revolutionary government are invalid due to the *de facto* nature of that government.¹¹⁴ This argument fails for the same reason as the preceding one, i.e., the laws of a revolutionary regime that is fully in control and meets popular acquiescence are valid regardless of the initial legitimacy of the regime. Also, as a practical matter, the success of a blanket challenge to the Revolution's legislation would be troubling, for it would also imply that all laws issued by the Batista regime after the 1952 coup d'état were invalid, as well as all laws issued by several other *de facto* regimes that have ruled Cuba.¹¹⁵ Moreover, a future transition government would likely be *de facto* in nature; therefore, its laws (including those dealing with property issues) subsequently would be subject to the same attack as the Revolutionary government expropriations. In short, a successful challenge to the validity of all the post-1959 laws on the grounds of lack of constitutional legitimacy by the enacting government could lead to legal complexities that could make it difficult for the country to govern itself during the transition.¹¹⁶

5. Validity of the Property Takings under Pre-Revolution Laws

Under the theory that the Fundamental Law of February 1959 and other constitutions enacted by the Revolutionary government are invalid and the 1940 Constitution is still in place, it has been further argued that the property expropriations conducted in the 1959-1968 period were invalid because the government failed to comply with the requirement in Art. 24 of the 1940 Constitution that cash compensation be paid in advance to the owners of the expropriated property.¹¹⁷

Even if the 1940 Constitution were held to have remained in effect during the Revolution, it does not necessarily follow that the Cuban courts would find laws like the Agrarian Reform Law and the Urban Reform Law to be invalid.¹¹⁸ While those laws expropriated many assets from the private sector, the laws undertook to establish compensation

mechanisms that, if implemented, would have provided payment over time to the owners.¹¹⁹ A court could find that such compensation schemes might have been insufficient or inadequately carried out, but were not in violation of the provisions of Art. 24.

6. Effectiveness of the Expropriations

The last remaining question is whether, assuming the 1940 Constitution was still in effect and the expropriations were deemed unlawful because compensation was not paid in advance, the takings succeeded nonetheless in vesting title to the properties with the government. The language of Art. 24 of the 1940 Constitution strongly suggests that failure to pay compensation in accordance with the constitutional provision did not in itself render the takings legally ineffective in passing title to the state. Instead, the language can be interpreted to mean that the takings transferred title to the properties to the government *and* gave rise to a continuing obligation on the part of the government to compensate former owners in accordance with the constitutional requirements, or return the property to the former owners.

After setting the conditions for a governmental expropriation of private property, Art. 24 states: “Failure to comply with these requirements shall give rise to the right by the person whose property has been expropriated to the protection of the courts and, *if appropriate*, to have the property returned to him.” (Emphasis added.) Under this article, it is clear that transfer of property back to the owners is neither automatic nor constitutionally required. Indeed, under the procedure established by Art. 24, the owner of an expropriated property who wished to contest the validity of the taking had to sue the government and, if successful, could obtain relief from the court in the form of damages. If justice so required – for example if it were shown that the takings were not for a legitimate state purpose – the owner might obtain restitution of the property. Thus, unless and until a court ruled that restitution should take place, title to the property remained with the state.¹²⁰

7. Conclusions on Effectiveness of Property Takings

The above discussion suggests that most of the Revolutionary government's takings of private property from Cuban nationals could be held by a reviewing court to have been legally valid. Alternatively, such a court would most likely rule that the takings were effective in transferring title of the properties to the state even if the takings were invalid.

This does not mean, however, that the state has no remaining duties to its citizens for the takings. It does not appear that compensation was ever paid to the former owners for any of the expropriations, even where (as with the Agrarian Reform Law) a mechanism was set up by the law to provide indemnification. Therefore, Cuba still has the legal obligation to comply with Art. 24 of the Fundamental Law of 1959 (or the 1940 Constitution) and provide remedies to those whose properties were confiscated without cause or expropriated, or else return the properties.¹²¹ Definition and implementation of the remedies are tasks that should be addressed through new laws issued by a transition government.¹²² The next section illustrates some of the decisions that would need to be made in the process of providing those remedies.

C. Remedies for the Cuban Nationals' Expropriations

Any system of remedies for the property expropriations carried out by a state against its citizens must seek to implement several somewhat inconsistent objectives. Those objectives include: 1) to provide predictable and substantially fair treatment to all interested parties; 2) to create in the shortest possible time a regime of clear, secure, and marketable rights to property; 3) to promote the expeditious privatization of state-held assets; 4) to encourage the early onset of substantial foreign investment; and 5) to keep the aggregate cost of the remedies within the financial means of the country.¹²³

As a government tries to implement these objectives, it needs to make decisions on a host of substantive and procedural questions that generally will not arise in a negotiated settlement of the claims of U.S. nationals, but which will be important in Cuba's domestic claims process. The discussion that follows considers some of these questions.

1. How Are Different Types of Property to Be Treated?

A key issue is whether different types of property (industrial, commercial, agricultural, residential, and personal) should be treated differently. Some types of expropriated property may lend themselves readily to direct restitution. On the other hand, restitution of residential property is likely give rise to numerous disputes among a variety of claimants, including former owners and their successors, current occupants, and others.¹²⁴ Due to these differences, some countries addressing the issue have handled different types of property separately.

2. Who Is Entitled to a Remedy for Property Expropriations?

The universe of potential claimants under Cuba's remedies program may include registered U.S. claimants who are allowed to "opt-out" of a United States-Cuba settlement (assuming such opting out is permitted), nonregistered U.S. claimants, Cuban nationals acquiring U.S. citizenship after their properties were confiscated, other Cuban nationals abroad, and Cubans still in the island.¹²⁵ In setting up a claims resolution program, it would be necessary to determine whether the various categories of claimants (for example, Cuban citizens residing abroad and those who have become citizens of another country) would qualify for remedies.¹²⁶ Another question is which successors in interest, if any, of the original property owners would be entitled to remedies.¹²⁷ Given the considerable amount of time that has passed since Cuba's expropriations and the likelihood that most of the former property owners will have died at the time a claims settlement process is implemented, Cuba will need to decide to what extent the heirs of former owners are entitled to share in the remedies, and, if so, who will qualify as an heir for the purpose of eligibility for remedies.

3. Who Is to Administer the Remedies?

Some countries have established agencies for the sole purpose of administering the remedies. Hungary, for example, established compensation offices in each county and in Budapest, and an appellate National

Compensation Office in the capital. Decisions of the local offices could be appealed to the appellate office, whose decisions could be reviewed by a designated civil court in Budapest.¹²⁸

Other countries, like Germany, assigned responsibility for handling expropriation claims to the local property registries where the property at issue was located.¹²⁹ Czechoslovakia chose not to establish an agency to administer or review restitution claims, but left the matter to negotiation between the former owner and the person occupying the property and, if agreement was not reached by negotiation, through court adjudication – which occurred frequently.¹³⁰

Given the large number and contentious nature of the claims expected in Cuba, it probably will be necessary to establish an independent agency of the Cuban government with jurisdiction over the determination of the validity of claims to title of confiscated property and the dispensation of remedies. Also, adequate staff and personal training should be provided in advance; inventories of the subject properties should be made; and valuation methods should be developed.

4. What Should Be the Procedures for Dispensing the Remedies?

The procedures for handling property claims would need to set fairly short time limits for filing remedy requests;¹³¹ define the means and procedures for proving title; establish mechanisms for adjudicating title disputes, dispensing remedies, and appealing agency determinations; define and enforce the duties of those who are granted restitution of properties (e.g., payment of taxes, environmental cleanup, economic use of the property); and put in place the administrative procedures and bureaucratic apparatus needed to identify and implement the applicable remedy in each case. The experience in other countries demonstrates that it is extremely important to have these mechanisms in place before attempting to consider any claims.¹³²

5. What Remedies Should Be Made Available?

The remedies that would be available to Cuban nationals under Cuba's claims settlement program would be the same discussed above for

U.S. nationals who chose to opt out of the government-to-government settlement procedure. Following is a brief recapitulation of that discussion, as it relates to Cuban nationals.

a. Restitution

Restitution of the actual property that was confiscated would be the solution that many Cuban claimants, like their U.S. counterparts, would favor. However, the possibility of granting restitution of the actual property that was seized by the government would depend on many economic, social, and political factors, and on the current condition of the property.

b. State Obligations Alternative

The main alternative to restitution would be a voucher system of compensation such as the one used in Hungary. The Hungarian system provides an interesting model for the resolution of some of the expropriation claims in Cuba. The Hungarian system recognized the limits of the country's ability to pay compensation claims, an important consideration for economically ravaged Cuba. It also took into account the rights of current occupants or users of property, and thus avoided the dislocation costs and disputes associated with direct restitution systems. On the downside, however, the level of compensation provided in Hungary was quite limited and was made even more so by the fact that the vouchers traded at less than 50 percent of their face value; the voucher's value as a source of annuity payments was low.¹³³ Dissatisfaction also arose over the difficulties inherent in having the population understand and use the voucher system wisely, and owing to the complexity of the entire process.¹³⁴

The experience with Hungary's compensation scheme also raises a number of questions, including what are the bases for valuating the expropriated property and for setting the compensation scale, and what forms of payment other than vouchers could be used (annuities, bonds, promissory notes, stock certificates in privatized enterprises, and combinations of several forms).¹³⁵ Also to be considered are the adequacy of the amount offered in proportion to the loss, and the security of the compensation instruments.

c. Other Remedies

While other remedies (not including direct cash payments, which will probably be beyond the state's ability to provide) could be utilized in Cuba, the practical range of such remedies is limited by the administrative difficulties in implementing a multiplicity of schemes and the very large number of Cuban claimants. Ad hoc negotiations with individual claimants also would be impractical, except perhaps with a few claimants, because domestic claimants probably would lack the means to pursue investment opportunities in Cuba and therefore would be unable to benefit from such incentives.

