

SOME LEGAL AND PRACTICAL ISSUES IN THE RESOLUTION OF CUBAN NATIONALS' EXPROPRIATION CLAIMS AGAINST CUBA

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1. INTRODUCTION

The Cuban government seized a great amount of real and personal property from its citizens and others during the first decade of the Cuban revolution. This Article examines legal issues that the Cuban government will need to address as it seeks to resolve the outstanding claims of its citizens brought in response to these seizures. In addition, the Article reviews the decisions regarding eligible recipients, procedures, and forms of compensation that will need to be made in developing a program of remedies for the past expropriations. This examination is not intended to be exhaustive, but rather illustrative of the complexity of the problem.

An underlying assumption of this Article is that in its transition to a free-market economy, Cuba will provide a remedy, whether restitution or another form of redress, to those whose property was seized by the Revolutionary government after 1959 and who have not yet received compensation for the taking.¹ This assumption is based on

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¹ The term "restitution" is sometimes used, particularly by European writers, to encompass all types of remedies for uncompensated property takings. For the purposes of this Article, however, the term restitution is synonymous with the return of the expropriated property to its original owners.

The issue of whether to provide a remedy for property losses is still being debated. It has been noted, in the context of restitution of expropriated assets to their former owners in post-Communist Eastern European countries, that any argument for giving a remedy to the victims of property takings must successfully demonstrate: (1) that the expropriations were unlawful or illegitimate; (2) that there exists a duty in a successor government to rectify the injustices of the old regime; and (3)

the requirements of Cuban law, fundamental notions of fairness, and the belief that the resolution of these property disputes is a necessary step towards achieving political and economic stability.²

that this duty takes precedence over other potentially conflicting duties. See Claus Offe & Frank Bönker, *A Forum on Restitution*, E. EUR. CONST. REV., Summer 1993, 30, 30-31. Offe and Bönker argue that, at a minimum, the third test has generally not been met in Eastern Europe, where "all kinds of arbitrary interests, privileges, and resentments have governed the actual practice of restitution," and that remedy for property loss has been given, whereas redress for non-property losses has not, because of "the strategic importance attached to property reform and the greater political leverage of former property owners compared with other victims of the Communist regime." *Id.* at 31.

It has also 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 torts, including "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, [and] discontinuance of pension payments" at the hands of the Cuban Government. Rolando H. Castañeda & George Plinio 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). The authors conclude that because 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 Jorge A. Sanguinetti, *The Transition Towards a Market Economy in Cuba: Its Legal and Managerial Dimensions*, in TRANSITION IN CUBA: NEW CHALLENGES FOR U.S. POLICY 669, 692-696 (Lisandro Perez ed., 1993) (suggesting that 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 determined early in Cuba's transition to a free-market society); 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).

² One scholar analyzing the philosophy behind restitution programs raises the following question: "[t]aken together, the economic and moral arguments against restitution seem unbeatable. Nevertheless, restitution is going on, in the Czech Republic, Hungary, Croatia, Bulgaria, Lithuania and elsewhere. Parliamentarians have been overriding the advice of economists and moral philosophers. Why?" Stephen Holmes, *A Forum on Restitution*, E. EUR. CONST. REV., Summer 1993, at 32, 33. Holmes answers this question by concluding that restitution is perhaps morally wrong but politically correct, and propounds the following thesis:

[E]ven if restitution is both economically inefficient and morally unjust, it is good policy if it can indirectly support democratization by helping legitimate the fledgling property system. It can do this, in turn, by helping break the pernicious monopoly of the former nomenklatura on the appropriation of state assets. This is one good

This Article does not present a proposal to resolve the outstanding property claims of Cuban citizens. Several specific proposals on this issue already have been developed,³ and Cuban exile and dissident groups have presented a variety of views on the subject.⁴ It is likely, however, that the economic and political climate in Cuba at the time it decides to address the problem will dictate the approach taken. Such conditions cannot be predicted at this time, and there is no evidence that Cuba is prepared to address the issue in the immediate future.

2. BRIEF HISTORY OF CUBA'S EXPROPRIATIONS AND RESULTING CLAIMS

Although Cuba began expropriating foreign-owned property on the island in 1959, most of the expropriations occurred in the second half of 1960.⁵ In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items, were expropriated at various times between 1959 and 1968.⁶ Additionally, beginning in 1961,

reason, which plays a role alongside the bad ones, for parliamentary support for restitution throughout the region.

Id. (emphasis omitted). A similar conclusion has been reached by other writers who have analyzed the claims resolution process in Central and Eastern Europe. See, e.g., Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L BUS. L. 315, 317 (1993) (arguing that "the distributive impact of reprivatization either will be minimal, or will bear little resemblance to the goals articulated in the laws and the public debates of their passage[, thus suggesting] that reprivatization is a creature of succession politics and that its primary function is ideological").

³ See, e.g., Nicolas Sanchez, *A Proposal for the Return of Expropriated Cuban Properties to their Original Owners*, Address at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy 1 (Aug. 1994) (on file with the *University of Pennsylvania Journal of International Business Law*) (attempting to define "the position of the exiled Cuban community [regarding] the return" of expropriated properties).

⁴ *Poll Results: How do Cuba's Dissident and Exile Groups Envisage Cuba's Economic Future?*, LA SOCIEDAD ECONOMICA, Bull. 38 (Dec. 6, 1993).

⁵ For a description of the process by which Cuba expropriated the assets of U.S. citizens and other foreign nationals, see MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 69-108 (1976).

⁶ For a summary of Cuba's expropriations of the assets of its nationals, see Nicolas J. Gutierrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba* (1994)

Cubans leaving the country had all their property confiscated as they departed.⁷

In 1964, the U.S. Congress amended the Foreign Claims Settlement Act to establish a Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States ("FCSC") was given the authority to determine and certify the validity and amount of claims by U.S. nationals against the Cuban government for the taking of their property.⁸ The Cuban Claims Program was active between 1966 and 1972. During that time, it received 8,816 claims: 1,146 by U.S. corporations and 7,670 by individual U.S. citizens.⁹ It certified 5,911 of these claims, with an aggregate amount of \$1.8 billion; denied 1,195 claims, with an aggregate amount of \$1.5 billion; and dismissed without consideration (or saw withdrawn) 1,710 other claims.¹⁰

Although the Cuban Claims Act did not expressly authorize the inclusion of interest in the amount allowed, the FCSC determined that statutory simple interest at a 6% rate should be imposed on the claims it certified.¹¹ Applying this interest rate to the outstanding \$1.8 billion principal yields a present value, as of January 1995, of about \$5.6 billion in certified U.S. nationals' claims against Cuba.¹²

The expropriation claims by citizens of other countries were much smaller than those of U.S. and Cuban citizens. For the

(Address at the American Bar Association's 1994 Annual Meeting, New Orleans, La.), *reprinted in* 1 *LATIN AM. BUS. L. ALERT* 5 (1994).

⁷ Ley 989, *published in* Gaceta Oficial, at 23,705 (Dec. 6, 1961) [hereinafter Ley 989].

⁸ 22 U.S.C. § 1643 (1988) (amended in 1994).

⁹ FOREIGN CLAIMS SETTLEMENT COMM'N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM, at 412 (1972) [hereinafter 1972 FCSC REPORT].

¹⁰ *Id.* The value of the certified claims 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. José F. Alonso & Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, in *CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY* 168, 201 (1993).

¹¹ 1972 FCSC REPORT, *supra* note 9, 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.

¹² See Alonso & Lago, *supra* note 10, at 201. This amount includes neither the value of those claims disallowed for lack of adequate proof, nor those not submitted to the FCSC during the period specified in the statute.

most part, these claims have been settled through agreements between Cuba and the respective countries (e.g., Spain, France, Switzerland, and Canada).¹³ In general, these claims have been settled at a fraction of the assessed value of the expropriated assets.¹⁴

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. citizens' claims, given the comprehensive nature of the Cuban government's expropriations. One "crude estimate" of the Cuban national expropriation claims puts their aggregate value at \$7 billion, not including interest.¹⁵

The outstanding property claims of both U.S. and Cuban nationals raise an important issue that will need to be addressed in the early stages of Cuba's free-market transition. There are several reasons why the early resolution of this issue is urgent: (1) U.S. laws require resolution of U.S. citizen expropriation claims before foreign aid can resume;¹⁶ (2) the Cuban government will need to give early resolution to the outstanding expropriation claims to assure domestic order and

¹³ See Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations Other than the United States*, 5 LAW. AM. 457 (1973). Gordon observes that Cuba's settlements with other countries "[do] not suggest a Cuban recognition of a right to compensation under either Cuban or international law, but rather an intention to settle claims as a condition precedent to the development or continuation of trade patterns with specific nations." *Id.* at 467.

¹⁴ The Spanish claims, for example, were valued at \$350 million but were ultimately settled for about \$40 million. Even this limited amount was not paid until 1994, three decades after the claims accrued. See *Cuba to Compensate Spaniards for Property Seizures*, REUTER TEXTLINE, Feb. 15, 1994, available in LEXIS, World Library, Txtlne File.

¹⁵ Alonso & Lago, *supra* note 10, at 202-04.

