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**EXPROPRIATION:
UNITED STATES CLAIMANTS' RIGHTS
AND THE FUTURE OF CUBA**

*ROBERT E. FREER, JR.**

I. CURRENT INTERNATIONAL LAW OF EXPROPRIATION

II. FOREIGN CLAIMS SETTLEMENT COMMISSION

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I. CURRENT INTERNATIONAL LAW OF EXPROPRIATION

There are minimum standards to be met while the World Community recognizes the sovereign right to expropriate property. Failure to follow a semblance of the norm amounts to unlawful confiscation, not expropriation, as illustrated by the current regime in Cuba. The minimum standards of legal expropriation under international law require that the taking be for a public purpose, nondiscriminatory and compensated.¹ The traditional principles of customary international law further require that the compensation be prompt, adequate and effective. The 1962 General Assembly

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1. U.N. Centre on Transnational Corporations, *Bilateral Investment Treaties*, 31 (1988).

*Resolution 1803 on Permanent Sovereignty Over Natural Resources*² [hereinafter Resolution 1803] embodies the traditional principles with respect to foreign property. It provides that in nationalization or expropriation cases “the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.”³

Many undeveloped countries criticized the traditional view of prompt, adequate and effective compensation and instead, supported the Calvo Doctrine.⁴ During the 1970’s, their actions created the United Nations Resolutions implementing the New International Economic Order [hereinafter NIEO]⁵ and the *Charter of Economic Rights and Duties of States* [hereinafter *Charter*]⁶ to obstruct the international law of expropriation.

2. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, § 4, at 15, U.N. Doc. A/5217 (1962).

3. *Id.*

4. GREEN HAYWOOD HACKWORTH, 5 DIGEST OF INT’L LAW 635 (1943). The Calvo Doctrine, created by an attorney from Argentina, proposes that an alien “may seek redress for grievances only before the local [national] authorities.” No recourse is available under international law according to the Calvo Doctrine.

5. G.A. Res. 3201, *Declaration on the Establishment of a New International Economic Order*, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, sec. 4e, U.N. Doc. No. A/9559 (1974), and G.A. Res. 3202 *Programme of Action on the Establishment of a New International Economic Order*, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, pt. VI, U.N. Doc. No. A/9559 (1974). These two United Nations Resolutions together created the NIEO which emphasized the right of states to control their resources “with means suitable to its own situation.”

6. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31 ch. 2 art. 2(2)(c), U.N. Doc. No. A/9631 (1974). The *Charter*, an offspring of the NIEO Resolutions, provides that when a nation nationalizes or expropriates foreign property, “appropriate compensation should be paid by the State adopting such measures taking into account its relevant laws.” The *Charter’s* provision adopts the Calvo Doctrine by not mentioning subjection to international law.

In 1977, however, *Texaco Overseas Petroleum Company v. Libya* [hereinafter *TOPCo*], an arbitral decision, held that efforts to obstruct the international law of expropriation were ineffective.⁷ The arbitrator enforced the traditional principles of customary international law regarding expropriation.⁸ The *Charter's* adoption "show[ed] unambiguously that there was no general consensus of the States, . . . all of the industrialized countries with market economies having abstained or having voted against it."⁹ Notably, "only Resolution 1803 . . . was supported by a majority of Member States representing all of the various groups."¹⁰ Thus, the arbitrator concluded that Resolution 1803 still reflects current customary international law for this issue based on the voting behavior described above and its expression of *opinion juris communis*.

Bilateral Investment Treaties [hereinafter BITs] arose to ensure that no conflicting views existed between two nations. Treaties create customary international law when a substantial number of them exist to show widespread practice and *opinion juris*.¹¹ By mid 1987, there was a network of 265 such BITs.¹²

7. *Texaco Overseas Petroleum Company v. Libya*, 53 INT'L L. REP. 389, 17 I.L.M. 1 (1977).

8. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct.923 (1964), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038 (1968), *reh'g denied* 390 U.S. 1037, 88 S.Ct. 1406 (1968). In *Sabbatino*, the U.S. Supreme Court chose not address a question it interpreted as raising issues under the Act of State Doctrine. Had the Court chosen to intervene, *Sabbatino* would have been entitled to compensation. The customary international law on expropriation has further solidified since the *Sabbatino* decision.

9. *See* note 7, *supra*. at 489.

10. *Id.* at 491.

11. U.N. Centre on Transnational Corporations, *supra* note 1, at 76.

12. *Id.* at 7.

Significantly, many undeveloped countries are parties to these treaties which aim to protect the investments originating from one contracting party in the territory of the other contracting party.¹³ According to a study by the United Nations Centre on Transnational Corporations, "most bilateral investment treaties tend to restate traditional principles of customary international law with respect to the treatment of foreign property abroad between the two [p]arties."¹⁴

The BITs are a "deliberate policy . . . to counteract what some capital-exporting countries considered a continuous erosion of principles of customary international law through United Nations resolutions," such as the NIEO and the Charter.¹⁵ This vast number of BITs demonstrates that a guarantee of compensation for expropriation is an expected prerequisite to foreign investment. The large number also shows that nations feel bound to provide the essential protection of compensation for expropriation. This consensus and widespread practice demonstrated by the treaties establishes the traditional principles requiring compensation as current customary international law.

BITs, together with the recent rejection of the NIEO by the United Nations General Assembly, further signify that the traditional principles remain current international law. Due to pressure from the International Monetary Fund to reduce debt, undeveloped States have been inclined to concede the Calvo Clause in order to effectuate profitable treaties with foreign investing nations.

In 1991, Argentina, the leading proponent of the Calvo Doctrine, signed a Bilateral Investment Treaty with the United States which not only omitted the Calvo Clause, but adopted the provision: "[i]nvestments shall not be expropriated or nationalized

13. *Id.* at 6.

14. *Id.* at 9.

15. *Id.*

. . . except . . . upon payment of prompt, adequate and effective compensation."¹⁶ The treaty further states that foreign investors ". . . shall in no case be accorded treatment less than that required by international law."¹⁷ "The US-Argentinean treaty enshrines the abandonment by Argentina of the Calvo Doctrine"¹⁸ and the adoption of the rules of customary international law.

The 1990 General Assembly Resolution 45/188 on Entrepreneurship has essentially destroyed the United Nations New International Economic Order (NIEO), adopted in the 1974 General Assembly Resolutions 3201 and 3202. The concept of the NIEO is anti-capitalistic and simply omits international law. The 1990 Resolution, however, has the objective of "establishing or improving conditions favorable for private initiative" and recognizes "the responsibility of the international community" in achieving such objectives.¹⁹ It also calls "for international support of specific programs for private enterprise development in the least developed countries, which should address, *inter alia*, the promotion of domestic and foreign investment."²⁰ Furthermore, this resolution had a vote of 138 approvals, one abstention, and no votes against,²¹ demonstrating consensus.

The 1990 Resolution advocates capitalistic behavior and encourages the involvement of international law. The NIEO perceived the developed countries as having a duty to

16. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., 31 I.L.M. 124, 131, art. IV(1) (1992).

17. *Id.* at 130, art. II(2)(a).

18. *Id.* at 124 (Introductory Note).

19. G.A. Res. 45/188, U.N. GAOR, 45th Sess., 71st mtg., U.N.Doc. A/45/848 (1990).

20. *Id.*

21. *Id.*

accommodate undeveloped countries, whereas the new resolution places the duty on the undeveloped countries to encourage foreign private investment. Thus, the NIEO, and thereby the *Charter*, have been recalled for all practical purposes. The traditional view of prompt, adequate, and effective compensation mandated by international law has been reaffirmed by the United Nations General Assembly. These retractions are significant since those States which were committed to challenging the traditional view now do so in their treaties and in their votes at the United Nations.