VI Conclusions and Recommendations

A. Conclusions

A time will come when the United States and Cuba will set out to negotiate a settlement of the expropriation claims of U.S. nationals against Cuba. The date of such an event is uncertain, but it is most likely that the negotiations will be held while a depressed economy and an unstable political situation besiege Cuba.

The conditions under which the settlement will be negotiated will greatly restrict the remedies that Cuba will be able to offer the U.S. claimants. Certainly, the traditional way of settling expropriation claims – i.e., Cuba's payment of a lump sum of money to the U.S. government to be distributed pro rata among all claimants – will not be adequate, given Cuba's inability to pay a significant portion of the amount it owes. Lump-sum compensation should be given to U.S. nationals to the extent funds are available. However, these should be replaced, for those who opt out of the lump-sum settlement, by a variety of other remedies to be negotiated by the claimants with Cuba, including restitution of the expropriated assets, compensation through state-issued instruments, and other means. While the eventual solution reached in each case is likely to grant only partial recovery to the claimant, the results in most cases probably would be more beneficial to the claimants than a lump-sum distribution.

The types of remedies available to U.S. nationals opting to participate in a parallel Cuban domestic claims program would of necessity have to

be few in number and relatively straightforward in execution, demanding little in the way of up-front cash outlays by the state. The results of a domestic Cuban process are likely to leave many dissatisfied. Therefore, both the Cuban government and the claimants should be prepared to exhibit flexibility in working towards as fair and reasonable a resolution of the claims as can be achieved under the constrained circumstances.

B. Recommendations

As the discussion in this paper suggests, the U.S. government needs to make a number of important policy decisions to prepare itself to discuss with Cuba the potential resolution of the claims issue. For example, the U.S. government will need to decide whether to espouse the expropriation claims of those who were Cuban nationals at the time their assets were confiscated by Cuba, but who have since become U.S. citizens. It will also need to decide whether to organize its settlement approach around the traditional “espousal” principle, precluding claimants from engaging in separate negotiations with Cuba, or whether it will adopt a more flexible approach that allows claimants to choose to be represented by the U.S. government or pursue other avenues to obtain redress.

These and other policy issues should be examined in the near term by a multiagency task force, perhaps with the assistance of outside experts. The task force’s mandate should be to identify what policy issues the U.S. government should address in the process of negotiating a resolution of the claims issue with Cuba, to recommend solutions for those issues, and to propose legislation to be enacted if the proposed solutions require appropriations or some other form of legislative action.

Notes

¹ The term “U.S. nationals” means in the claims context those natural persons who were citizens of the United States at the time their properties in Cuba were seized by the Cuban government, or those corporations or other entities organized under the laws of the United States and 50 percent or more of whose stock or other beneficial interest was owned by natural persons who were citizens of the United States at the time the entities’ properties in Cuba were taken. *See* 22 U.S.C. § 1643a(1). Individuals and entities meeting this definition were eligible to participate in the Cuban Claims Program established by Congress in 1964 to determine the amount and validity of their claims against the government of Cuba for the uncompensated taking of their properties after January 1, 1959. *See* 22 U.S.C. § 1643.

² *See, e.g., Alarcón: Nation ‘U.S. Protectorate’ with Helms-Burton Bill*, PRENSA LATINA, Nov. 1, 1995, available in F.B.I.S. (LAT-95-215), Nov. 7, 1995, at 1 [hereinafter *Alarcón: Nation ‘U.S. Protectorate’*].

³ This position is expressly set forth in Cuba’s Law 80 of 1996, the “Law on the Reaffirmation of Cuban Dignity and Sovereignty,” whose Art. 3 reads in relevant part:

Art. 3. –The claims for compensation for the expropriation of U.S. properties in Cuba nationalized through that legitimate process, validated by Cuban law and international law referred to in the preceding article, may be part of a negotiation process between the Government of the United States and the Government of the Republic of Cuba, on the basis of equality and mutual respect.

The indemnification claims due to the nationalization of said properties shall be examined together with the indemnification to which the Cuban state and the Cuban people are entitled as a result of the damages caused by the economic blockade and the acts of aggression of all nature which are the responsibility of the Government of the United States of America.

Ley Número 80: Ley de Reafirmación de la Dignidad y Soberanía Cubanas, GACETA OFICIAL (December 24, 1996, Extraordinary Edition). An English-language translation appears at 36 I.L.M. 472 (1997). For the complete text of Law 80 online, *see* <http://www.cubavsbloqueo.cu/cubavsbloqueo/leyantidoto.htm>.

⁴ President Kennedy officially imposed the trade embargo in February 1962. *See* Proclamation 3447, 27 Fed. Reg. 1085 (1962), 3 C.F.R., 1059-63 Comp., at 157. Previously, authorization had been suspended for most industrial export licenses to Cuba. 43 DEPT. STATE BULL. 715 (1960). President Eisenhower had also reduced the quota of Cuban sugar in the U.S. market to zero. Proclamation No. 3383, effective December 21, 1960, 25 Fed. Reg. 13131. Additional trade restrictions were imposed

by other laws enacted in the 1960-1962 period. Therefore, by the time President Kennedy proclaimed a total trade embargo, trade between the United States and Cuba already was essentially at a standstill. For a Cuban perspective on the history of the embargo, see <http://www.cubagob.cu/>.

⁵ Citing U.S. government figures, Cuban Parliament President and former Foreign Minister Ricardo Alarcón asserted in a November 1995 speech that the outstanding expropriation claims by U.S. and Cuban nationals could total approximately \$100 billion, a figure that represents 50 times Cuba's average yearly receipt from exports. Alarcón pointed out: "This means that we would have to return the properties to the former owners or that we would have to allocate the country's revenues for half a century to amortize the debt in order for the United States to lift its hostile policies on Cuba, regardless of the ideological orientation of its government." *Alarcón: Nation 'U.S. Protectorate'*, *supra* note 2.

⁶ See, e.g., Matias F. Travieso-Díaz & Steven R. Escobar, *Cuba's Transition to a Free-Market Democracy: A Survey of Required Changes to Laws and Legal Institutions*, 5 DUKE J. COMP. & INT'L L. 379, 412 (1995); Rolando H. Castañeda & George P. Montalván, *Economic Factors in Selecting an Approach to Expropriation Claims in Cuba*, presented at the Shaw, Pittman, Potts & Trowbridge Workshop on "Resolution of Property Claims in Cuba's Transition," Washington, D.C., 16 (Jan. 1995) (on file with author) [hereinafter Castañeda & Montalván].

⁷ It has been asserted that there is no legal or moral basis for providing a remedy for property losses and not compensating those who have suffered all manner of torts at the hands of the Cuban government – involuntary or uncompensated work, unjust imprisonment, loss of life or limb, loss of loved ones, physical or psychological abuse and harassment by agents of the state, discontinuance of pension payments, and so on. Rolando H. Castañeda & George P. Montalván, *Transition in Cuba: A Comprehensive Stabilization Proposal and Some Key Issues*, in CUBA IN TRANSITION – PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 11, 25 (1993) [hereinafter ASCE-3]. (The authors conclude that, since the cost of providing compensation for tort claims "defies imagination," no remedies should be provided for either tort or property claims. *Id.* at 25, 30.) See also Rudi Dornbusch, *Getting Ready for Cuba after Castro*, BUS. WK., May 24, 1993, at 19 (arguing against restitution on the grounds that it would result in court deadlocks over conflicting claims to property, and delays in privatization); Jorge Sanguinetti, *The Transition towards a Market Economy in Cuba: Its Legal and Managerial Dimensions*, in TRANSITION IN CUBA – NEW CHALLENGES FOR U.S. POLICY 463, 479-81 (Lisandro Perez ed., 1993) [hereinafter TRANSITION IN CUBA] (suggesting that the resolution of the property claims issue be deferred until Cuba's economy has recovered, but pointing out that a formula for the settlement of claims must be arrived at early in Cuba's transition to a free-market society.)

⁸ All countries in Central and Eastern Europe that have implemented schemes to settle expropriation claims have experienced a great deal of uncertainty over property rights. This uncertainty has discouraged potential investors and has delayed privati-

zation efforts. CHERYL W. GRAY ET AL., *EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE* (World Bank Discussion Paper No. 209) 4 (1993) [hereinafter GRAY ET AL.]. While it appears inevitable that the claims resolution process will have some impact on Cuba's economic transition, the rapid development of a claims resolution plan would help minimize this impact.