¹⁶ 22 U.S.C. § 2370(a)(2) (1988) (amended 1994). See generally Matias F. Travieso-Diaz, *Requirements for Lifting the U.S. Trade Embargo Against Cuba*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 222 (1993) (discussing the requirements which must be met before the U.S. embargo may be lifted). Recently introduced legislation to provide aid to a transition government in Cuba expressly ratifies the prohibition against helping Cuba until the U.S. citizen expropriation claims are resolved. Free and Independent Cuba Assistance Act, H.R. 611, 104th Cong., 1st Sess., § 5(d)(2) (1995); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 5.381, 104th Cong., 1st Sess., § 206(6); H.R. 927, 104th Cong., 1st Sess., § 207 (7) (1995) [hereinafter LIBERTAD Act].

political and economic stability, expedite privatization, and foster foreign investment;¹⁷ and (3) resolution of the claims issue will diminish the perceived political risks of investing in Cuba. Political risks are a matter of concern to prospective investors, traders, and financial institutions.¹⁸

The expropriation claims by U.S. nationals and Cuban citizens have separate legal and political bases and may have to be addressed differently by the Cuban government. U.S. claims are based on well-recognized international law principles that require "prompt, adequate and effective" compensation to aliens whose property is confiscated.¹⁹ As a practical matter, U.S. citizens' claims are also backed by express U.S. policy dating back to President Kennedy, under which settlement of U.S. nationals' expropriation claims is cited as a precondition to the normalization of U.S.-Cuba relations and the lifting of the trade embargo.²⁰

¹⁷ 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 privatization efforts. Cheryl W. Gray et al., *Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe 4* (1993) (World Bank Discussion Paper No. 209). 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.

¹⁸ Ibrahim F.I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 21 INT'L LAW. 671, 685-88 (1987).

¹⁹ *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (Cl. Ct. 1983); 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 it carried the expropriations out in a discriminatory manner against U.S. citizens. *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 Juan C. Consuegra-Barquin, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873 (1994) (discussing the difficulties that a transition government will face in re-establishing a system of private property rights and restitution in Cuba).

²⁰ 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, 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 U.S.-owned property by the Cuban government will have to be addressed); Frank J. Prial, *U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba*, N.Y. TIMES, Nov. 25, 1992, at A1 (quoting Alexander

By contrast, international law principles do not provide a remedy to domestic claimants for the expropriation of their assets by their government.²¹ The resolution of the Cuban nationals' expropriation claims, therefore, will have to be handled in accordance with Cuban laws.²²

Watson, 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'").

²¹ *Banco Nacional de Cuba v. Farr*, 383 F.2d at 185; *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982); *F. Palicio y Compania v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir. 1967).

²² 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 advocate 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 U.S. and Cuba and being permitted to pursue their claims in U.S. courts. See, e.g., Alberto Diaz-Masvidal, *Scope, Nature and Implications on Contract Assignments of Cuban Natural Resources (Mineral and Petroleum)*, Address at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy, 54-62 (Aug. 1994) (on file with the *Journal*).

A bill recently introduced in the U.S. Congress would provide the relief sought by the above-mentioned Cuban-Americans. The proposed legislation would: (1) amend the Cuba Claims Act to allow U.S. citizens to file expropriation claims against Cuba with the FCSC, whether or not the claimants were U.S. citizens at the time of expropriation, and (2) enable any U.S. citizen whose property was confiscated by Cuba to bring action in U.S. district courts against any third-country person or government that "traffics" in (i.e., sells, transfers, distributes, dispenses, purchases, receives, possesses, obtains control of, manages, uses, or disposes of) the expropriated property. LIBERTAD Act, *supra* note 16, §§ 4(7), 302, 303.

There is some precedent for including the claims of individuals who were not U.S. citizens at the time 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 the LIBERTAD Act or the 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 (1988). Enactment of such legislation, however, may be opposed by the existing certified U.S. claimants, whose share of a lump settlement would decrease if the claimant class were enlarged and the negotiated settlement amount was less than 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* 53-56 (2d ed. 1970).

An analyst identified additional problems raised by legislation like the LIBERTAD Act:

Passage of such legislation would pose additional uncertainties for anyone contemplating the purchase of Cuban assets. If Congress were to open the U.S. courts, or the FCSC, to such claims and provide funding, U.S. citizens now bound by the original Cuban Claims Act and the determination of the FCSC would clamor for equal treatment. Given the current emphasis on deficit reduction, it is unlikely that such legislation would include funding by the Congress. But, without funding, a new set of claims would cast further doubts over any negotiations with a newly democratic Cuba. Absent an agreement by a new government of Cuba and the United States to establish a tribunal, perhaps along the lines of the Iran-United States Arbitral Tribunal in The Hague, these claimants may be without a remedy or a forum in which to pursue a remedy.

Robert C. Helander, *Creditors' Rights: Claims Against Cuban Confiscated Assets*, in *INVESTING IN CUBA: PROBLEMS AND PROSPECTS* 37, 42 (1994).

Another potential approach to protecting the interests of Cuban expropriation victims who are now U.S. citizens would be to make express provisions in the claims settlement agreement between the United States and Cuba for setting aside moneys for the compensation of individuals who were not U.S. citizens at the time of the takings. Most interesting in this respect is the treatment in the U.S.-Czechoslovakia Claims Settlement Agreement of claims from persons whose property was expropriated by Czechoslovakia and who subsequently became naturalized U. S. citizens. (The U.S.-Czechoslovakia Agreement laid to rest all claims of U.S. citizens against Czechoslovakia for expropriations carried out between 1945 and 1981; Czechoslovakia agreed to pay a lump sum of \$81.5 million to be distributed to U.S. claimants, whereas the United States agreed to return to Czechoslovakia 18.4 metric tons of monetary gold, worth \$250 million, recovered from the Nazis after World War II, and also agreed to release blocking control over properties and interests of Czechoslovakia in the United States). Vratislav Pechota, *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 *AM. J. INT'L L.* 639, 640 & n.8 (1982).

The agreement contains a provision that sets aside a portion of the settlement for "persons who were not U.S. citizens when their property was nationalized." *Id.* at 649. The provision applies to persons whose property was expropriated between 1945 and 1948 and who had become U.S. citizens by 1948. *Id.* Inclusion of such provision was strongly opposed by the U.S. Department of State, which wrote to Congress stating that:

[u]nder well-established principles of international law, to which the United States adheres, the United States cannot espouse claims against foreign governments for injuries inflicted upon persons who were not U.S. citizens at the time of the injury. . . . Deviation from the established legal principles cited above would create a precedent with implications beyond this immediate case. It could open a broad range of new and marginal claims for the U.S. Government to pursue, without support under international law. At the same time, it would erode our ability to espouse legitimate

3. HOW U.S. CITIZENS' CLAIMS MAY BE RESOLVED

Although a full discussion is beyond the scope of this Article, the potential resolution of the expropriation claims of U.S. nationals needs to be acknowledged briefly because the Cuban government may be under political pressure to treat U.S. and Cuban property claims uniformly. In addition, the nature and amount of a U.S.-Cuba settlement may limit the options available to the Cuban government when settling the claims of Cuban nationals.

The President of the United States has wide, but not plenary, power to settle claims against foreign governments who take property belonging to U.S. citizens without compensation.²³ The President has delegated authority to the U.S. State Department to act on behalf of U.S. claimants in the negotiation of their claims against an expropriating country.²⁴ Under the doctrine of espousal, the settlement resulting from the negotiations conducted by the State Department is binding on the claimants and constitutes their

claims of U.S. citizens in the face of worthless undertakings by a foreign government to provide compensation.

Letter from Richard Fairbanks, Assistant Secretary for Congressional Relations, to Charles Percy, Chairman, Committee on Foreign Relations, U.S. Senate, (Oct. 2, 1981), reprinted in S. Rep. No. 211, 97th Cong., 1st Sess. 4, 5 (1981). Congress nonetheless enacted legislation implementing a settlement agreement that set aside a portion of the settlement proceeds for individuals whose property was taken between 1945 and 1948 and whose claims had been previously turned down by the FCSC because they were not U.S. nationals at the time of the confiscations. In doing so, however, Congress reaffirmed the existing U.S. practice and clarified that "[i]n making payments under this section, the Congress does not establish any precedent for future claims payments." Czechoslovakian Claims Settlement Act of 1981, Pub. L. No. 97-127 § 6(2)(B), 95 Stat. 1675, 1677.

While the Czechoslovakian settlement is thus not a direct precedent for providing a remedy to Cuban-born claimants who have become U.S. citizens, it could serve as a model for analogous legislation relating to a settlement between the United States and Cuba. The obstacles to such legislation would be the same as those discussed above.

²³ *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *Shanghai Power Co.*, 4 Cl. Ct. at 244-45. The President's authority is limited, however, by the rarely exercised power of Congress to enact legislation requiring renegotiation of a settlement which it considers unfavorable. See *Dames & Moore*, 453 U.S. at 687-88.

²⁴ See *Dames & Moore*, 453 U.S. at 680 n.9, for a listing of ten settlement agreements entered into by the U.S. Department of State with foreign countries between 1952 and 1979.

sole remedy.²⁵ The United States and the expropriating country typically arrive at a settlement involving a lump sum payment by the expropriating country that is a fraction of the total estimated value of the confiscated assets.²⁶ The settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest. A 1992 settlement with Germany concerning East Germany's expropriations of assets belonging to U.S. nationals, however, included the payment of simple interest from the time the U.S. properties were taken.²⁷

Usually, U.S. claimants may not opt out of the settlement reached by the U.S. government, nor may they pursue their claims before U.S. courts or tribunals of the settling country.²⁸ It may be possible, however, to reach a settlement agreement with Cuba that would remove these impediments and allow individual claimants to pursue alternative remedies, such as negotiating separately with the Cuban government for restitution of expropriated assets, investment concessions, or payments in cash or government obligations.²⁹

²⁵ See *id.* at 679-80; *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); 1 RICHARD B. LILICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 6 (1975).