Another basis for liability is the theory of unjust enrichment, which is a general principle of international law. General principles found in the laws of various nations establish international law when the principles are representative of the world community. The unjust enrichment doctrine provides that the nationalizing state unjustifiably enriches itself when it takes foreign property without granting compensation. The state, then, should be liable to the foreign investor for the sum enriched.

The information on these national laws was gathered by Dicke in his Belgrade Report where, "based on a comparison of a representative number of states on all continents, of Capitalist and Communists countries, of legal orders with roots in Roman Law, Common Law as well as Islamic states, [he] proved that the principle of unjust enrichment or an analogous construction exists everywhere."²²

22. *Id.* at 269. There has been other discussion of Cuba's concept of Usucapio. This concept is found in Article 1959 of the Cuban Civil Code (November 5, 1889), and is now preserved in Articles 184 to 190. Agustín de Goytisolo & José M. Hernández, *Debating Cuban Property Law*, 1 CUBA NEWS No. 2, Oct. 1993, P.B. The thirty year period to contest title established by the Code is recognized by the authors of the article to be limited in effect. As they have noted, "former owners might also take solace from rulings by the pre-Castro Supreme Court that limited the effect of adverse possession when former owners 'could not exercise their rights if impeded by governmental decrees or similar state action.'" The Roman Law doctrines from which this concept is drawn was never meant to apply in situations where the state has acted outside its normal role of referee and instead has become the "thief" undermining normal societal protection from

Arechaga, a highly qualified publicist, also advocates the unjust enrichment principle since it "constitutes the legal foundation of the conduct actually followed by the United States."²³ Arechaga explains that "what makes the principle of unjust enrichment highly relevant in the field of nationalizations is its equitable foundation."²⁴

Finally, under the doctrine of *Ex Aequo Et Bono* (what is just and good), Cuba should compensate or provide restitution for the taken properties. Fairness requires that Cuba reimburse victims for the confiscations. One's property should not be taken away without compensation. "Classical international law doctrine normally considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the international minimum standard and the duty of protection of foreign property by the host State."²⁵ Cuba violates the minimum standard by denying any compensation whatsoever. All sense of equity is offended when a country strips people's property unnecessarily and refuses reimbursement.

II. FOREIGN CLAIMS SETTLEMENT COMMISSION

Historically, the United States has dealt with the claims of United States citizens against foreign governments in a variety of ways. After World War II, Congress enacted the International Claims Settlement Act, which in turn created the International

property right infringement.

23. Eduardo Jiménez de Arechaga, *Application of the Rules of State Responsibility to the Nationalization of Foreign-Owned Property*, LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, 222 (Kamal Hossain ed., 1980).

24. *Id.* at 223.

25. U.N. Centre on Transnational Corporations, *supra* note 1, at 31.

Claims Commission (the "ICC").²⁶ In 1954, Congress abolished the ICC and transferred all its functions and powers (and those of the previously created War Claims Commission) to the newly created Foreign Claims Settlement Commission (hereinafter the "Commission" or the "FCSC").²⁷

The Commission was established to administer and disburse funds to United States citizens who had lost their property in specified foreign countries.²⁸ In 1964, Congress added Title V, codified as Subchapter V and also known as the "Cuban Claims Act,"²⁹ to the International Claims Settlement Act in order to specifically address claims by U.S. citizens against Cuba. In its declaration of purpose, Congress emphasized that Subchapter V did not authorize the appropriation of any funds for claim payments, but that it was merely establishing the procedural mechanism for adjudicating and quantifying those claims.

There were two requirements to qualify as claimants under the Cuban Claims Act: (1) the citizen or corporation must be organized under the laws of the United States and (2) more than 50% of the stock in the corporation must be owned by U.S. citizens at the time of the taking.³⁰ Moreover, claims would only be considered if American citizens held title to the property in question not only at the time of loss, but also continuously so until

26. International Claims Act of Mar. 10, 1950, c. 54, Title I, § 2, 64 Stat. 13, *amended by* Act of Aug. 9, 1955, c. 645, §§ 1, 2, 69 Stat. 562 (codified at 22 U.S.C. §1621) (1955).