⁹ Section 620(a)(2) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(2) (1988) (amended in 1994) prohibits U.S. assistance to Cuba until Cuba has taken "appropriate steps under international law standards to return to United States nationals, and to entities no less than 50 percent beneficially owned by United States citizens, or provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after January 1, 1959, by the government of Cuba." Also, the LIBERTAD Act includes, as a precondition to declaring that a "democratically elected government" is in power in Cuba (thereby authorizing the provision of significant economic aid to Cuba and the lifting of the U.S. trade embargo), that Cuba has made "demonstrable progress in returning to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban government from such citizens and entities on or after January 1, 1959, or providing full compensation for such property in accordance with international law standards and practice." See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12, 1996), *codified as 22 U.S.C. Chapter 69A* [hereinafter the Helms-Burton Law], §§ 202(b)(2)(B), 204(c), 206(6). The Helms-Burton Law further expresses the "sense of 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." *Id.*, § 207.

¹⁰ See, e.g., Lisa Shuchman, *U.S. Won't Ease Embargo against Cuba, Official Says*, PALM BEACH POST, Apr. 29, 1994, at 5B (quoting Dennis Hays, then Coordinator of Cuban Affairs, U.S. Department of State, as saying that before the United States lifts the trade embargo against Cuba, the expropriation of American-owned property by the Cuban government will have to be addressed); Frank J. Priol, *U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba*, N.Y. TIMES, Nov. 25, 1992, at A1 (quoting Alexander Watson, then Deputy U.S. Representative to the United Nations, as stating in an address to the General Assembly of the United Nations that the United States chooses not to trade with Cuba because "among other things[,] Cuba, 'in violation of international law, expropriated billions of dollars worth of private property belonging to U.S. individuals and has refused to make reasonable restitution.'")

¹¹ Many Cuban nationals whose properties were seized by the Cuban government subsequently moved to the United States and became U.S. citizens. Some of these Cuban-Americans have advocated being added to the U.S. claimants class (so they can be included in an eventual U.S.-Cuba settlement) or, alternatively, being recognized as not bound by an agreement between the United States and Cuba and being permitted to pursue their claims in U.S. courts. See, e.g., Alberto Diaz-Masvidal,

Scope, Nature, and Implications of Contract Assignments of Cuban Natural Resources (Minerals and Petroleum), presented at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy, Miami 54-62 (Aug. 1994).

Some precedent exists for including in the class of recognized U.S. claims those of individuals who were not U.S. citizens at the time of the expropriations in the settlement of U.S. claims against another country. Such an inclusion would require legislation amending the Cuban Claims Act, along the lines of a bill that was passed by Congress in 1955 to include individuals who were U.S. citizens as of August 1955 in the U.S. war claims against Italy. *See* 22 U.S.C. § 1641c. Political pressures may be emanating from the Cuban-American community in the United States to have such legislation enacted, particularly if it does not appear likely that the Cuban American claimants will find adequate redress under a parallel claims resolution program implemented in Cuba. Enactment of such legislation, however, will almost certainly be opposed by the existing certified U.S. claimants, whose share of a lump settlement would be decreased if the claimant class were enlarged and (as is likely to be the case) the negotiated settlement amount were less than 100 percent of the certified value of the claims. In addition, such legislation would raise numerous legal questions, including its potential inconsistency with well-settled international law principles under which a state can only act to protect the interests of those who were nationals of that state at the time of the expropriations. *See* D.W. GREIG, *INTERNATIONAL LAW* 530-31 (2d. Ed. 1976).

¹² *See* Section III, *infra*.

¹³ Some authority supports the proposition that property is on its way to becoming recognized as a human right under international law. *See* Stephen J. Kimmerling, *Rights and Remedies Concerning Cuban Residential Property*, in *CUBA IN TRANSITION – PAPERS AND PROCEEDINGS OF THE ELEVENTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY* 258, 268-70 (2001). However, to date, no court appears to have invoked such an international law principle as the basis for protecting the property rights of the citizens of a country vis-à-vis their government. As a practical matter, Cuban claimants are more likely to find adequate support for their expropriation claims in Art. 24 of Cuba's Constitution (further discussed below) without need to resort to international law principles.

¹⁴ *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), reversed *on other grounds*, 376 U.S. 398, 84 S. Ct. 923 (1964); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D. N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir. 1967); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *Jaffari v. Islamic Republic of Iran*, 539 F.Supp. 209, 215 (N.D. Ill. 1982); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 702, Comment k; *Case Concerning the Barcelona Traction, Light, and Power Co., Ltd. (Belgium v. Spain) Second Phase*, 1970 I.C.J. 3; *LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS* 1019 (2d ed. 1987).

¹⁵ *See, e.g.,* Nicolas Sanchez, *A Proposal for the Return of Expropriated Cuban*

Properties to their Original Owners, in CUBA IN TRANSITION – PAPERS AND PROCEEDINGS OF THE FOURTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 350 (1994); Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 GEORGETOWN INT’L L. J. 137 (1995) [hereinafter Kern & Mills].

¹⁶ For a detailed description of the process by which Cuba expropriated the assets of U.S. nationals, see Michael W. Gordon, THE CUBAN NATIONALIZATIONS: THE DEMISE OF PROPERTY RIGHTS IN CUBA, 69-108 (1975) [hereinafter THE CUBAN NATIONALIZATIONS].

¹⁷ Ley de Reforma Agraria, published in GACETA OFICIAL, June 3, 1959 [hereinafter Agrarian Reform Law].

¹⁸ Law 851 of Nationalization of July 6, 1960, published in GACETA OFICIAL, July 7, 1960.

¹⁹ Resolution No. 1, August 6, 1960, published in GACETA OFICIAL, August 6, 1960; Resolution No. 2, September 17, 1960, published in GACETA OFICIAL, September 17, 1960; Laws 890 and 891 of October 13, 1960, published in GACETA OFICIAL, October 13, 1960; Resolution No. 3, October 24, 1960. For a listing of laws, decrees, and resolutions by means of which Cuba’s expropriations of the assets of U.S. nationals were implemented, see FOREIGN CLAIMS SETTLEMENT COMM’N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM 78-79 (1972) [hereinafter 1972 FCSC REPORT].

²⁰ THE CUBAN NATIONALIZATIONS, *supra* note 16, at 105-6.

²¹ For a summary of Cuba’s expropriations of the assets of its nationals, see Nicolás J. Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro’s Systematic Assault on Private Ownership in Cuba*, presented at the American Bar Association’s 1994 Annual Meeting, New Orleans, La. (1994), reprinted in 1 LATIN AM. BUS. L. ALERT 5 (1994).

²² Law 851 of July 6, 1960, which authorized the nationalization of the properties of U.S. nationals, provided for payment for those expropriations by means of 30-year bonds yielding two percent interest, to be financed from the profits Cuba realized from sales of sugar in the U.S. market in excess of 3 million tons at no less than 5.75 cents per pound. The mechanism set up by this law was illusory because the United States already had virtually eliminated Cuba’s sugar quota; see Proclamation No. 3355, 25 Fed. Reg. 6414 (1960) (reducing Cuba’s sugar quota in the U.S. market by 95 percent). Nonetheless, the inclusion of this compensation scheme in the law constituted an explicit acknowledgment by Cuba of its obligation to indemnify the U.S. property owners for their losses.

²³ Cuba has entered into settlement agreements with five foreign countries for the expropriation of the assets of their respective nationals in Cuba: France, on March 16, 1967; Switzerland, March 2, 1967; United Kingdom, October 18, 1978; Canada, November 7, 1980; and Spain, January 26, 1988. See <http://www.cubavsbloqueo.cu/>. See also 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).

²⁴ The Spanish claims, for example, were valued at \$350 million, but ultimately were settled for about \$40 million. Even this limited amount was not paid until 1994, six years after the claims were settled and three decades after the claims accrued. *Cuba to Compensate Spaniards for Property Seizures*, REUTERS TEXTLINE, February 15, 1994, available in LEXIS, World Library, Txtline File.

²⁵ U.S.C. §1643 *et seq.* (1988) (amended in 1994).

²⁶ 1972 FCSC REPORT, Exhibit 15.

²⁷ *Id.* The value of the certified Cuban claims exceeds the combined certified amounts of all other claims validated by the FCSC for expropriation of U.S. nationals' assets by other countries (including the Soviet Union, China, East Germany, Poland, Czechoslovakia, Hungary, Vietnam, and others). FOREIGN CLAIMS SETTLEMENT COMM'N 1994 ANNUAL REPORT 146 (1994) [hereinafter 1994 FCSC REPORT].