²⁶ For example, the United States settled U.S. claims against the People's Republic of China for \$80.5 million, which was about 40% of the \$197 million certified by the FCSC. Agreement on the Settlement of Claims, May 11, 1979, U.S.-P.R.C., 18 I.L.M. 551, 551; *Shanghai Power Co.*, 4 Cl. Ct. at 239.

²⁷ Letter from Ronald J. Bettauer, Assistant Legal Advisor for International Claims and Investment Disputes, U.S. Department of State, to German Democratic Republic Claimants (May 29, 1992) (on file with the *Journal*); Agreement Concerning the Settlement of Certain Property Claims, May 13, 1992, U.S.-F.R.G., T.I.A.S. 11,959 [hereinafter Agreement].

²⁸ See *Shanghai Power*, 4 Cl. Ct. at 244.

²⁹ There is some precedent for such flexibility. The recent U.S. settlement agreement with Germany, for example, allows U.S. nationals to forego their portions of the settlement amount and instead pursue their claims under Germany's domestic property claims program. Agreement, *supra* note 27, art. 3; 57 Fed. Reg. 53,175, 53,175-76 (1992).

4. RESOLUTION OF THE CUBAN NATIONALS' CLAIMS

4.1. Introduction

Resolution of Cuban nationals' expropriation claims is a political issue as well as a legal one. From a legal standpoint, the inquiry made is into the legal validity and effectiveness of the expropriations under applicable Cuban law at the time of the takings. If the expropriations were lawful, or at least legally effective, then the problem is reduced to determining what remedies should be given to the former property owners. If, however, the expropriations were legally ineffective, the Cuba may be said to have unjustly enriched itself at the expense of the owners and may be holding the properties in a constructive trust for the benefit of the owners, with the obligation to eventually return them.³⁰

From a political standpoint, the resolution of the claims depends upon a number of domestic and international factors. One important factor that will shape the process is Cuba's ability to compensate the claimants, either immediately or in the long run.³¹

4.2. Right to Private Property Ownership Under Cuban Constitutional Law

Beginning with Cuba's independence from Spain in 1902, the country has constitutionally recognized private property, but the extent of this recognition has varied. The 1901 Constitution, the first constitution of the newly-independent nation, provided strong protection for private property

³⁰ See B. A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 96 (1977). This distinction has a practical significance because if the Cuba is holding the properties in a constructive trust, it is bound to return them or provide equivalent monetary compensation to the owners. If, however, the property takings were lawful or legally effective, the Cuban government is free to craft a remedy of its choosing for the takings.

³¹ Some authors believe that Cuba may not be able to afford *any* program to provide remedies for property expropriations. See Castañeda & Montalván, *supra* note 1, 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.")

rights.³² Similarly, the 1940 Constitution, which was in effect at the time of the Revolution, gave broad recognition to private property rights.³³

Throughout the period during which the Revolutionary government was expropriating the assets of Cubans and foreign nationals, it retained this broad constitutional declaration of private property rights intact. The constitutional provision protecting private property rights was not deleted until the 1976 Constitution,³⁴ which was enacted after all the expropriations had been completed.³⁵ Even then, ownership of private property was not abolished, but only curtailed.³⁶ The 1976 Constitution recognized the right of small farmers to own land and other means of agricultural production in Article 20, and the right of farmers to band together in cooperatives to own land in Article 21.³⁷ In addition, Article 22 reaffirmed the right of individuals to own personal property.³⁸

³² See CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1901) [Constitution] art. 32 (Cuba), reprinted in 2 AMERICAN CONSTITUTIONS: A COMPILATION OF THE POLITICAL CONSTITUTIONS OF THE INDEPENDENT NATIONS OF THE NEW WORLD 112, 119 (José Ignacio Rodríguez trans., 1905) [hereinafter CONSTITUCIÓN DE 1901]. Article 32 provided that:

[n]o one shall be deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property.

Id.

³³ See CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1940) [Constitution] arts. 85-96 (Cuba), reprinted in 1 CONSTITUTIONS OF NATIONS 610, 626-27 (Amos J. Peaslee ed. & trans., 2d ed.) [hereinafter CONSTITUCIÓN DE 1940]. For example, Article 87 provided that "[t]he Cuban Nation 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, are established by law." *Id.* art. 87, at 626.

³⁴ See CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1976) [Constitution] (Cuba), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1976) [hereinafter CONSTITUCIÓN DE 1976].

³⁵ The final expropriations took place in March, 1968. GORDON, *supra* note 5, at 107.

³⁶ CONSTITUCIÓN DE 1976 arts. 20-22, *supra* note 34, at 7.

³⁷ See *id.*, art. 21, at 7.

³⁸ Article 22 of the 1976 Constitution provided that:

A recognition of private property rights remains embedded in Cuba's legal framework. Articles 19, 20, and 21 of the current constitution, adopted in August 1992, are essentially equivalent to Articles 20, 21, and 22 of the 1976 Constitution.³⁹ In addition, Article 23 of the 1992 Constitution recognizes the right of private property ownership through joint ventures and other economic enterprises.⁴⁰ This uninterrupted constitutional recognition of private property rights indicates that the Cuban government may not deprive individuals of their property except as provided by law. Individual property rights, therefore, can be limited in accordance with the constitution and the laws, but cannot be arbitrarily violated by the State.

4.3. Limitations on the Cuba's Ability to Interfere With Private Property Rights

A State can interfere with an individual's right to own private property in a number of ways. The two most common forms of interference are confiscation and expropriation of assets from their private owners. Confiscation is the seizure of private property by a State without compensation, usually to punish the owners for who they are or for what they have done. Confiscations are ordered for political, religious, legal or

The state guarantees the right of citizens to ownership of personal property in the way of earnings and savings derived from their own work, to their place of residence provided that they have legal title to it, and to their other possessions and objects which serve to satisfy their material and cultural needs.

Likewise, the state guarantees the right of citizens to ownership over their personal or family work tools, as long as these tools are not employed in exploiting the work of others.

Id.

³⁹ Compare CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1992) [Constitution] arts. 19-21 (Cuba), published in *Gaceta Oficial*, at 33, 36 (Aug. 1, 1992) [hereinafter CONSTITUCIÓN DE 1992] with CONSTITUCIÓN DE 1976 arts. 20-22, *supra* note 34, at 7.

⁴⁰ Article 23 of the 1992 Constitution provides that:

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.

other reasons relating to the owner, and not to the property itself.⁴¹ Expropriation, on the other hand, is the taking by a State of specified property under the color of some public purpose, with the taking being independent of the acts or identity of the owner.⁴²

4.3.1. Confiscation

As a general proposition, confiscation of private property had always been prohibited by Cuban constitutions.⁴³ This policy was revised during the first days of the Revolution,⁴⁴ and soon thereafter the Revolutionary government promulgated the Fundamental Law to replace the 1940 Constitution.⁴⁵ The Fundamental Law ratified and enlarged the exception to the prohibition against confiscation.⁴⁶ The

⁴¹ For example, forfeiture is the confiscation of specific property or deprivation of rights as punishment for nonperformance of an obligation or commission of a crime. BLACK'S LAW DICTIONARY 650 (rev. 6th ed. 1990).

⁴² The state may, for instance, reclaim private land for public use by eminent domain and thereby expropriate the land from its owners. *See id.* at 523.

⁴³ Article 33 of the 1901 Constitution provided that "[i]n no case shall the penalty of confiscation of property be imposed." CONSTITUCIÓN DE 1901 art. 33, *supra* note 32, at 119. Similarly, Article 24 of the 1940 Constitution provided that "[c]onfiscation of property is prohibited." CONSTITUCIÓN DE 1940 art. 24, *supra* note 33, at 614.

⁴⁴ Article 24 of the 1940 Constitution was modified as follows:

Confiscation of property is prohibited. *However, confiscation is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasury committed during the tyranny which ended on December 31, 1958, as well as in the case of the property of the tyrant and his collaborators.*

Reforma Constitucional art. 2, *published in* Gaceta Oficial, at 1 (Jan. 14, 1959) [hereinafter Reforma Constitucional] (emphasis added) (translation by author).

⁴⁵ *See* Ley Fundamental, *published in* Gaceta Oficial, at 1 (Feb. 7, 1959) [hereinafter Ley Fundamental].

⁴⁶ Article 24 of the Fundamental Law provided that "[c]onfiscation 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." *Id.* at 3-4 (translation by author). This provision was further modified by several amendments to the Fundamental Law, the last of which amended Article 24 as follows:

1976 Constitution also included a qualified prohibition against the confiscation of private property by the State.⁴⁷ Thus, although Cuba's Revolutionary government has created exceptions to the prohibition of the confiscation of private property, it explicitly recognizes that the State does not have an unfettered right to seize private property without providing compensation to its owner.⁴⁸

4.3.2. Expropriation

Cuban constitutions have always recognized the State's right to take possession of private property, provided that the taking is for a legitimate public purpose and that compensation is paid to the owner. From the country's

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 national 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.

Ley de Reforma Constitucional, *published in* Gaceta Oficial, at 1 (July 5, 1960) [hereinafter Ley de Reforma Constitucional] (translation by author).

⁴⁷ Article 59 of the 1976 Constitution provided that the "[c]onfiscation of property is only applied as a punishment by the authorities in [such] cases and [under such procedures as] determined by law." CONSTITUCIÓN DE 1976 art. 59, *supra* note 34, at 15. Article 60 of the 1992 Constitution contains identical language. *See* CONSTITUCIÓN DE 1992 art. 60, *supra* note 39, at 40.