27. Reorganization Plan No. 1 of 1954, 19 F.R. 3985 (effective July 1, 1954) (codified at 22 U.S.C. § 1621-1627).

28. *Id.*

29. 22 U.S.C. § 1643-1643k (1964). In 1966, Subchapter V was amended to extend the applicability of its provisions to Communist China.

30. 22 U.S.C. § 1643a (1964).

the date of filing with the FCSC.³¹ These requirements effectively precluded numerous non-U.S. citizens from asserting their claims against Cuba.³²

Subchapter V stipulated that the Commission would complete its affairs in connection with Cuban claims no later than July 6, 1972. By the time the FCSC submitted its Final Report of the Cuban Claims Program to Congress, the Commission had adjudicated a total of 8,816 claims, rejecting approximately a third of these and certifying 5,911 as valid. The qualifying claims submitted under the Act totaled \$1.8 billion, to which an adequate amount of interest, computed from the date of loss to the date of settlement, should be added.³³ It is interesting to note that of the 5,911 certified claims, there were only 898 personal claims and the remaining 5,013 were corporate claims. Of the \$1.8 billion certified claims, \$1.6 billion were corporate, and \$1.02 billion of that represented the top 10 claimants' claims.³⁴

31. 22 U.S.C. § 1643c(a) (1964).

32. Paper presented by Robert C. Helander, Esq., *Creditor's Rights: Claims Against Cuban Confiscated Assets*, International Conference on "Investing in Cuba: Problems and Prospects," at 5-6, (Sept. 8, 1993).

33. *Id.* at 3. Estimates for the amount of claims including interest owed have ranged from around \$5 billion to almost \$12 billion, based on a "fair market rate" compounded. Jose de Cordoba, *Cuba Is Selling What It Usurped And Original Owners Are Fuming*, WALL ST. J., Oct. 21, 1993, at A14. For a significant period during this time, an international double digit prime rate was considered applicable. *See also*, Galliano, *Resolution of U.S. Cuban Claims: Toward a Democratic Free Market Post-Castro Cuba*, at xi, May 20, 1993. Galliano arrives at an \$11.6 billion figure, compounded at 6%.

34. Foreign Claims Settlement Commission. While the certified claims of American citizens totaled \$1.8 billion in 1960, claims by Cubans who fled Castro and who now live in the United States have been estimated at \$8 billion by a number of experts with whom I have discussed the subject. Regrettably, neither they nor I know of any published source for these estimates. *But see id.* at 3, n. 4, (Helander noting a \$7.1 billion estimate in 1958 dollars that is very close, and citing José F. Alonso & Armando M. Lago, *A First Approximation of the*

III. RESTITUTION

Given the generally agreed upon notion that Cuba will abandon its centrally planned economy, it is imperative to develop certain parameters within which the transition to a market-driven economy may take place as smoothly as possible. It is with this end in mind that I present these thoughts on the future of the Cuban economy.

Once the conversion from a centrally controlled economy to a market-based one occurs (and as previously mentioned, the overwhelming consensus seems to be that such a shift is inevitable), Cuba will find itself in dire need of capital investment. Generally, there are two sources of capital: foreign and domestic. In the case of Cuba, however, the possibility of domestic investment should be, by and large, discounted--given the ruinous condition of the Cuban treasury and the impoverished state of its population. In the absence of domestic-source capital, Cuba will have to rely, at least during the initial stages of its economic conversion, on an influx of foreign investment. This infusion of foreign capital, however, will only take place if certain conditions are present. For example, the Cuban government must recognize that legitimate property rights will be respected,³⁵ and more specifically, it must acknowledge that those people and entities whose property was confiscated more than thirty years ago have a legal right to said property. Otherwise, potential investors will hesitate to risk capital under the threat of loss through confiscation.

None of the current scenarios seem to indicate that Cuba plans to pay for confiscated property. Therefore, Cuba should strive whenever possible to give full restitution of the confiscated

Foreign Assistance Requirements of a Democratic Cuba (1993) (unpublished paper). While these claims are not "certified claims," it is hard to imagine a political solution that does not respond to the reality of these claims as well.