The total amount certified by the FCSC is almost double the \$956 million book value of all U.S. investments in Cuba through the end of 1959, as reported by the U.S. Department of Commerce. Jose F. Alonso and Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, in ASCE-3, *supra* note 7, at 168, 201. The valuation of the U.S. nationals' expropriation claims has never been established in an adversary proceeding. The FCSC certification process involved administrative hearings in which only the claimants introduced evidence on the extent and value of their losses. *See* 45 C.F.R. Part 531.

²⁸ 1972 FCSC REPORT, *supra* note 27, Exhibit 15.

²⁹ *Id.*

³⁰ *Id.* at 413.

³¹ *Id.* at 76. The interest rate, if any, that should be applied to the amounts certified by the FCSC would most likely be subject to negotiation between the United States and Cuba.

³² *Shanghai Power Co. v. United States* [hereinafter *Shanghai Power Co. v. United States*], 4 Cl. Ct. 237, 240 (Cl. Ct. 1983), *aff'd mem.*, 765 F.2d 59 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 909 (1985); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 185-90 (1965). It has been held by U.S. courts that Cuba's expropriations of the assets of U.S. nationals violated international law because Cuba failed to provide adequate compensation and because Cuba carried the expropriations out in a discriminatory manner against U.S. nationals and conducted them for purposes of retaliation against the U.S. government. *Banco Nacional de Cuba v. Sabbatino*, 193 F.Supp. 375, 384 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *Banco Nacional de Cuba v. Farr*, 272 F.Supp. 836, 838 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166, 184-85 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). *See generally* THE CUBAN NATIONALIZATIONS, *supra* note 16, at 109-52.

³³ A shorthand sometimes used for the Hull formula is that of “just compensation,” meaning “in the absence of exceptional circumstances . . . an amount equivalent to the value of the property taken . . . paid at the time of the taking . . . and in a form economically usable by the foreign national.” Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 A.J.I.L. 474, 475 (1991) [hereinafter Norton]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987).

³⁴ Ibrahim F. I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* 163 (1993) [hereinafter *Legal Treatment of Foreign Investment*].

³⁵ ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 774-76 (Matthew Bender, 1991). Shihata explains the “adequacy” element of compensation as follows:

Compensation will be deemed ‘adequate’ if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.

Legal Treatment of Foreign Investment, *supra* note 34, at 61. Shihata goes on to define fair market value as the amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future, and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment, and other relevant factors. *Id.* at 161-62.

³⁶ *Id.* at 163.

³⁷ It has been the conclusion of U.S. courts and legal scholars that at least some of the expropriations of the assets of U.S. nationals, such as those arising from Law 851 of July 6, 1960, were contrary to international law on the additional grounds that they were ordered in retaliation against actions taken by the United States to eliminate Cuba’s sugar quota, and because they discriminated against U.S. nationals. Although the expropriations were contrary to international law for one or more reasons, they were legally effective in transferring title to the assets to the Cuban state, and therefore the breach of Cuba’s international law obligations must be seen as giving rise to a duty by Cuba to provide compensation to the former owners of the properties, but not necessarily to an inescapable obligation to provide restitution of the property to them. See *infra* Section V.

³⁸ See Juan C. Consuegra-Barquin, *Cuba’s Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L.R. 873 (1994) [hereinafter Consuegra-Barquin] (discussing the difficulties that a Cuban transition government will face in seeking to provide remedies for residential property expropriations.)

³⁹ See Emilio Cueto, *Property Claims of Cuban Nationals*, presented at the Shaw,

Pittman, Potts & Trowbridge Workshop on “Resolution of Property Claims in Cuba’s Transition,” Washington, D.C. (Jan. 1995) (on file with author) [hereinafter Cueto] at 9-12.

⁴⁰ See <http://www.cubavsbloqueo.cu/>.

⁴¹ *Dames & Moore v. Regan*, 453 U.S. 654, 688, 101 S. Ct. 2972, 69 L. Ed. 918 (1981) [hereinafter *Dames & Moore v. Regan*]; *Shanghai Power Co. v. United States*, 4 Cl. Ct., *supra* note 32, at 244-45. The president’s authority is limited by the rarely exercised power of Congress to enact legislation requiring that a settlement seen as unfavorable be renegotiated. *Dames & Moore v. Regan*, *supra* at 688-89 and n.13.

⁴² See *Dames & Moore v. Regan*, 453 U.S. at 680 and n.9, for a listing of 10 settlement agreements reached by the U.S. Department of State with foreign countries between 1952 and 1981.

⁴³ *Id.*, 453 U.S. at 679-80; *Asociación de Reclamantes v. United States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); RICHARD B. LILICH AND BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (William S. Hein and Co., 1975) at 6.

⁴⁴ For example, the United States settled its nationals’ claims against the People’s Republic of China for \$80.5 million, which was about 40 percent of the \$197 million certified by the FCSC. *Shanghai Power Co. v. United States*, 4 Cl. Ct., *supra* note 32, at 239; XVIII I.L.M. 551 (May 1979).

⁴⁵ Letter from Ronald J. Bettauer, Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State, to claimants (May 29, 1992); Agreement between the government of the United States of America and the government of the Federal Republic of Germany Concerning the Settlement of Certain Property Claims, May 13, 1992, TIAS 11959 [hereinafter German Agreement].

⁴⁶ See *Shanghai Power Co. v. United States*, *supra* note 32.

⁴⁷ See <http://www.odci.gov/cia/publications/factbook/geos/cu.html>. Cuba’s external debt is a staggering 58 percent of the country’s Gross Domestic Product. *Id.*

⁴⁸ *Id.*

⁴⁹ See Cueto, *supra* note 39, at 9-12, 34-36.

⁵⁰ Residential property and small farms are good candidates for a compensation remedy because such a remedy avoids the potential need to dispossess current occupants to those properties, who may have acquired legal rights to them and whose eviction might be politically untenable; see *Consuegra-Barquin*, *supra* note 38. In addition, owners of residential or small farming property in a foreign country may be generally less likely to desire restitution of those assets almost 40 years after they were taken.

⁵¹ A 50-percent level of recovery would exceed the recovery level in most “lump-sum” settlements negotiated by the United States under the International Claims

Settlement Act programs. *See* 1994 FCSC REPORT, *supra* note 27, at 146.

⁵² The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, protects, subject to specified exceptions, the property of foreign states or their agencies and instrumentalities from damages claims by private parties. One of the exceptions to this immunity permits suits against certain foreign states (including Cuba) for terrorist acts or provision of material support thereto. 28 U.S.C. §1605(a)(7). Under that provision (known as the Terrorist Act Exception) and a counterpart provision in the criminal code, U.S. nationals have the right to recover treble damages, plus attorneys' fees, for injuries to person, property, or business incurred as a result of international terrorism. However, the Terrorist Act Exception also allows the president to waive the ability to execute any judgments that are obtained in such a suit against blocked assets of the foreign government. 28 U.S.C. §1610(f)(3).

In 2000, however, Congress enacted the "Victims of Trafficking and Violence Protection Act of 2000," Public Law 106-386 (approved October 28, 2000), whose section 2002(a) allows plaintiffs holding certain judgments against Cuba to recover against blocked Cuban assets. The legislation was intended to permit recovery of judgments awarded to the families of the Brothers to the Rescue pilots whose planes were shot down by Cuba in 1996. *See* Jonathan Groner, *Payback Time for Terror Victims*, LEGAL TIMES, June 7, 2000, *available online at* <http://www.law.com/cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=ZZZ6C54V59C&live=true&cst=1&pc=0&pa=0&s=News&ExpIgnore=true&showsummary=0>; *see also* *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239 (S.D. Fl., 1997). The Alejandro court allowed the recovery of \$187 million in compensatory and punitive damages, which, under the 2000 legislation, could be recovered against Cuba's blocked assets, whose value was pegged in 1993 at approximately \$112 million. *See* Department of Treasury, Office of Foreign Assets Control, Annual Report to the Congress on Assets in the United States Belonging to Terrorist Countries or International Terrorist Organizations, April 19, 1993, *available online at* http://www.fas.org/irp/congress/1993_cr/h930503-terror.htm. Therefore, the blocked Cuban assets under control by the U.S. government probably would not be available to provide payment to expropriation claimants.

⁵³ In November 2000, a task force of former U.S. government officials and other public figures established by the Council on Foreign Relations issued a report that recommended a number of initiatives to prepare for a transition in bilateral relations between the United States and Cuba. The task force, headed by former Assistant Secretaries of State for Inter-American Affairs Bernard W. Aronson and William D. Rogers, recommended, among other steps, resolving expropriation claims by licensing American claimants to negotiate settlements directly with Cuba, including equity participation in Cuban enterprises. *See* http://www.cfr.org/Public/media/pressreleases2000_112900.html. The U.S. government has not authorized such direct negotiations in the past.

⁵⁴ *See* *Dames & Moore v. Regan*, *supra* note 41.

⁵⁵ Indications are that at least some major U.S. claimants would be interested in alternative methods to settle their claims. *Amstar Says, Let's Make a Deal*, CUBA NEWS, Jan. 1996, at 6. There is also some precedent for such flexibility. The U.S. settlement agreement with Germany, for example, allows U.S. nationals to forgo their portions of the settlement amount and instead pursue their claims under Germany's program for the resolution of claims arising from East Germany's expropriations. German Agreement, *supra* note 45, art. 3; *see also* 57 Fed. Reg. 53175, 53176 (November 6, 1992).