⁴⁸ As discussed above, the Fundamental Law and its amendments significantly expanded the class of people from whom property could be confiscated. It is important to note, however, that when Cuba proceeded with its socialist program, it did not take over private properties through an expansive application of the "confiscation" clause in Article 24, but instead enacted a series of laws specifically intended to allow the expropriation, and not the confiscation, of various classes of property. *See* GORDON, *supra* note 5, at 118. Recent measures taken by the Cuban government against alleged money hoarders illustrate the manner in which confiscation is used in Cuba today. *See* Ley 149, *published in* Gaceta Oficial, (May 5, 1994) (establishing a procedure under which government prosecutors investigate alleged instances of illicit enrichment and attach properties suspected to be the result of illegal activities). Although the procedure set up by Ley 149 is appalling because of its lack of due process, it implicitly recognizes that property rights exist and that assets cannot be confiscated by the state without basis and some regard for the owner's rights.

inception, Article 32 of the 1901 Constitution made this limited right available to the State.⁴⁹ Similarly, Article 24 of the 1940 Constitution gave the State the right to expropriate private property.⁵⁰

When the Revolutionary government issued a Fundamental Law in 1959 to replace the 1940 Constitution, it retained the text of Article 24 referring to the State's limited expropriation rights.⁵¹ The State's limited right to expropriate private

⁴⁹ Article 32 of the 1901 Constitution provided that:

No one shall be deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property.

CONSTITUCIÓN DE 1901 art. 32, *supra* note 32, at 119.

⁵⁰ Article 24 of the 1940 Constitution provided that:

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] compl[y] with these requi[rements] 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 his property restored to him.

The reality of the cause of public utility or social interest, and the need for expropriation, shall be decided by the courts in case of impugnation.

CONSTITUCIÓN DE 1940 art. 24, *supra* note 33, at 614.

The 1940 Constitution modified the corresponding provision of Article 32 of the 1901 Constitution in four major respects: (1) Only a *judicial* authority was empowered to authorize an expropriation; (2) property could be taken both for reasons of public utility and *social interest*; (3) compensation for the property had to be *in cash, and the amount was to be set by the courts*; and (4) challenges to the legitimacy of the purpose for the taking could be raised, and would be decided by the courts. *Compare id. with* CONSTITUCIÓN DE 1901 art. 32, *supra* note 32, at 119. Taken together, these changes suggest that the drafters of the 1940 Constitution wanted to expand the State's ability to expropriate private property, but wished to ensure that such takings were subject to judicial review of the legitimacy of the purpose behind the taking and the promptness, adequacy and liquidity of the compensation. The drafters, therefore, attempted to incorporate international law principles requiring compensation for property expropriations into the 1940 Constitution.

⁵¹ Subsequent amendments, including the 1960 amendment of Article 24 of the Fundamental Law, relaxed the constitutional requirements for expropriating private properties. *See* Ley de Reforma Constitucional art. 1, *supra* note 46, at 1 (amending Article 24 of the Fundamental Law). Following the new language on confiscation, the amended Article 24 provides that:

property was also reaffirmed in the 1976 Constitution, which again authorized the State's right to expropriate private property.⁵²

It is evident that the Fundamental Law of 1959 (as amended) and the 1976 and 1992 Constitutions have weakened, if not eliminated, the guarantees that private property owners would receive prompt, adequate, and effective compensation in the event of expropriation. These constitutions nonetheless continued to recognize two fundamental requirements for a valid expropriation: (1) private property can only be taken by the State for some legitimate public purpose, and (2) such a taking must be accompanied or followed by the payment of compensation. These principles, therefore, remain part of Cuba's legal tradition.

[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.

Id. For a discussion of the new language on confiscation see *supra* note 41 and accompanying text.

Gutierrez notes that this amendment greatly weakened the protections against expropriation by removing the requirements that the action be taken by a competent judicial authority, that advance payment be made in cash in an amount set by the courts for the expropriation, and that the owner be able to appeal to the courts the utility or need for the expropriation. See Gutierrez, *supra* note 6, at 7-9.

⁵² Article 25 of the 1976 Constitution provided that:

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

The law establishes the method for the expropriation and the bases on which the need for and the usefulness of this action is to be determined, as well as the form of the compensation, considering the interests and economic and social needs of the person whose property has been expropriated.

CONSTITUCIÓN DE 1976 art. 25, *supra* note 34, at 8. Article 25 of the 1992 Constitution contains identical language. See CONSTITUCIÓN DE 1992 art. 25, *supra* note 39, at 36.

4.4. *Legal Validity and Effectiveness of the Means Used by Cuba for Its Takings of Property of Cuban Nationals*

4.4.1. *Means Used for the Property Takings*

Cuba's takings of its nationals' property was accomplished by three methods: (1) confiscations of the property of alleged officials of the Batista government and its sympathizers, and subsequent confiscations of the property of alleged counter-revolutionaries;⁵³ (2) expropriations pursuant to major economic reform laws, such as the Agrarian Reform Law of 1959 and the Urban Reform Law of 1960;⁵⁴ and (3) takings of the property of individuals leaving the country as "abandoned property."⁵⁵

The first category of property takings was carried out in 1959 and 1960. During those years, the government confiscated the assets of hundreds of individuals charged with: (1) being government officials during the 1952-1958 period; or (2) having benefitted from corruption during the Batista years.⁵⁶ The seizures occurred summarily, and the subjects of the confiscations had the burden of proving that they had not improperly benefitted from their association with the ousted regime.⁵⁷ An estimated \$200 million worth of property was confiscated from officials of the Batista government and their alleged supporters.⁵⁸

The second and most significant group of takings occurred between 1959 and 1961 through a series of laws intended to create a socialist economic structure in Cuba. The most important of these laws were: (1) the Agrarian Reform Law of 1959, which expropriated land holdings in excess of 1,000 acres;⁵⁹ (2) Law 890 of October 1960, which expropriated a wide range of Cuban-owned industries and businesses;⁶⁰ (3)

⁵³ See GORDON, *supra* note 5, at 72-73.

⁵⁴ See *infra* notes 59-62 and accompanying text.

⁵⁵ Ley 989, *supra* note 7, at 23,705.

⁵⁶ See GORDON, *supra* note 5, at 72-73.

⁵⁷ See Ley 78, *published in* Gaceta Oficial, at 2342 (Feb. 19, 1959).

⁵⁸ See GORDON, *supra* note 5, at 73 n.18.

⁵⁹ Ley de Reforma Agraria, *published in* Gaceta Oficial, at 2 (June 3, 1959) [hereinafter *Ley de Reforma Agraria*].

⁶⁰ Ley 890, *published in* Gaceta Oficial, at 2 (Oct. 15, 1960) [hereinafter *Ley 890*].

the Urban Reform Law of October 1960, which ordained the forced sale to the State of all the rental residential property in private hands;⁶¹ and (4) a directive issued in March 1968 taking over all remaining small, privately-owned businesses.⁶²

The third class of takings was conducted pursuant to the "abandoned property" law of December 1961.⁶³ This law confiscated all properties of those who left Cuba and did not return within a certain period of time.⁶⁴ Such properties were deemed "abandoned" by the owners and seized by the State.⁶⁵

4.4.2. *Validity of the Property Takings Clause*

The effects of the property takings by Cuba's Revolutionary government must be assessed from two standpoints: (1) whether the takings were permissible under the laws in effect at the time the takings occurred, or alternatively, if the laws were invalid, whether the takings were permissible under pre-existing laws, and (2) assuming the laws in effect at the time of the takings were invalid, whether the takings were nonetheless legally effective in terms of passing title to the State.⁶⁶

⁶¹ Ley de Reforma Urbana, published in *Gaceta Oficial*, at 2 (Oct. 14, 1960) [hereinafter *Ley de Reforma Urbana*].

⁶² See *Castro Pledges End of Private Business*, N.Y. TIMES, Mar. 14, 1968, at 1.

⁶³ See Ley 989, *supra* note 7, at 23,705.

⁶⁴ Resolution 454 of the Ministry of the Interior, published in *Gaceta Oficial* (Oct. 9, 1961). Resolution 454 gave Cubans leaving the country for the United States twenty-nine days to return to Cuba; those traveling elsewhere in the Western Hemisphere had sixty days to return, and those traveling to Europe had ninety days. *Id.* 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. *Id.*

⁶⁵ See Ley 989, *supra* note 7, at 23,705. In reality, those people wishing to leave Cuba after 1961 were required to turn their assets over to the state before being granted final authorization to depart. The author and his family were subjected to this process in 1963.

⁶⁶ In discussing the validity of Cuba's expropriation laws, it is important to keep in mind the distinction between the legitimacy of the Revolutionary Government and the legal validity of certain of its acts. Some equate the two. One commentator 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

4.4.2.1. *Validity of the Property Takings Under Existing Laws*

The Revolutionary government cited the changes it made to the 1940 Constitution, via the Fundamental Law of February 1959 as a justification for its property takings during the 1959-1968 period.⁶⁷ One such change was a modification of Article 24 that allowed the confiscation of the property of officials in the Batista government and others.⁶⁸ Another important change to the Constitution was the addition of Article 232 of the Fundamental Law of February 1959, which gave the Council of Ministers (the Cabinet), with the approval of the President, the power to amend the Constitution without following the amendment procedures set forth in the 1940 Constitution.⁶⁹ This provision was the constitutional source of power for later legislation issued by the Cabinet which directly amended the Constitution.⁷⁰

It has been argued that the 1940 Constitution was never effectively repealed and that the Fundamental Law of 1959

effective. HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 117, 187-88 (1961). Others, however, 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.* 50, 138-40 (1994).

⁶⁷ For a discussion of these changes, see *supra* section 4.3.1.