35. See Section I *supra*, regarding the bilateral assurances being widely sought in investment treaties.

industrial property to the original owners.³⁶ In other words, restitution should be the rule, and compensation the exception.³⁷

Two key advantages of restitution are that investment will generate employment and will increase productivity by placing properties in the hands of those with both the experience and the capital necessary to make these facilities competitive. This will in turn result in the output of both exportable goods and essential commodities for the Cuban population. Moreover, restitution will encourage the formation of a Cuban tax base which will generate tax revenues while substantially reducing compensation demands for confiscated properties.

Notwithstanding these advantages, property owners should be free to elect compensation for their property rather than restitution. It should be noted, however, that compensation would necessarily lag well behind a plan of restitution, given the cash-poor position of the Cuban government.

Having established that restitution should be the norm in the privatization of industrial and agricultural property in Cuba, we must now consider the question of exactly how this process should take place. The guiding principle of any plan of restitution and compensation should be the need for swiftness, to ensure that the economy does not stagnate before investment begins.³⁸ In light of this, Cuba should look closely at the German system of restitution, which provides that an early deadline (such as six months after conversion) must be set by which all claims of

36. See Robert E. Freer, Jr., *The Significance of Restitution in the Economic Recovery of Cuba*, 4 U. MIAMI Y.B. INT'L L. 183.

37. See *Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen* (Joint Declaration of the FRG and GDR on the Settlement of Outstanding Issues of Property Rights) (Hereinafter Joint Declaration on Property Rights), June 15, 1990. See also Dorothy A. Jeffress, *Resolving Rival Claims on East German Property Upon German Unification*, 101 YALE L.J. 527, 545.

38. *Id.* at 12.

restitution must be made.³⁹ In order to carry out its plan of restitution and compensation, Cuba should immediately establish an independent agency whose sole function would be to resolve property claims and settle title disputes. Such an agency would circumvent the established administrative and adjudicatory systems which may not be able to deal with these issues in a speedy and efficient manner. Furthermore, an independent court system dealing exclusively with property issues could be organized, thereby streamlining the claims process and avoiding inefficiency. The proposed claims agency should produce a set of clear guidelines to instruct these courts as to how to prioritize uses and manage conflicts.⁴⁰

In determining the course of action to follow to implement a restitution plan, Cuba might do well to study the different programs instituted by other former communist countries and the difficulties they have encountered. For example, Hungary adopted a system of compensation for confiscated property without the option of restitution. While this program served to clear title to property quickly and efficiently, it also created a number of problems, most significantly that of securing the resources to pay for all the property claims. Germany, on the other hand, operates under a system that favors restitution over compensation, and as mentioned before, set up an early deadline to file all applications for restitution. The need for encouraging immediate investment clearly outweighs any potential benefit that might accrue from additional time to file a claim.⁴¹ Further, no real conflict exists as to the identity of the rightful owners of the large industrial properties that would prevent a prompt restoration of their property.

None of the changes foreseen for Cuba will take place in a

39. While the German system is not free of defects, it is better suited to the Cuban situation in terms of the need for a speedy settlement of property issues than those adopted by other former Communist countries.

40. Freer, *supra* note 36.

41. *Id.*

vacuum, and it is of the utmost importance to be aware of the political and social contexts of the island. These political and social considerations are discussed at length in "The Significance of Restitution in the Economic Recovery of Cuba."⁴² The importance of these issues, however, merits consideration here as well.