⁵⁶ *British Petroleum Exploration Co. v. Libyan Arab Republic*, reprinted in 53 ILR 297 (1973) (deciding that the municipal procedural law would govern the arbitration); *Texaco Overseas Petroleum & California Asiatic Oil Co. v. Libya*, reprinted in 17 ILM 1 (1978) (holding that local law was not to be applied to the arbitration); *Libyan American Oil Co. v. Libyan Arab Republic*, 20 ILM 1 (1981) (leaving unclear whether the arbitration was governed by the international legal system or the place of arbitration).

⁵⁷ *See Norton*, *supra* note 33, at 482-86.

⁵⁸ 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, 19 January 1981 [hereinafter Claims Settlement Declaration], art. II(1).

⁵⁹ *Id.*, art. II(2)

⁶⁰ Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 [hereinafter General Declaration]. *See* Claims Settlement Declaration, *supra* note 58, art. II(3).

⁶¹ Claims Settlement Declaration, *supra* note 58, art. VI(4).

⁶² *See* United Nations United Nations Commission on International Trade Law Arbitration Rules (1976), [hereinafter UNCITRAL Rules], available online at <http://www.jus.uio.no/lm/un.arbitration.rules.1976>.

⁶³ Article VI of the Claims Settlement Declaration allows the Tribunal to be located in The Hague "or any other place agreed by Iran and the United States." Whether the Netherlands was the most advantageous place for the Tribunal was debated internally within the United States government. *See, e.g.*, Symposium on the Settlement with Iran, 13 Law. Am.1, 46 (1981).

⁶⁴ *See* Islamic Republic of Iran and United States, (Case A18) (Dual Nationality), Dec. 32-A18-FT (Langergren, Holtzman (CO), Kashani (DO), Riphagen (CO), Aldrich, Shafeiei (DO), Mangard, Ansari (DO), & Mosk (CO), arbs., Apr. 6, 1984), 5 IRAN-U.S. C.T.R. 251 (1984 I).

⁶⁵ Claims for less than \$250,000 may be presented by the government of a national according to a supplemental clause. Claims Settlement Declaration, *supra* note 58, art. III(3).

⁶⁶ General Declaration, *supra* note 60, para. 7 (“All funds in the Security Account are to be used for the sole purpose of the payments of . . . claims against Iran. . .”).

⁶⁷ For example, the UNCITRAL rules provide for the appointment of an authority to resolve disputes over the Tribunal’s composition. UNCITRAL Rules, *supra* note 62, art. 9-12.

⁶⁸ Restitution has been used as the remedy of choice for expropriations in many countries in Central and Eastern Europe, including Germany, Czechoslovakia, the Baltic republics, Bulgaria, and Romania. On the other hand, Hungary, Russia, and all other former republics of the USSR (with the exception of the Baltic republics) have expressly refused to grant restitution of property expropriated during the communist era. Frances H. Foster, *Post-Soviet Approaches to Restitution: Lessons for Cuba* [hereinafter Foster], in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 93 (JoAnn Klein ed., 1994) [hereinafter CUBA IN TRANSITION: OPTIONS].

The former Czechoslovakia is a good example of the restitution approach. Czechoslovakia implemented an aggressive, across-the-board restitution program, under which it enacted a series of restitution laws that distinguished between “small” property (such as small businesses and apartment buildings), “large” property, and agricultural lands and forests, with each type of property being subject to somewhat different procedures and remedies. The restitution of “small” property was governed by the Small Federal Restitution Law, which provided for direct restitution to original owners. GRAY ET AL., *supra* note 8, at 49. The Large Federal Restitution Law governed the restitution of “large” property (industries and associated real estate), and again provided for the return of the property to its former owners, except in situations where the property was in use by natural persons or foreign entities, in which case restitution was barred and compensation had to be paid instead. Ann Gelpert, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT’L BUS. L. 315, 337-38 (1993). Likewise, for agricultural land and forests, the Federal Land Law provided presumptive restitution of lands to the original owners. Where neither the land originally expropriated nor a substantially similar parcel in the locality was available, financial compensation was provided as an alternative remedy. *Id.*

⁶⁹ The top twenty U.S. claimants, in terms of amounts certified by the FCSC, are all corporations. Their combined certified claims add up to \$1.25 billion, or 70 percent of the total claims certified. Most of the corporations owned sugar mills and other large industrial installations that would be readily identifiable.

⁷⁰ GRAY ET AL., *supra* note 8, summarize the restitution experience in Eastern Europe as follows:

Restitution-in-kind is complex and leaves many problems in its wake. The legal precedence typically given restitution over privatization has created great uncertainty among potential investors and has complicated privatization, particularly in the case of small business and housing. It is also leading to many disputes that are begin-

ning to clog the courts. In Romania, for example, restitution of agricultural land has led to more than 300,000 court cases. *Id.* at 4. These authors level the same criticism against the programs instituted in Czechoslovakia. *Id.* at 49.

⁷¹ For example, in evaluating the potential implementation of a restitution program in Cuba in light of the experiences in the Baltic republics, one commentator writes:

Furthermore, the preceding study suggests that restitution could serve as a major brake on overall Cuban national economic modernization. It could delay the establishment of stable, marketable legal title to assets, a critical requirement for both privatization and domestic and foreign investment. Moreover, it could drain an already depleted Cuban national treasury. A Baltic-style restitution program would obligate the Cuban State either to turn over state and collective property gratuitously or to pay equivalent compensation. In the Cuban case, this would be particularly onerous because of the sheer enormity of U.S. claims for “prompt, adequate, and effective” compensation for expropriated property.

Finally, the cases of Estonia, Latvia, and Lithuania demonstrate that restitution could have a severe socioeconomic impact on current Cuban citizens. As in those three states, the Cuban government has heavily subsidized the living expenses of its population. It has prevented its citizens from significant acquisition of assets and, until recently, legally prohibited them from accumulating hard currency. Thus, if Cuba should elect to return property to former owners (many of whom are foreign corporations or émigrés) and to introduce free market mechanisms, its present population would be at a competitive disadvantage. *See Foster, supra* note 68, at 113 (footnotes omitted).

⁷² Castañeda & Montalván, *supra* note 6, at 14. The concerns expressed by these authors reflect apprehension over a return to the significant role played by U.S. investors in the Cuban economy at the time of the 1959 Revolution, when U.S. investments in Cuba amounted to roughly one-third of the capital value of Cuba’s industrial plant. *See Eric N. Baklanoff, EXPROPRIATIONS OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE* 27 and n. 43 (1975). At that time, U.S.-owned enterprises dominated or played leading roles in the agricultural, mining, manufacturing, petroleum, and utility industries. *Id.* at 12-31.

⁷³ In the former Czechoslovakia, for example, restitution led to numerous disputes between original owners and current occupants, as well as disputes between competing claimants, resulting in clogged courts. GRAY ET AL., *supra* note 8, at 49.

⁷⁴ Hungary has used compensation vouchers as the sole means of indemnifying expropriation claimants. Katherine Simonetti et al., *Compensation and Resolution of Property Claims in Hungary*, in *CUBA IN TRANSITION: OPTIONS*, *supra* note 69, at 61, 69 [hereinafter Simonetti]. The means of compensation are interest-bearing transferable securities or “vouchers” known as Compensation Coupons, issued by a Compensation Office charged with the administration of the claims program. *Id.* Compensation is given on a sliding scale with regard to the assessed value of the lost property. GRAY ET AL., *supra* note 8, at 70. The vouchers are traded as securities and

pay interest at 75 percent of the basic interest rate set by the central bank.

⁷⁵ *Id.* at 69-72. In Hungary, vouchers can be used also to purchase farmland in auctions held by the state; however, only former owners of land may use their vouchers for that purpose. *Id.*

⁷⁶ A Cuban economist has included the issuance of vouchers as an option for providing compensation to U.S. corporate claimants. Pedro Monreal, *Las Reclamaciones del Sector Privado de los Estados Unidos Contra Cuba: Una Perspectiva Académica*, paper presented at the Shaw, Pittman, Potts & Trowbridge Workshop on “Resolution of Property Claims in Cuba’s Transition,” Washington, D.C. 5 (Jan. 1995) (on file with author). The alternative proposed by this economist would require the claimant to invest in Cuba an amount equal to the value of the coupons received.

⁷⁷ See Cueto, *supra* note 39, at 26-28 for a brief discussion of some of the valuation and financing issues that will surface if Cuba seeks to implement a voucher compensation scheme. See also Castañeda and Montalván, *supra* note 6, at 14-16.

⁷⁸ This was experienced, for example, in the Czech and Slovak republics. Heather V. Weibel, *Avenues for Investment in the Former Czechoslovakia: Privatization and the Historical Development of the New Commercial Code*, 18 DEL. J. CORP. L. 889, 920 (1993) [hereinafter Weibel].