⁶⁸ *See id.*

⁶⁹ Article 232 of the Ley Fundamental provides that "[t]his 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." Ley Fundamental art. 232, *supra* note 45, at 27. By contrast, Article 285 of the 1940 Constitution allowed constitutional amendments via referendum or "super-majority" vote of Congress, and under Article 286, major constitutional reforms or complete overhaul of the Constitution could only be accomplished by a Constitutional Convention followed by a plebiscite. CONSTITUCIÓN DE 1940 arts. 285-286, *supra* note 33, at 668-669.

⁷⁰ The Council of Ministers exercised this Constitution-giving 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. *See* Ley de Reforma Agraria, *supra* note 59, at 11. The same declaration is contained in the "Final Provision" of the Urban Reform Law. *See* Ley de Reforma Urbana, *supra* note 61, at 8.

and subsequent constitutions are invalid because they were not enacted in accordance with the procedures described in Articles 285 and 286 of the 1940 Constitution.⁷¹ As a result, the argument goes, laws deriving their authority from the Fundamental Law of 1959 (such as the Agrarian Reform Law) are invalid.⁷²

This argument is based on the 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 the existing Constitution and create a new set of fundamental legal norms.⁷³ These conditions include political control over the country and the population's acceptance of, or at least acquiescence to, both the revolutionary regime and its changes to the constitution and laws.⁷⁴

⁷¹ See José D. Acosta, *El Marco Jurídico-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 61, 78-82 (1992).

⁷² See Consuegra-Barquin, *supra* note 19, at 899.

⁷³ 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 SOURCEBOOK OF THE CONSTITUTIONAL LAW OF GHANA 493 (1972) (Ghana); *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, 123-33 (Lesotho); *Matanzima v. President of the Republic of Transkei*, 4 S. Afr. L.R. 989, 994-97 (1989) (Transkei).

One commentator 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. See Mahmud, *supra* note 66, at 53. This result is independent of whether the challenge is brought while the de facto regime is in power or thereafter.

⁷⁴ In *Mokotso*, the Chief Justice of the Lesotho High Court declared the test to be as follows:

A court may hold a revolutionary government to be lawful, and its legislation to have been legitimated ab initio, where 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.

Mokotso, 1989 L.R.C. Const. at 133. This test is analogous to the traditional test under international law principles for deciding whether a de facto

There is little doubt 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 over thirty-six years, and throughout that period there has been general acquiescence by the population to the legal changes made by it. These include the enactment of three constitutions and the passage of legislation that has drastically changed the island's political and economic structure. To deny legal validity to the revolutionary laws is, therefore, to deny reality.⁷⁵

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 R. TRIMBLE, *INTERNATIONAL LAW* 421-423 (1991).

⁷⁵ 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 A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 66-67 (3rd ed. 1978) ("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, in fact, that law was signed by many eminent Cubans, including the then President of the Cuban Bar Association. Emilio Cueto, *Property Claims of Cuban Nationals*, Address at the Shaw, Pittman, Potts & Trowbridge Workshop on Resolution of Property Claims in Cuba's Transition, Washington, D.C. (Jan. 1995) (copy on file with the *Journal*).

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 the revolutionary government since its accession to power. *Williams v. Bruffy*, 96 U.S. 176, 186 (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:

[T]he people may well accept without necessarily approving . . . If they decide to accept the new regime, even if that decision is based on weakness or even fear, such 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.

Thus, under this analysis, 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 Article 24 of the Fundamental Law because the properties were taken for an identified public purpose (i.e., to eliminate large landholdings, which were said to be an obstacle to the development of the national economy);⁷⁶ the State's obligation to provide compensation to the owners of the expropriated lands was expressly acknowledged;⁷⁷ and mechanisms for providing such compensation were established.⁷⁸ Similar features were contained in the Urban Reform Law of 1960 and some of the other expropriation laws.⁷⁹

Mokotso, 1989 L.R.C. Const. at 132.

⁷⁶ Ley de Reforma Agraria, *supra* note 59, at 2.

⁷⁷ Art. 29 of the Agrarian Reform Law provided that:

[t]he 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.

Ley de Reforma Agraria, *supra* note 59, at 6.

⁷⁸ *Id.* Article 31 provides:

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 one-half percent (4½%). 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. at 6. 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 an integral part of the Fundamental Law and thus amended Article 24 to the extent that it was inconsistent with the Agrarian Reform Law. *Id.* at 11.

⁷⁹ Article 37 of the Urban Reform Law also creates a compensation program for owners of expropriated buildings. Ley de Reforma Urbana, *supra* note 61, at 6-7. Law 890 of October 13, 1960 established, with respect to the expropriation of Cuban-owned industries and businesses, that "[t]he

At least one type of property seizure, one made 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 invalid, however.⁸⁰

There are three reasons for the conclusion that these seizures are invalid. First, the properties were not taken for an express public purpose but only because they were deemed "abandoned." Second, the properties were confiscated outright and no effort was made to establish a mechanism to compensate the former owners. Third, to the extent that the confiscations involved "personal consumption" items (e.g., residences, motor vehicles, works of art, jewelry), the confiscations were inconsistent with the principles of socialism that had been embraced by the Revolution long before the takings took place.⁸¹ Socialist property principles distinguish between means of production, which are the property of the State, and items of personal consumption, over which the State has only limited rights.⁸² The confiscation of personal consumption items was therefore inconsistent with socialist doctrine.⁸³ Thus, under socialist principles of property rights,

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." Ley 890, *supra* note 60, at 2. Such additional legislation, however, was never actually enacted.

⁸⁰ Of course, any seizures made without authority of law (such as the March 1968 takings of small businesses) would be by definition invalid.

⁸¹ See DEBRA EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 11-14 (1994) (summarizing the transformation of Cuba to a socialist legal order in the first few years of the Revolution).

⁸² See CONSTITUCIÓN DE 1992 arts. 15 & 24, *supra* note 39, at 35-36 (distinguishing between the State's ownership of the means of production and the right to private ownership of personal property).

⁸³ One commentator posits an additional reason why the confiscations of the property of the Cubans leaving the country may be invalid: Law 989 appears to have been enacted to punish those who left the country for political reasons, and if so it would be unconstitutional in that it discriminated against a class of people because of their political beliefs, contrary to Article 33 of the Constitution of 1940 and the Fundamental Law of February 1959. Consuegra-Barquin, *supra* note 19, at 903-04.

The legal theory on which Law 989 was based, that the individuals who left Cuba for political reasons "abandoned" their property, is invalid for a number of reasons. For example, the doctrine of abandonment of property requires a voluntary relinquishment of the property. *Id.* at 904-06. The Cubans who fled the country in the early 1960s for fear of political

Law 969 of December 5, 1961, appears to be invalid as it is in violation of the Fundamental Law of 1959.

Another argument occasionally raised against the Revolution's constitutional changes and property expropriation laws is that none of the laws enacted by the Revolutionary government are valid due to the illegitimate nature of the government.⁸⁴ This argument fails because the laws of a revolutionary regime that is fully in control and receives popular support are valid, regardless of the legitimacy of the regime. Also, as a practical matter, a blanket challenge to the Revolution's legislation is troubling, in that it implies 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.⁸⁵ A future government would likely be de facto in nature, moreover, and thus its laws (including those dealing with property issues) would be subject to the same attack as the Revolutionary government's expropriations. In short, a successful challenge to the validity of all post-1959 laws on the grounds of lack of constitutional legitimacy by the enacting government could leave Cuba in a

persecution were not acting voluntarily when they left their property behind. In many cases, they were required to turn over their assets to the state in order to be permitted to depart. Under the circumstances, the forsaking of their personal assets was the result of coercion and cannot be deemed to constitute an act of abandonment. *Id.* at 906.

The current state of title to "abandoned" property seized pursuant to Law 989 has been examined under the provisions governing adverse possession (*usucapio*) in Cuba's Civil Code of 1889 and its successor, the 1987 Civil Code (Law 59 of July 17, 1987). *See id.* at 912-23; Cueto, *supra* note 75, at 16-23. This Article will not consider the adverse possession theory, other than to note that most current possessors of "abandoned" property would appear to have good title to it, either under the adverse possession principles embodied in the 1889 Civil Code (if still applicable) or those in the 1987 Civil Code (if the new Code is indeed in effect). *See* Consuegra-Barquin, *supra* note 19, at 912-23.

⁸⁴ *See* Néstor Cruz, *Legal Issues Raised by the Transition: Cuba From Marxism to Democracy*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE SECOND ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 51 (1992).

⁸⁵ Shortly after seizing power through a coup d'état in 1952, the Batista 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 Articles 285 and 286 of the 1940 Constitution, the same procedure followed in the Fundamental Law of 1959. *See* Cueto, *supra* note 75, at 13.

State of legal chaos and make it difficult for the country to govern itself.⁸⁶

4.4.2.2. *Validity of the Property Takings Under Pre-Revolution Laws*

It has been argued, based on the assumption that the Fundamental Law of February 1959 and other constitutions enacted by the Revolutionary government were invalid and the 1940 Constitution is still in effect, that the property expropriations conducted during the 1959-1968 period were invalid because the government failed to comply with Article 24 of the 1940 Constitution, which required the advance payment of cash compensation to the owners of the expropriated property.⁸⁷

It appears unlikely, however, even if it is held that the 1940 Constitution was in effect during the Revolution, that the Cuban courts would find laws like the Agrarian Reform Law and the Urban Reform Law to be invalid.⁸⁸ Although those laws resulted in the expropriation of many assets from the private sector, the laws established compensation mechanisms which, if implemented, would have provided payment to the owners over time.⁸⁹ A court could find that such compensation schemes were insufficient or inadequately implemented, but were not in violation of the intent of Article 24.

4.4.3. *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 nonetheless vested title to the properties with the government. The language of Article 24 of the 1940

⁸⁶ See Consuegra-Barquin, *supra* note 19, at 899.