Cuba, unlike other democratizing nations, is in a uniquely favorable position to make a smooth progression from a centralized to a market-oriented economy. Several factors contribute to this situation. First, the apparent willingness and ability of the large Cuban-American population to cooperate with and invest in a post-Castro Cuba will provide much-needed capital as well as a stabilizing political influence. However, it is not just the Cuban community in the United States which is looking forward to investing in Cuba. Second, it is well-known that in addition to the Cuban community, American and foreign companies also have a keen interest in potential investment in the island. In fact, many European and Canadian corporations have already established a presence in Cuba through joint ventures entered into with the Cuban government. Such endeavors are expected to increase dramatically once the current government either reforms itself or collapses.⁴³

An additional consideration which will greatly contribute to a smooth transition is the fact that a large segment of today's Cuban population remembers life before the Castro regime, and

42. *Id.*

43. Those joint ventures in Cuba are at serious risk of nonrecognition and are likely to be voided by any market economy democratic government that would follow the present regime to the extent that they involve seized property of others. Most recently Secretary Christopher sent a cable entitled "Buyer Beware" to all our consulates around the world. He sought to discuss with the respective foreign affairs ministries placing potential participants on notice regarding the inadvisability of entering into any venture with the government of Cuba that would pose a conflict with pre-existing property claims. Cable from Warren Christopher, Secretary of State, to American Consulates (Sept. 9, 1993).

will be able to adapt to a market economy with relative ease. Consequently, the process of restitution and privatization will take place in a speedy manner and hopefully without much opposition.

Cuba's original infrastructure from its previous market economy still exists. In addition, the government has made some investments in new industries, such as biotechnology, which will facilitate the transition to a market economy.

Another important factor is Cuba's desire to reap the benefits of its promising economic position. It must become a stable political system and a low-risk investment for tourism and business enterprises. Future governments and the Cuban people will have to ensure that Cuba becomes politically secure so that it may take full advantage of its favorable economic prospects.⁴⁴

44. The extent to which the U.S. restores access to its market for sugar grown in Cuba will have a bearing on Cuba's economic recovery and its capacity to fund its confiscation claim obligations. In a recent report on the Sugar Program, the General Accounting Office presented an analysis indicating that a shift by the U.S. and other nations that restrict access to their markets for sugar to a more liberalized trade arrangement would result in a 50% increase in the world sugar price level, a change that would generate significant additional revenue for Cuba. GENERAL ACCOUNTING OFFICE, SUGAR PROGRAM: CHANGING DOMESTIC AND INTERNATIONAL CONDITIONS (1993) REPORT TO THE HON. CHARLES E. SCHUMER, HOUSE OF REPRESENTATIVES (Apr. 1993). The opposition to the sweetener provisions of NAFTA by those who benefit from the Sugar Program suggests that restoration of market access for Cuban sugar will face strong opposition. The sugar program responds to certain domestic economic interests rather than to actions of the Government of Cuba. Reforms by or changes in Cuba's Government will not moderate this opposition. Indeed, this raises questions about the capacity of the U.S. to effectively act on behalf of American claimants when it is required to carry out domestic programs that impair the capacity of Cuba to fund compensation obligations. This inherent conflict of interest, together with the elimination of any national security priority, indicate that other claims settlements offer no precedent for the Cuban situation.

The GAO Report includes a comment by the U.S.D.A. that 10 of the 22 cane sugar refineries operating in the U.S. closed in 1982, a result the U.S.D.A. attributes substantially to restrictions on access to sugar supplies due to the Sugar Program. In effect, this is a governmental taking of some of the industrial facilities that, prior to 1960, refined raw cane sugar from the properties taken by

In terms of social considerations, potential hostility by Cubans in the island toward "outsiders" seems to be a key issue. Companies interested in bringing capital and immediate employment to Cuba should therefore spearhead investment in the island in order to avoid possible social unrest resulting from the restitution process. Investments will be key in maintaining an unemployment rate at or below the 4-6% level.⁴⁵ Hopefully, improving Cuba's general economy will aid in allaying any possible social tensions.

the Government of Cuba. The GAO Report also includes the remarkable perception that the Sugar Program's high domestic prices stimulate significant increases in imports of products that contain sugar as an ingredient, an effect that may have enhanced markets in third countries for sugar grown on and processed with properties confiscated from Americans.

45. Freer, *supra* note 36, citing Andrew B. Abel & Ben S. Bernanke, *MACROECONOMICS* 735 (1992).