⁷⁹ The experience in Hungary has been that vouchers used to collect annuities have yielded very disappointing results. Simonetti, *supra* note 74, at 78.

⁸⁰ A.R.M. Ritter, *Financial Aspects of Normalizing Cuba’s International Relations: The Debt and Compensation Issues*, in TRANSITION IN CUBA, *supra* note 7, at 559-560.

⁸¹ Ben A. Wortley, *Expropriation in Public International Law* 96 (Ayer Company Publishers, Inc., 1977).

⁸² One of those factors, of course, is the country’s economic condition and its ability to provide a remedy for property losses. Some authors believe that Cuba may not be able to afford *any* program to provide a remedy for property expropriations. See Castañeda & Montalván, *supra* note 6, at 25 (“[T]he magnitude of the disaster in Cuba and the requirements to set the country back on track socially, politically and economically leads one to conclude that attempting to set up a process of claims adjudication in Cuba, at least during what will no doubt be an extremely difficult transition period, would be pure folly.”)

⁸³ The aggregate amount of the expropriation claims by Cuban nationals has not been quantified precisely, but is likely to be many times that of U.S. citizen claims, given the comprehensive nature of the Cuban government’s expropriations.

⁸⁴ CONSTITUTION OF 1940, *published in* GACETA OFICIAL, July 5, 1940, art. 87.

⁸⁵ 1992 CONSTITUTION, *published in* GACETA OFICIAL, August 1, 1992 [hereinafter 1992 CONSTITUTION].

⁸⁶ 1992 CONSTITUTION, art. 23.

⁸⁷ For example, forfeiture is confiscation of specific property or deprivation of rights as punishment for a breach of contract or a crime. BLACK'S LAW DICTIONARY 778 (Rev. 4th Ed. 1968).

⁸⁸ The state may, for instance, reclaim private land for public use by eminent domain and thereby expropriate the land from its owners. *Id.* at 616.

⁸⁹ Ley Fundamental of February 7, 1959, *published in* GACETA OFICIAL, February 7, 1959.

⁹⁰ *Id.*, art. 24. This provision was further modified by several amendments to the Fundamental Law, the last of which – the Constitutional Reform Law of July 5, 1960 – amended Art. 24 to read in relevant part:

Art. 24. Confiscation of property is prohibited, but it is authorized in the case of the property of the tyrant overthrown on December 31, 1958 and his accomplices, that of natural persons or corporate bodies responsible for the crimes against the public economy or the public treasury, that of those who are enriching themselves or have done so in the past unlawfully under the protection of the public authorities, and that of those people who are convicted of crimes classified as counterrevolutionary, or who leave in any manner the country's territory in order to evade the reach of the Revolutionary Tribunals, or those who having abandoned the country commit acts of conspiracy abroad against the Revolutionary government.

Art. 59 of the 1976 Constitution enlarged further the state's authority to confiscate private property. It read:

Art. 59. Confiscation of property is only applied as a punishment by the authorities, in such cases and under such procedures as determined by law.

CONSTITUCION DE LA REPUBLICA DE CUBA, GACETA OFICIAL, Feb. 24, 1976) [hereinafter CONSTITUTION OF 1976], art. 59. Art. 60 of the 1992 Constitution contains identical language.

⁹¹ This paper does not deal with the potential claims involving properties confiscated by the Cuban government because of alleged graft and corruption by officers of the predecessor government. The issue of confiscated properties is one of determining whether, as a matter of fact, the properties were acquired through graft or other illegal means, in which case the confiscations should stand; otherwise, the properties in question would become subject to expropriation claims.

⁹² The amended Art. 24 read:

Art. 24. [N]o other natural person or corporate entity shall be deprived of his property except by competent authority, for a justified cause of public utility or social or national interest. The procedure for the expropriations and the methods and forms of payment will be established by law, as well as the competent authority to declare the cause of public utility or social or national interest and the necessity for the expropriation.

Constitutional Reform Law of July 5, 1960, art. 24.

⁹³ CONSTITUTION OF 1976, *supra* note 90, art. 25. Art. 25 of the 1992 Constitution contains identical language.

⁹⁴ Law 78 of February 13, 1959, *published in* GACETA OFICIAL, February 19, 1959. Subsequently, the confiscations were expanded to cover persons found guilty of counterrevolutionary activities, whether in Cuba or abroad. Law of November 22, 1959.

⁹⁵ THE CUBAN NATIONALIZATIONS, *supra* note 16, at 73, n.18.

⁹⁶ Agrarian Reform Law, *supra* note 17. A subsequent Agrarian Reform Law issued in October 1963 expropriated all land holdings above five *caballerias* (165 acres).

⁹⁷ Law 890 of October 13, 1960, *published in* GACETA OFICIAL, October 15, 1960.

⁹⁸ Ley de Reforma Urbana, *published in* GACETA OFICIAL, October 14, 1960 [hereinafter Ley de Reforma Urbana].

⁹⁹ N. Y. TIMES, Mar. 14, 1968, at A-1. There appears to have been no formal legislation ordering the takings, which affected many thousands of small property owners.

¹⁰⁰ Law 989 of December 5, 1961, *published in* GACETA OFICIAL, December 6, 1961.

¹⁰¹ Resolution 454 of the Ministry of the Interior of September 29, 1961, *published in* GACETA OFICIAL, October 9, 1961, gave Cubans leaving the country for the United States 29 days to return to Cuba; those traveling elsewhere in the Western Hemisphere had 60 days to return, and those traveling to Europe had 90 days. Failure to return to Cuba within those time periods was deemed a permanent departure from the country, rendering the person's property subject to confiscation.

¹⁰² In discussing the validity of Cuba's expropriation laws, it is important to keep in mind the distinction between the *legitimacy* of a revolutionary regime and the *legal validity* of certain of its acts. Some equate both; for example, Kelsen argues that legitimacy is created when the state's power is exercised with both a presumption by the rulers that they have the right to govern and a corresponding recognition by the governed of that right; such legitimacy renders the acts of the rulers valid and legally effective. This is known as the doctrine of "revolutionary legality." HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 117, 187-88 (1961). Others, on the other hand,

distinguish between the legitimacy of a government – which they feel is a question of politics and morality and thus not amenable to legal adjudication – and the validity or binding nature of its norms, which can be judicially assessed. Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49, 148-50 (1994) [hereinafter Mahmud].

¹⁰³ Article 285 of the 1940 Constitution allowed constitutional amendments via referendum or “super-majority” vote of Congress. Under Art. 286, major constitutional reforms (including changes to arts. 24 or 87) or complete overhaul of the Constitution could only be accomplished by a Constitutional Convention followed by a plebiscite. By contrast, Art. 232 of the Fundamental Law of February 1959 stated:

Art. 232. This Fundamental Law may be amended by the Council of Ministers, by affirmative vote of two thirds of its members, ratified by the same margin in three successive meetings of the Council of Ministers and subject to the approval of the President.

¹⁰⁴ The Council of Ministers exercised this authority to incorporate certain important legislation into the Fundamental Law. Thus, the Agrarian Reform Law includes as its “Final Additional Provision” a declaration that the Council of Ministers, in exercise of “its Constitution-making power,” made the Agrarian Reform Law an integral part of the Fundamental Law. The same declaration is contained in the “Final Provision” of the Ley de Reforma Urbana, *supra* note 98.

¹⁰⁵ Jose D. Acosta, *El Marco Juridico-Institucional de un Gobierno Provisional de Unidad Nacional en Cuba*, in *Cuba in Transition – Papers and Proceedings of the Second Annual Meeting of the Association for the Study of the Cuban Economy* [hereinafter ASCE-2] 61, 78-82 (1992).

¹⁰⁶ Consuegra-Barquin, *supra* note 38, at 899.

¹⁰⁷ Legal authorities and many recent judicial decisions in various countries have recognized and applied this rule. *State v. Dosso*, 1958 P.L.D. S. Ct. 533, 538-41 (Pakistan); *Uganda v. Matovu*, 1966 E. Afr. L. R. 514, 535-39 (Uganda); *Sallah v. Attorney-General*, reprinted in 2 S.O. Gyandoh, Jr., and J. Griffiths, *A REVIEW OF THE CONSTITUTIONAL LAW OF GHANA* 493 (1972) (Ghana); *Lakanmi v. Attorney-General*, 1971 U. Ife L.R. 201, 206 (Nigeria); *Jilani v. Government of Punjab*, 1972 P.L.D. S. Ct. 139 (Pakistan) (overruling the *Dosso* case, but stating that when revolutions are successful and their actions meet with the habitual submission from the citizens they acquire the power to overturn prior constitutions); *Valabhaji v. Controller of Taxes*, Civil Appeal No. 11 of 1980, Seychelles Court of Appeals, summarized in 7 Commonwealth L. 1249 (1981) (Seychelles); *Mitchell v. Director of Public Prosecutions*, 1985 L.R.C. Const. 127 (Grenada High Ct.) (Grenada); *Mokotso v. King Moshoeshe II*, 1989 L.R.C. Const. 24, 123-133 (Lesotho); *Matanzima v. President of the Republic of Transkei*, 4 S. Afr. L.R. 989, 994-997 (1989) (Transkei); KELSEN at 94; see generally Mahmud, *supra* note 102.