⁸⁷ Gregorio Escagedo, Jr., *Posibles Problemas que Confrontaremos en Cuba: Sus Soluciones*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 250, 253 (1993).

⁸⁸ Of course, the political branches of a transition government could decide to enact laws reversing the expropriations or providing other remedies to the former owners.

⁸⁹ See, e.g., Ley de Reforma Agraria, *supra* note 59, at 6.

Constitution strongly suggests that the Cuban government's failure to pay compensation in accordance with the constitutional provision did not render the takings legally ineffective, but instead transferred title of the properties to the government and gave rise to an obligation to compensate former owners.⁹⁰

After setting forth the legal requirements for a governmental expropriation of private property, Article 24 provided that "[f]ailure to comply with [its] 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."⁹¹ Under this Article, it is clear that transfer of property back to its original owners was neither automatic nor constitutionally required. Indeed, under the procedure established by Article 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 or return of the property. Thus, unless and until a court ruled that the property should be returned, title to the property remained with the State.⁹²

4.4.4. Conclusions on the Validity and Effectiveness of the Property Takings

The above discussion strongly suggests that a reviewing court would hold that most of the Revolutionary government's takings of private property from Cuban nationals were legally valid. In the alternative, if such a court ruled that the takings

⁹⁰ See CONSTITUCIÓN DE 1940 art. 24, *supra* note 33, at 614.

⁹¹ *Id.* (emphasis added).

⁹² The conclusion that the State acquired and retains title to the properties it seized is also consistent with a literal reading of Article 194 of the 1940 Constitution, which provides that when a law was 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. See CONSTITUCIÓN DE 1940 art. 194, *supra* note 33, at 649 ("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."). Article 172 of the Fundamental Law of 1959 contains an identical provision. See *Ley Fundamental* art. 172, *supra* note 45, at 19. For a discussion of the issues raised by Article 194 of the Constitution of 1940, see Cueto, *supra* note 75, at 15-16, and authorities cited therein.

were invalid, it is likely that the court would find that the takings were nonetheless effective in transferring title of the properties to the State.

This does not mean, however, that the Cuban government has no remaining duties to its citizens for the takings. It does not appear that the former owners were ever compensated for any of the expropriations, even where, as with the Agrarian Reform Law, a legal mechanism was created to provide indemnification. Cuba, therefore, still has a legal obligation to comply with Article 24 of the Fundamental Law of 1959 (or the 1940 Constitution) and provide remedies (compensation, restitution, or other) to those whose properties were expropriated or confiscated without cause.⁹³ The definition and implementation of the remedies should be addressed through new laws issued by the government.⁹⁴ Section five below identifies some of the decisions that will need to be made during the process of providing those remedies.

5. SOME PRACTICAL CONSIDERATIONS IN THE DEVELOPMENT OF REMEDIES FOR CUBA'S PROPERTY EXPROPRIATIONS

A system providing remedies for the property expropriations carried out by a socialist regime must attempt to achieve several somewhat inconsistent objectives. Those objectives include: 1) providing predictable and substantially fair treatment to all interested parties; 2) creating, in the shortest possible time, a regime of clear, secure and marketable rights to property; 3) promoting the expeditious privatization of state-held assets; 4) encouraging the early onset of substantial foreign investment; and 5) keeping the

⁹³ The validity of the confiscations of property owned by individuals accused of graft during the Batista regime presents a special case that will likely be resolved separately.

⁹⁴ Such legislation, for example, could vest title of the properties in an appropriate government agency and establish a 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 have no jurisdiction to consider challenges to the disposition of the properties. Such provisions would preclude disputes over title holding up the productive utilization of the properties. See Matias F. Travieso-Diaz & Steven R. Escobar, Overview of Required Changes in Cuba's Laws and Legal Institutions During its Transition to a Free-Market Democracy, Address at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy 46-49 (Aug. 1994) (on file with the *Journal*).

aggregate cost of the remedies within the financial means of the country.⁹⁵ As a government tries to implement these objectives, it must resolve a number of substantive and procedural questions. The discussion that follows considers some of these questions and explores how other countries have addressed these same issues. These countries' experiences may provide useful guidance in the development of a system of remedies for Cuba's expropriations.

5.1. *Treatment of Different Types of Property*

A key issue is whether different types of property (industrial, commercial, agricultural, residential, and personal) should receive different treatment. Some types of expropriated property, such as large industrial installations, may lend themselves readily to direct restitution because the identity of the former owners may be uncontested and the extent of the ownership rights may be relatively easy to establish. At the other end of the spectrum, residential property is likely to be subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others.⁹⁶ Nontangible property rights, such as rights to payment of money, typically are not included in property claim resolution legislation, nor are claims based on

⁹⁵ See Jon L. Mills, *Principal Issues in Confiscated Real Property in Post-Communist Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 23, app. A (JoAnn Klein ed., 1994) for a similar list of objectives.

⁹⁶ In the former Czechoslovakia, restitution of residential property led to numerous disputes between original owners and current occupants, as well as between competing claimants, which resulted in clogged courts. See Gray et al., *supra* note 17, at 49; Gelpert, *supra* note 2, 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 17, at 49.

A complicating factor in the case of Cuba is the fact that Cuba is entering into a number of joint ventures with foreign (non-U.S.) investors. See e.g., *An Index of Foreign Investment in Cuba*, LA SOCIEDAD ECONOMICA, Bull. 43 (Sept. 1994). Many of these ventures involve property that was expropriated from U.S. and Cuban nationals. See *id.* A transition government will have to balance the rights and interests of former owners against those of third parties who have invested in Cuba.

loss of earning capacity, deprivation of human rights, loss of life, or other injuries to the individual.⁹⁷

Some countries, including the former Czechoslovakia, have opted to enact different laws for the various types of property for which claims were brought. The former Czechoslovakia enacted a series of restitution laws which distinguished between "small" property (e.g., small businesses and apartment buildings), "large" property (e.g., industries and associated real estate), and agricultural lands and forests, with each type of property subject to somewhat different procedures and remedies.⁹⁸ The restitution of "small" property was governed by the Small Federal Restitution Law, which provided for direct restitution to its original owners.⁹⁹ The

⁹⁷ Some countries, including the former Czechoslovakia, have granted remedies for non-property infringements such as political persecutions, but the relief given has been largely declaratory (e.g., invalidating job terminations due to political reasons) and no actual remedies, such as job reinstatements, damages, or special pensions, have been given to the victims. See Gelpert, *supra* note 2, at 337 n.73. On the other hand, Hungary has provided compensation in the form of interest-bearing securities (vouchers), life annuities, or social security benefits "to persons deprived of their freedom or life for political reasons" between 1939 and 1989. Katherine Simonetti et al., *Compensation and Resolution of Property Claims in Hungary*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 61, 74 (JoAnn Klein ed., 1994).

It has been argued that providing remedies to Cuban property claimants without, at the same time, compensating the victims of non-property rights abuses

may be unacceptable—even offensive—to [the latter], or, for that matter, to anyone (including the international community) expecting that the New Cuban Authorities will be sensitive to human rights abuses and that they should also send a clear signal to the world about their commitment to 'first-amendment-type' rights.

Cueto, *supra* note 75, at 24. The subject of remedies for non-property rights claims is beyond the scope of this Article. The author notes, however, that at least some of those who argue in favor of giving remedies to non-property rights claimants recognize that providing such remedies would be impractical. *Id.* at 24-25; Castañeda & Montalván, *supra* note 1, at 30.

⁹⁸ After the division of Czechoslovakia into separate Czech and Slovak states, the Czech Republic enacted a fourth law returning land confiscated from ethnic Germans and Hungarians after the end of World War II. Gelpert, *supra* note 2, at 327.

⁹⁹ Gray et al., *supra* note 17, at 49. Both natural persons and companies could claim restitution under this law. See Gelpert, *supra* note 2, at 340. Companies, however, could only claim restitution if they were expropriated as such. *Id.*

Large Federal Restitution Law provided for the return of "large" property to its former owners.¹⁰⁰ In situations where the property was in use by natural persons or foreign entities, however, the return of the property was barred, and the government paid compensation instead.¹⁰¹ For agricultural land and forests, the Federal Land Law provided for the presumptive return of lands to the original owners.¹⁰² Where "neither the land originally [expropriated], nor a substantially similar parcel in the locality [was] available," financial compensation was provided as an alternative remedy.¹⁰³

Cuba may want to follow Czechoslovakia's example and enact separate laws for the various types of property subject to claims. This would be prudent in light of the unique considerations associated with each type of property, and the potentially distinct legal rights involved depending upon the means originally used by Cuba (confiscation, expropriation, seizure of "abandoned" property) to justify the takings.

5.2. Parties 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 permitted to opt-out of a U.S.-Cuba settlement (assuming such an option is available), non-registered U.S. claimants, Cuban nationals who acquired U.S. citizenship after their properties were confiscated, other Cuban nationals living abroad, and Cubans living on the island.¹⁰⁴ In deciding who will be

¹⁰⁰ See Gelpert, *supra* note 2, at 337.

¹⁰¹ *Id.* at 338. Cash compensation under this law has been quite limited, with a cap of approximately \$1,000; most of the compensation has been in the form of state securities which can be invested in newly-privatized companies or shares in the companies themselves. See Gray et al., *supra* note 17, at 49; Gelpert, *supra* note 2, at 338.