Mahmud notes that in virtually every case in which the legality of the acts of a de

facto government has been challenged, the validity of the act has been upheld by the courts. *Id.* at 53. This result is independent of whether the challenge is brought while the de facto regime is in power or thereafter. For example, the Sallah, Mitchell, and Mokotso cases cited above involved the determination of the validity of acts of a regime that was no longer in power.

¹⁰⁸ In *Mokotso v. King Moshoeshoe II*, *supra* note 107, at 133, the Chief Justice of the Lesotho High Court declared the test to be as follows: “A court may hold a revolutionary government lawful, and its legislation to be legitimated *ab initio*, when it is satisfied that (a) the government is firmly established, there being no other government in opposition thereto; and (b) the government’s administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.” This test is analogous to the traditional test under international law principles for deciding whether a de facto government should be recognized, which includes determining whether the new government is in control of the territory and in possession of the machinery of the state, whether there is public acquiescence in the authority of the new government, and whether the new government has indicated its willingness to comply with its obligations under treaties and international law. BARRY E. CARTER & PHILLIP E. TRIMBLE, *INTERNATIONAL LAW* 421-423 (1991).

¹⁰⁹ It may be open to debate as to when the conditions of effective control by Cuba’s Revolutionary government and acquiescence by the people to the social and economic changes brought about by the Revolution were met. However, it is difficult to dispute that those conditions have been met for some time. See STANLEY DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 76-77 (4th Ed. 1981) (“Successful revolution sooner or later begets its own legality.... Thus, might becomes right in the eye of the law.”) It has been pointed out that the Cuban Revolution was immensely popular at the time it issued the Fundamental Law of February 1959 and that in fact that law was signed by many eminent Cubans, including, among others, the then-president of the Cuban Bar Association. See Cueto, *supra* note 39.

At any rate, a persuasive argument can be made that the conditions for validating the acts of the Revolutionary government were reached no later than the end of 1961, by which time the major expropriation laws had been implemented, with the apparent acquiescence of the Cuban people. (The legal authorities agree that effective control coupled with popular support or acquiescence for a period of several years suffices to validate the revolutionary changes.) Once such validation takes place, it extends back in time to render valid all acts taken by a revolutionary government since its accession to power. *Williams v. Bruffy*, 96 U.S. 176, 186, 24 L. Ed. 716 (1877).

The fact that the acquiescence may have been the result of dictatorial rule does not negate its legal effect. The Chief Justice of the High Court of Lesotho explains: “The people may well accept without necessar[il]y approving.... If they decide to accept the new regime, even if that decision is based on weakness or fear, such a decision may not be gainsaid.... Ultimately it is the will of the people, however motivated, which creates a new legal order and the Court must recognize this fact and give effect thereto.” *Mokotso v. King Moshoeshoe II*, *supra* note 107, 1989 L.R.C. Const. at 132.

¹¹⁰ Agrarian Reform Law, *supra* note 17, Preamble.

¹¹¹ Art. 29 of the Agrarian Reform Law reads as follows:

Art. 29. The constitutional right of the owners affected by this Law to receive indemnification for the expropriation of their property is acknowledged. Such indemnification shall be set based on the sale price of the subject farms entered into the municipal land records before October 10, 1958. The affected installations and buildings on the farms will be valued separately by the authorities charged with implementation of this Law. Also valued separately will be the crops on the subject farms, so that the legitimate owners can be compensated. *Id.*

¹¹² Art. 31 of the Agrarian Reform Law provides:

Art. 31. The indemnification (for property expropriations) will be paid in negotiable bonds. To that end, a series of bonds of the Republic of Cuba will be issued in the amounts, terms and conditions that will be set at the appropriate time. The bonds shall be denominated “Agrarian Reform Bonds” and will be regarded as government obligations. The issuance or issuances will have a term of twenty years, with an annual interest rate not to exceed four and a half percent (4-1/2%). The Republic’s Budget for each year shall include the necessary amount to finance the payment of interest, amortization and expenses of the issuance. *Id.*

The “Final Additional Provision” of the Agrarian Reform Law also declared that the Council of Ministers, in exercise of its Constitution-giving powers, declared the Law to be integral part of the Fundamental Law, and thus amended Art. 24 to the extent it was inconsistent with the Agrarian Reform Law. Cuba’s Court of Constitutional Guarantees upheld this interpretation when the constitutionality of the Agrarian Reform Law was challenged. Decision 45 of Apr. 14, 1961. *Id.*

¹¹³ Art. 37 of the Ley de Reforma Urbana, *supra* note 98, also sets up a compensation program for owners of expropriated buildings. Likewise, Law 890 of October 13, 1960, establishes, with respect to the expropriation of Cuban-owned industries and businesses, that “[t]he means and forms of payment of the indemnification that will be due to natural or juridical persons whose properties are expropriated under this Law, will be established in subsequent legislation.”

On the other hand, at least one type of property seizure – the takings under Law 989 of 1961 of property that was not specifically expropriated by law, but was seized upon the departure of its owners from Cuba under an abandonment theory – appears to be inconsistent with the constitutional norms in place at the time of the takings and therefore is invalid. Of course, any seizures made without authority of law (such as appear to be the March 1968 takings of small businesses) would be by definition invalid.

¹¹⁴ This argument is suggested, for example, in Nestor Cruz, *Legal Issues Raised by the Transition: Cuba From Marxism to Democracy, 199?-200?*, in ASCE-2, *supra* note 105, at 51.

¹¹⁵ Shortly after seizing power through a coup d'état in 1952, Batista's government issued a Constitution that, among other things, gave the Council of Ministers the right to amend the Constitution in derogation of the express provisions of arts. 285 and 286 of the 1940 Constitution. This is the same procedure followed in the Fundamental Law of 1959. Cueto, *supra* note 39, at 13.

¹¹⁶ See Consuegra-Barquin, *supra* note 38, at 899.

¹¹⁷ Gregorio Escagedo, Jr., *Posibles Problemas que Confrontaremos en Cuba: Sus Soluciones*, in ASCE-3, *supra* note 7, at 250.

¹¹⁸ Of course, the political branches of a transition government could well decide to enact laws to reverse the expropriations or provide remedies to the former owners.

¹¹⁹ See, e.g., Art. 31 of the Agrarian Reform Law, *supra* note 17.

¹²⁰ The conclusion that the state acquired and retains title to the properties it seized is consistent with a literal reading of Art. 194 of the 1940 Constitution, which states that, when a law is invalidated by a Cuban court on the grounds of unconstitutionality, such invalidation has only prospective effect and does not alter the effectiveness of prior applications of the law. Art. 194 reads in relevant part: "In every case the legislative or regulatory provision or administrative measure declared unconstitutional shall be considered null and without any value or effect from the date the decision is made public in court." (Art. 172 of the Fundamental Law of 1959 contains an identical provision.) See Cueto, *supra* note 39, at 15-16, and authorities cited therein, for a discussion of the issues raised by Art. 194 of the Constitution of 1940.

¹²¹ As noted earlier, the validity of the confiscations of the property of individuals accused of graft during the Batista regime presents a special case that should be handled separately. If no basis for some of the confiscations is found, the claims to those properties could be handled as part of the expropriation claims program.

¹²² Such legislation could, for example, vest title of the properties in an appropriate governmental agency and establish some mechanism for providing remedies to the former owners. The legislation also could expressly declare that the state has good title to the expropriated properties and that the courts shall have no jurisdiction to consider challenges to the disposition of the properties. Such provisions would preclude holding up the productive utilization of the properties because of disputes over title.

¹²³ See Jon L. Mills, *Principal Issues in Confiscated Real Property in Post-Communist Cuba*, presented at the American Bar Association's 1994 Annual Meeting, New Orleans, 23, 31 (1994) for a similar list of objectives.

¹²⁴ In the former Czechoslovakia, restitution of residential property led to numerous

disputes between original owners and current occupants, as well as disputes between competing claimants, resulting in clogged courts. GRAY ET AL., *supra* note 8, at 49; GELPERN, *supra* note 68, at 360. In addition, “the legal precedence given restitution over privatization has created great uncertainty among potential investors and has complicated privatization, particularly in the case of small businesses and housing.” GRAY ET AL., *supra* note 8, at 49.

¹²⁵ As discussed in Section I, some Cuban-Americans may want to be treated as “U.S.” claimants and have their claims included in an eventual U.S.-Cuba settlement. It is likely, however, that naturalized U.S. citizens of Cuban origin will be treated like other Cuban nationals for purposes of the claims settlement process and will therefore be covered by whatever provisions Cuba makes for handling the claims of Cuban citizens living abroad.