¹⁰² See Gelpert, *supra* note 2, at 337. Originally, restitution was limited to parcels under 150 hectares for non-agricultural land and 250 hectares for farmland. *Id.* at 339. These restrictions were subsequently lifted. *Id.*

¹⁰³ *Id.*

¹⁰⁴ As discussed *supra* note 22, some Cuban-Americans may want to be treated as U.S. claimants and have their claims included in a future U.S.-Cuba settlement. It is likely, in any case, that naturalized U.S. citizens of Cuban origin will be treated by Cuba as 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

entitled to a remedy, the Cuban government will need to address the issues of whether Cuban citizens residing abroad and those who have become citizens of another country will qualify for remedies, and which successors in interest, if any, of the original property owners will be entitled to a remedy.

On the question of the treatment of expatriates, the approaches followed by Hungary and Czechoslovakia in dealing with émigrés are instructive. In Hungary, foreign citizens and residents may claim compensation if they were Hungarian citizens at the time of expropriation.¹⁰⁵ Czechoslovakia, on the other hand, conditions émigrés' claims on the type of property expropriated. Émigrés are eligible to claim restitution for "small" property, but not for "large" property.¹⁰⁶ In addition, in Czechoslovakia, only resident citizens are entitled to restitution of agricultural and forestry lands.¹⁰⁷ The Hungarian system provides perhaps the most equitable and pragmatic model for the treatment of claims from Cuban expatriates. Adoption of such an open system by Cuba would eliminate a potential source of civil discord, which could be particularly significant due to the large number of Cubans living abroad who have outstanding expropriation claims.

The examples of Hungary and Czechoslovakia also serve to illustrate the different approaches that may be taken regarding successors in interest. Czechoslovakia is in this regard the more liberal of the two countries because all of its restitution laws allow former owners, as well as their co-owners and partners, to recover remedies for expropriations.¹⁰⁸ In addition, all "testamentary heirs or immediate family [members] may claim in proportion to their share of the [owner's] inheritance."¹⁰⁹ In Hungary, by contrast, when the former owner is deceased, the descendants

abroad.

¹⁰⁵ Gelpert, *supra* note 2, at 347. "Foreign and national claims are treated equally under Hungarian law." *Id.*

¹⁰⁶ *Id.* at 340.

¹⁰⁷ *See id.* Moreover, Czechoslovakia's Federal Land Law prohibits foreign ownership of land in Czechoslovakia, thereby precluding émigrés who have become citizens of other countries from owning land in Czechoslovakia. *Id.* at 341 n.95.

¹⁰⁸ *Id.* at 340.

¹⁰⁹ *Id.*

may claim compensation only for their proportional share of the estate. If any of the descendants are dead, the surviving descendants do not share in the deceased descendant's share.¹¹⁰ The surviving spouse of a deceased claimant is only entitled to compensation if there are 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 the claimant's death.¹¹¹

A considerable amount of time has passed since Cuba's expropriations and it is likely that many of the former property owners will have died by the time a claims settlement process is implemented. Under these circumstances, the Cuban government will have to decide whether the heirs of former owners are entitled to share in the remedies, and if so, who qualifies as an heir for purposes of determining eligibility for remedies.

5.3. Administration of Remedies

Some countries have established agencies whose sole purpose is to administer remedies. Hungary, for example, has established compensation offices in each county and in Budapest, and an appellate National Compensation Office in the capital. Decisions of the local offices may be appealed to

¹¹⁰ See *id.* at 347.

¹¹¹ *Id.* Other countries seeking to define the eligible claimants for expropriation remedies have adopted a variety of definitions. For example, Estonia allows claims for individuals who are presently Estonian citizens or who were citizens 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. Frances H. Foster, *Post-Soviet Approaches to Restitution: Lessons for Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 93, 96-97 (JoAnn Klein ed., 1994). Latvia allows claims by "previous owners or their heirs, regardless of their present citizenship." *Id.* at 97 (quoting Republic of Latvia Law on the Return of Buildings to their Legal Owners (Oct. 30, 1991)). Lithuania restricts restitution to current citizens and permanent residents of the country, and only extends the right to bring a claim to former owners, and, if they are deceased, to their surviving parents, spouses, children and grandchildren. *Id.* at 98.

the National Office,¹¹² whose decisions are reviewable by a designated civil court in Budapest.¹¹³

Other countries, such as Germany, have assigned responsibility for handling expropriation claims to the local property registry where the property at issue is located.¹¹⁴ Czechoslovakia has chosen not to establish an agency to administer or review restitution claims, but rather it has left the matter to negotiation between the former owner and the person occupying the property.¹¹⁵ If agreement cannot be reached through negotiation, the matter is adjudicated in court.¹¹⁶

Given the large number and contentious nature of the claims that will likely be asserted in Cuba, it will be necessary to establish an independent agency within the Cuban government with jurisdiction over determining the validity of claims of title to confiscated property and over the dispensing of remedies. Adequate staff and personnel training will need to be provided in advance, inventories of the subject properties will need to be made, and valuation methods will need to be developed.

5.4. Procedures for Dispensing the Remedies

The procedures for resolving property claims will need to set stringent, but reasonable time, limits for filing remedy requests;¹¹⁷ define the means and procedures for proving

¹¹² The National Compensation Office has a staff of 500. Gelpern, *supra* note 2, at 348.

¹¹³ Simonetti et al., *supra* note 96, at 67.

¹¹⁴ See Dorothy A. Jeffress, Note, *Resolving Rival Claims on East German Property Upon German Unification*, 101 YALE L.J. 527, 543-44 (1991) (discussing the rationale behind, and the advantage of, maintaining preexisting property registries as the authorities to hear claims).

¹¹⁵ Gelpern, *supra* note 2, at 342.

¹¹⁶ *Id.* The Federal Land Law requires the involvement of the local Land Office in the resolution of restitution claims against land. *Id.* at 342-43. The Land Office can veto, compel, or amend an agreement to return land to its former owner on a variety of public interest grounds. *Id.* at 343.

¹¹⁷ Hungary set a ninety-day deadline for filing claims under the first of its compensation laws, enacted in April 1991. Simonetti et al., *supra* note 94, at 66. That deadline, however, was extended several times through 1994. *Id.* Initially, Germany set a deadline of October 1990 for filing property restitution claims. That deadline was later extended to the end of 1992 for real property and the middle of 1993 for personal property. Paul

title; establish mechanisms for adjudicating title disputes, dispensing remedies, and appealing agency determinations; enforce the duties of those whose property is returned to them (e.g., payment of taxes, environmental cleanup and economic use of the property); and put in place the administrative procedures and bureaucratic apparatus needed to determine and implement the applicable remedy in each case. The experiences of other countries demonstrate the importance of having these mechanisms in place before attempting to consider any claims.¹¹⁸

5.5. Available Remedies

5.5.1. Restitution

Many claimants would like to have the confiscated property returned to them. The possibility of returning the actual property seized by the government, however, depends on factors such as the type and size of the property, economic and social considerations (e.g., how the property is currently being used), and the possibility of clear identification if the original property has been subject to transformation, merger, subdivision, improvement, or other changes.

In addition, the rights of current lessors, occupants, or other users of the property must be taken into account, and any restrictions or obligations on the claimants' use and transfer of the property after its return must be specified. The difficulties arising from these considerations may dictate alternative remedies, such as compensation or return of

Dodds, *Restitution Claims in Eastern Germany: An Experience to Avoid*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 125, 131 (JoAnn Klein ed., 1994).

¹¹⁸ One commentator 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. . . . [T]his has proven to be a major stumbling block to overall national privatization efforts.

Foster, *supra* note 111, at 106-07 (footnotes omitted).

substitute property (i.e., the transfer of equivalent property to the one confiscated). Where return of substitute property is employed, it is necessary to specify how equivalence of the properties will be defined and established.

The choices regarding the appropriate remedy for expropriations made by countries in Central and Eastern Europe and the consequences of these choices illustrate the trade-offs inherent in each remedy. Return of the confiscated property or a substitute property has been the preferred remedy in Germany, Czechoslovakia, the Baltic Republics, Bulgaria and Romania.¹¹⁹ Hungary, however, has chosen to provide compensation to the former owners, instead of returning the expropriated assets to them.¹²⁰

At the start of its return to democracy, Czechoslovakia, which implemented an aggressive, across-the-board restitution program, was under conditions similar to those of Cuba today, in that the State had total control over most forms of property.¹²¹ As previously discussed, Czechoslovakia passed three successive laws which returned to their private owners "small" properties, "large" properties, and agricultural lands and forests.¹²² In each case, restitution was the presumptive remedy.¹²³ If, however, restitution was either undesirable or impossible, the former owner could receive instead limited compensation in cash and securities.¹²⁴

¹¹⁹ Conversely, all of the former Soviet Republics, with the exception of the Baltic states, have expressly refused to grant restitution of property expropriated during the Communist Era. Foster, *supra* note 111, at 93.

¹²⁰ See Gelpern, *supra* note 2, at 344.

¹²¹ One significant difference between the two countries is the fact that Czechoslovakia had almost no foreign debt when it made its transition to democracy. Cuba, however, is both heavily in debt and in the midst of a severe economic crisis which may continue for many years. It has been suggested that countries which enjoyed relatively favorable economic conditions while developing their remedies programs, such as Czechoslovakia, decided they could afford the economic costs associated with restitution, whereas countries with high inflation and foreign debt, such as Hungary, rejected restitution for fear of its potential interference with privatization, foreign investment, and economic recovery. *Id.* at 371-72.

¹²² See *supra* notes 97-99 and accompanying text.

¹²³ Gelpern, *supra* note 2, at 337.

¹²⁴ *Id.* at 337-38. Restitution may be undesirable or impossible because the property had been altered or destroyed, was in the hands of holders exempt from claims under the laws, or served a public purpose.