¹²⁶ On the question of the treatment of expatriates, the approaches followed by Hungary and Czechoslovakia for dealing with émigrés are instructive. In Hungary, foreign citizens and residents could claim compensation if they were Hungarian citizens at the time of expropriation. GELPERN, *supra* note 68, at 366. Czechoslovakia, on the other hand, conditioned the ability of émigrés to claim compensation on the type of property that was expropriated. Émigrés were eligible to claim restitution for “small” property, but not for “large” property. In addition, only resident citizens were entitled to restitution of agricultural and forestry lands. *Id.* at 340-41. Moreover, Czechoslovakia’s Federal Land Law prohibited foreign ownership of land in Czechoslovakia, thereby precluding émigrés who have become citizens of other countries from owning land in Czechoslovakia. *Id.* at 341.

The Hungarian system provides, perhaps, the most equitable and pragmatic model for the treatment of claims from Cubans who have become citizens of other countries or reside abroad. Adoption of such an open system would eliminate one potential source of civil discord and would be particularly important given the large number of Cubans living abroad who have outstanding expropriation claims.

¹²⁷ The examples of Hungary and Czechoslovakia again serve to illustrate the different approaches that can be taken to the successor in interest issue. Czechoslovakia was in this regard the more liberal of the two countries: All of its restitution laws allowed former owners, as well as their co-owners and partners, to recover for the expropriations. In addition, all testamentary heirs or immediate family members could claim in proportion to their share of the owner’s inheritance. *Id.* at 340. In Hungary, by contrast, if the former owner was dead, the descendants could claim compensation; however, if any of the descendants had died, the survivors did not share in the decedent’s share. The surviving spouse of a dead claimant was entitled to compensation only if there were no surviving descendants and if the surviving spouse was married to and living with the decedent both at the time of the expropriation and at the time of his or her death. *Id.* at 346-47.

Other countries seeking to define the eligible claimants for expropriation remedies have adopted a variety of definitions. For example, Estonia allowed claims for indi-

viduals who were Estonian citizens or were citizens of the country at the time of the country's annexation by the USSR, as well as the owner's testamentary heirs or (if the owner died intestate) the spouse, parents, and children of the owner. Foster, *supra* note 68, at 96-97. Latvia allowed claims by previous owners and their heirs, regardless of their present citizenship. *Id.* at 97. Lithuania restricted restitution to current citizens and permanent residents of the country, and extended the right to claim only to former owners, and (if deceased) to their surviving parents, spouses, children, and grandchildren. *Id.* at 98.

¹²⁸ Simonetti, *supra* note 74, at 66-67.

¹²⁹ Dorothy A. Jeffreys, *Resolving Rival Claims on East German Property Upon German Reunification*, 101 YALE L.J. 527, 543-544 (1991).

¹³⁰ GELPERN, *supra* note 68, at 342. The Federal Land Law called for the involvement of the local Land Office in the resolution of restitution claims against land. The Land Office could veto, compel, or amend an agreement to return land to its former owner on a variety of public interest grounds. *Id.* at 343-344.

¹³¹ Hungary set initially a 90-day deadline for filing claims under the first of its compensation laws, enacted in April 1991. That deadline, however, was extended several times through 1994. Simonetti, *supra* note 74, at 67. Germany set an initial deadline of October 1990 for filing property restitution claims; that deadline was later extended to mid-1993 for real property and the end of 1992 for personal property. Paul Dodds, *Restitution Claims in Eastern Germany: An Experience to Avoid*, presented at the American Bar Association's 1994 Annual Meeting, New Orleans, 125, 131 (1994).

¹³² Foster describes the consequences of inadequate administrative procedures for handling expropriation claims in the Baltic republics as follows: "Baltic administrative and judicial organs have paid a heavy price for this lack of foresight and concrete action. With only a limited number of qualified staff, these bodies have been flooded with literally hundreds of thousands of restitution cases. The result has been significant delay in confirmation, review, and resolution of claims and in ultimate distribution of property or compensation. As will be seen below, this has proven to be a major stumbling block to overall national privatization efforts." Foster, *supra* note 68, at 106-107, footnotes omitted.

¹³³ Simonetti, *supra* note 74, at 78.

¹³⁴ *Id.* The use of vouchers may also prove inadequate if the privatization program does not make satisfactory progress. Weibel, *supra* note 78, at 920.

¹³⁵ See Cueto, *supra* note 39, at 26-28, for a brief discussion of some of the valuation and financing issues that will surface if Cuba seeks to implement a compensation scheme.

About the Author

Matias Travieso-Diaz, Esq., is a partner in Shaw Pittman LLP, an international law firm with offices in Washington, D.C., New York, Los Angeles, London, and Northern Virginia. The recipient of B.S. (1966) and M.S. (1967) degrees in Electrical Engineering from the University of Miami, Mr. Travieso-Diaz earned a Ph.D. degree in Electrical Engineering from the Ohio State University in 1971. Mr. Travieso-Diaz attended Columbia Law School, receiving a J.D. degree in May 1976.

Mr. Travieso-Diaz concentrates his legal practice on international matters, with a particular emphasis on commercial transactions and administrative and judicial litigation and arbitration proceedings relating to nuclear and fossil-fueled energy projects. He has represented U.S. and foreign clients in administrative, judicial, and international arbitration proceedings concerning the Koshkonong, Three Mile Island, Rancho Seco, South Texas, Susquehanna, Perry, Shearon Harris, Diablo Canyon, Millstone, PNPP-1 (Philippines), Temelin (Czech Republic), and Angra-1 (Brazil) nuclear power plants and the proposed Private Fuel Storage Facility in Central Utah. His work in this area, which has included a variety of U.S. Nuclear Regulatory Commission proceedings, state prudence cases, plant audits, and litigation and arbitration cases, has involved a wide range of technical and commercial issues including the management, design, licensing, construction, quality assurance, testing, and operation of the plants. In addition, he has been involved in acquisitions, restructurings, and other transfers of ownership involving, among others, the Palo Verde, Peach Bottom, Salem, Nine Mile Point, Indian Point 2 and 3, J.A. FitzPatrick, Wolf Creek, and Hope Creek nuclear power plants.

Mr. Travieso-Diaz has also been involved in a variety of business transactions abroad, particularly in Latin America. He is the head of Shaw Pittman's Latin American Practice Group and has led various projects in the region, including the privatization of the state-owned telecommunications company of a Central American country and the privatization via concession of the international airports of two countries.

Mr. Travieso-Diaz closely follows events in Cuba and since 1991 has headed the Cuban Project, a Shaw Pittman interdisciplinary effort designed to assess the legal and business issues that will arise when Cuba moves to a free-market economy. He organized a number of day-long seminars and workshops on topics relevant to Cuba's transition to a free-market society, including "Requirements for the Re-Entry of U.S.-Based Business into Cuba" (Washington, D.C., April 29, 1993); "Strategies for the First Year of Cuba's

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Mr. Travieso-Díaz has studied the transition process in the emerging democracies of Eastern Europe and has presented papers and given lectures on subjects relating to Cuba’s free-market transition at a number of events, including meetings sponsored by the Association for the Study of the Cuban Economy, the Association of the Bar of the City of New York, the George Mason University School of Law, the George Washington University School of Business, the Eastern Economic Association, the Caribbean/Latin American Action and the International Trade and Service Association of Puerto Rico, the Hispanic National Bar Association, the Women in International Trade Council, the Inter American Bar Association, the National Policy Association, and others.

Mr. Travieso-Díaz has published a book on the changes that will be required in Cuba’s legal system during its free-market transition, entitled *The Laws and Legal System of a Free-Market Cuba: A Prospectus for Business* (Quorum Books), which was released in November 1996. He is also co-editor of another book, *Perspectives on Cuban Economic Reforms* (Arizona State University Press, 1998). He also has written numerous papers on matters relating to Cuba’s transition to a free-market democratic society, including *Some Lessons for Cuba from the Legal Changes in Eastern Europe*, 3 U. Mia. Y.B. Int’l L. 173 (1995); *Cuba’s Transition to a Free-Market Democracy: A Survey of Required Changes to Laws and Legal Institutions*, 5 Duke J. Comp. and Int’l L. 379 (1995); *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims against Cuba*, 16 U. Pa. J. Int’l Bus. L. 217 (1995); *Requirements for Lifting the U.S. Trade Embargo against Cuba*, 3 U. Mia. Y.B. Int’l L. 53 (1995); *Recommended Features of a Foreign Investment Code for Cuba’s Free-Market Transition*, 21 U.N.C. J. Int’l L. & Comm. Reg. 511 (1996); *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals’ Expropriation Claims Against Cuba*, 17 U. Pa. J. Int’l Bus. L. 659 (1996); *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 Berkeley J. Int’l L. 234 (1999); *The Helms-Burton Law and Its Antidotes: A Classic Standoff* (with Dr. Jorge Pérez-López), 7 SW J. L. & Trade Amer. 95 (2000); *Key Environmental Legislation for Cuba’s Transition Period*, 21 U. Pa. J. Int’l Bus. L. 331 (2000); *So, Your Client Wants to Go to Havana . . .* (paper presented at the ABA International Law Section Fall Meeting, New Orleans, November 1999); *The Contribution of BITs to Cuba’s Foreign Investment Program* (with Dr. Jorge Pérez-López), 32

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