The restitution programs implemented in countries like Czechoslovakia have been praised for "enhanc[ing] the credibility of economic reform by increasing its irreversibility,"¹²⁵ providing a way to resolve claims without impacting the country's depleted treasury,¹²⁶ and lending political legitimacy to the government and the democratization process.¹²⁷ Restitution as a remedy for expropriation, however, has been severely criticized on economic grounds.¹²⁸ In addition, its performance in Czechoslovakia and the other countries of Central and Eastern Europe has been specifically questioned.¹²⁹

¹²⁵ Offe & Bönker, *supra* note 1, at 31.

¹²⁶ *See id.* at 31-32.

¹²⁷ *See* Holmes, *supra* note 2, at 33.

¹²⁸ Offe & Bönker describe the negative economic consequences of restitution and other remedies as follows:

- (i) As it does not correspond in any sense to criteria of need, past or future achievement, or to standards of equal citizenship rights, restitution causes certain injustices which are further aggravated by the contingencies within the very process of restitution.
- (ii) Restitution nurtures the 'old' economic attitudes of claiming resources from the state and favors rent-seeking behavior.
- (iii) Restitution aggravates the notorious fiscal problems of post-Communist states.
- (iv) Since the former owners and their heirs are not necessarily the most suitable owners and entrepreneurs, natural restitution may lead to a temporary misallocation of assets.
- (v) Natural restitution makes property rights uncertain until all claims are filed and resolved, thus increasing private investment risks and delaying the privatization process.
- (vi) Restitution may lead to the restoration of highly inefficient smallholdings.
- (vii) Restitution via compensation may fuel inflation.
- (viii) Due to its distributional effects, restitution may endanger the social consensus needed for the lasting establishment of a new polity.

Offe and Bönker, *supra* note 1, at 32.

¹²⁹ Gray et al. 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 beginning to clog the courts. In Romania, for example, restitution of agricultural land has led to more than 300,000 court cases.

Gray et al., *supra* note 17, at 4. They level similar criticisms against the programs instituted in Czechoslovakia. *Id.* at 49.

A number of analysts have concluded that the use of restitution in Cuba would be fraught with perils.¹³⁰ Conversely, other commentators have predicted that restitution of the expropriated properties to former owners would have a positive economic impact.¹³¹

¹³⁰ For example, in evaluating the potential implementation of a restitution program in Cuba against the experiences in the Baltic republics, one commentator writes:

The Baltic experience reveals, however, that there could be serious drawbacks to Cuban adoption of a restitution program. Identification, certification, review, and resolution of restitution applications could create a significant burden on inexperienced, inadequately staffed governmental and judicial organs. Cuba, like the Baltic states, has only limited personnel with the legal and real estate expertise to handle complex property issues.

Furthermore, the preceding study suggests that restitution could act 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 further 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, Estonia, Latvia, and Lithuania indicate that restitution could have a severe socioeconomic impact on current Cuban citizens. As in these 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 emigres) and to introduce free market mechanisms, its present population would be at a competitive disadvantage. Similar to the Baltic case, Cuba should expect particularly negative results in the housing sector, including widespread eviction of tenants.

Foster, *supra* note 111, at 113 (footnotes omitted).

¹³¹ Gutierrez, *supra* note 6, at 17. Gutierrez writes that:

Full restitution of all non-materially altered industrial, commercial and agricultural properties to their legitimate owners will not only carry out the justice required for social peace, but it will also place the means of production in the hands of those entrepreneurs which had elevated Cuba to the top of nearly every socio-economic index in Latin America prior to the communist revolution. By creating constitutional and other legal incentives to encourage the

5.5.2. Compensation

In Hungary, as noted earlier, the remedy of choice has been lump sum compensation by way of interest-bearing transferable securities or "vouchers" known as Compensation Coupons, issued by the Compensation Office.¹³² The amount of loss eligible for compensation is determined using a sliding scale based on the assessed value of the lost property, with the first 200,000 forints (HUF) (approximately \$2,100) compensated in full.¹³³ The next HUF 100,000 (HUF 200,001-300,000) is compensated at 50%; the next HUF 200,000 (HUF 300,001-500,000), at 30%; and any remaining losses (HUF 500,001 and up), at 10% with an overall cap on recovery of HUF 5 million (approximately \$53,600).¹³⁴ The coupons are traded as securities and pay interest at 75% of the basic rate set by the central bank.¹³⁵ The coupons cannot be redeemed for cash, but may be used as collateral for loans; as payment for property sold by the State, including land, shares in state-owned industries, and apartments; in exchange for

unleashing of the creative energies of the Cuban people (both on the island and in exile), Cuba can rapidly earn foreign exchange through exports, produce abundantly for its own domestic consumption, employ workers at real jobs paying in a currency that has value (unlike today's Cuban peso), and restore labor rights. The economic multiplier effect of this combined economic activity will rapidly return prosperity to the island.

Id.

¹³² Simonetti et al., *supra* note 96, at 69.

¹³³ Gelpert, *supra* note 2, at 344. The valuation method used for calculating compensation in Hungary is as follows:

For non-agricultural real estate, compensation is measured in proportion to the area, valued at HUF 200 to HUF 2000 per square meter, depending on the present location. Classifications [of location] include Budapest, provincial towns, villages and vacant lots outside any of the enumerated areas. For companies, the value is proportional to the size of the workforce permanently employed at the time of confiscation. Where the claim is for loss of farmland, cadastral net income of arable land, the Gold Crown Value, is the basis for compensation.

Id. (footnotes omitted). "The Gold Crown Value is a measure of the land's productive potential which originated in the 19th Century." *Id.* at 344 n.112.

¹³⁴ Gray et al., *supra* note 17, at 70.

¹³⁵ Simonetti et al., *supra* note 96, at 69. Interest on the coupons accrued from August 1991 through December 1994. *See id.*

annuities, if the holder is of retirement age or incapacitated; as payment in some retail shops; and as investment instruments.¹³⁶ Only former owners of land, however, may use their coupons to purchase farmland. Land is auctioned off by the State, thereby enabling former owners to purchase back their land, provided they are the highest bidders and their parcel is actually auctioned. Cooperatives, however, hold the best land and are expected to retain their landholdings.¹³⁷

The Hungarian system provides an interesting, and perhaps realistic, model for the resolution of some expropriation claims in Cuba. The Hungarian system recognizes a country's limited ability to pay compensation claims, an important consideration for economically-ravaged Cuba. It also takes into account the rights of current occupants or users of the property, thus avoiding the dislocation costs and disputes associated with direct restitution systems. On the downside, however, the level of compensation provided in Hungary is limited by the fact that the vouchers trade at less than 50% of their face value.¹³⁸ The difficulties of understanding and using the voucher system wisely, and the complexity of the entire process have spurred dissatisfaction with the system.¹³⁹

The experience with Hungary's compensation scheme also raises a number of questions including what bases should be used for valuing the expropriated property and for settling the compensation scale and what forms of payment other than vouchers can be used (e.g., annuities, bonds, promissory notes, stock certificates in privatized enterprises, and combinations of several forms).¹⁴⁰ The adequacy of the amount offered

¹³⁶ See *id.* at 69-72.

¹³⁷ See *id.*

¹³⁸ See *id.* at 78. The voucher's value as a source of annuity payments is low. See *id.*

¹³⁹ See *id.* The use of vouchers may also prove inadequate if the privatization program falters, as is said to have occurred in the Czech and Slovak Republics. See Heather V. Weibel, Note, *Avenues for Investment in the Former Czechoslovakia: Privatization and the Historical Development of the New Commercial Code*, 18 DEL. J. CORP. L. 889, 921 (1993).

¹⁴⁰ See Cueto, *supra* note 75, 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.

relative to the loss and the security and marketability of the compensation instruments must also be considered.

5.5.3. Other remedies

One commentator has suggested that the best approach to resolving the claims issue in Cuba would be to establish a system using a hybrid of partial compensation, partial restitution, vouchers, rights in joint ventures with the State, and partial forgiveness.¹⁴¹ In addition, he has proposed that ad hoc, case-by-case negotiations be used to resolve the most significant claims.¹⁴² Other remedies that could be used in Cuba, but have not been attempted elsewhere, include economic incentives to invest in the country. Some examples of such remedies are priority in bidding on properties being privatized, tax benefits, and preferences in government contracting.

6. CONCLUSION

It is virtually certain, for political as well as legal reasons, that Cuba will need to provide a remedy to its citizens (both on the island and abroad) whose property was expropriated or unjustly confiscated by the Revolutionary government. It is almost just as probable that neither of the standard approaches, restitution or compensation, will be satisfactory or practical if implemented in large measure. The economic condition of the country will not allow more than token compensation to the former owners, unless payment is delayed for a substantial period of time. Restitution will pose a myriad of legal and political problems, and may cast doubt upon property titles, causing considerable discouragement of foreign investment, privatization, and economic recovery.

These circumstances appear to preclude any mechanistic approach to the issue or the institution of unbending or simplistic rules. A variety of remedies, each tailored to the characteristics of discrete categories of claims and claimants, will need to be developed in order to provide just results

¹⁴¹ A.R.M. Ritter, *Financial Aspects of Normalizing Cuba's International Relations: The Debt and Compensation Issues*, in *TRANSITION IN CUBA: NEW CHALLENGES FOR U.S. POLICY* 501, 559-60 (Lisandro Perez ed., 1993).

¹⁴² *Id.* at 543.

consistent with the country's means. The Cuban government will thus need to exercise great care and creativity when confronting the difficult and highly volatile expropriation issue. Those seeking to assert property claims must remain vigilant in order to take appropriate action on short notice. They must also exhibit good faith and flexibility in working with the U.S. and Cuban governments to achieve a fair and reasonable resolution of their claims.