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Step-Down Restitution: A Proposal for an Equitable Resolution to Confiscated Cuban Property

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STEP-DOWN RESTITUTION: A PROPOSAL FOR AN EQUITABLE RESOLUTION TO CONFISCATED CUBAN PROPERTY

DANIEL A. ESPINO

I. INTRODUCTION

With the deterioration of Fidel Castro's health in recent years, the focus of Cuban-Americans has once again been honed on the status of their real property in Cuba—property confiscated in some manner by the Communist Castro Regime. "In the years . . . following the rise of Fidel Castro," hundreds of thousands of Cuban Citizens were forced to flee the island nation with nothing but the clothing on their backs, escaping property seizures and political pressure exercised by the Castro government.[1] These takings, ulti-

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mately, affected United States and Cuban citizens alike and, due to the nature of the of the takings and the lack of compensation paid by the Castro government, these takings constituted clear violations of international law, human rights, and Cuba's Constitution of 1940.[2] As such, when a future, post-Castro Cuban government at long last throws off the shackles of communist oppression and moves toward democracy, Cuba will undoubtedly be forced by economic and political pressure to enter into negotiations with the United States to resolve outstanding confiscated property claims from United States citizens and Cuban-American Citizens.[3] In that undertaking, a post-Castro Cuban government should create a restitution and compensation policy with specific guidelines and procedures to administer equitable remedies for "existing and potential property claims."[4] Given the condition of Cuba's government, infrastructure, and economy at the present time, "a 'gradualist' approach to privatization is the only feasible solution as it allows the development of a market economy that incorporates the socio-cultural and socio-psychological [and economic] order of the country."[5] Accordingly, this article proposes a remediation policy, which presumptively proffers natural restitution as the preferred remedy for confiscated land claims and gradually "steps down" to other remedies such as substitution of similar land and compensation for the seized property.

While the Castro regime may have a definite end, "[h]ow or when the 'Castro [regime]' will end is purely a matter of speculation."[6] As such, this

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1. Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107, 108 (2000). "Unable to carry their belongings with them, most of the Cuban refugees left with, as the . . . saying goes, 'one hand in front and one hand behind.'" *Id.*

2. *See generally id.*

3. Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659, 659–60 (1996) [hereinafter Travieso-Diaz, *Alternative Remedies*].

4. Oscar M. Garibaldi & John D. Kirby, *Property Rights in the Post-Castro Cuban Constitution*, 3 U. MIAMI Y.B. INT'L L. 225, 254 (1995).

5. Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation—A New Form of Property*, 27 U. MIAMI INTER-AM. L. REV. 453, 460 (1996).

6. Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 322 (2000).

article must operate within certain established parameters. First, it is presumed Cuba will depart from its communist ways and adopt democratic principles in the near future, so as to regain its economic footing in the world. Second, this article presumes "Cuba will provide [redress] . . . to those [individuals] whose property was [confiscated] by the [Castro government] . . . and who have not yet received compensation for [such] taking[s]" as it transitions to a free market.[7] Third, there are three categories of claimants that will benefit from such redress: "(1) Cuban nationals and exiles—[a.k.a. Cuban-American Citizens]; (2) U.S. corporations and individuals; and (3) foreign companies currently possessing [some kind of] ownership interest[] in [the confiscated] propert[ies]."[8] The policy proffered in this article will only apply to the first class of claimants, Cuban nationals, as they do not yet have an avenue through which to seek redress for their property claims. Fourth, while the term "restitution" has been used to encompass all forms of redress for expropriations and confiscations, for purposes of this article the term restitution should be considered "synonymous with the return of expropriated property to [a claimant]," either directly or indirectly.[9] Lastly, although disparate views of the legality and effectiveness of confiscations by Castro's regime exist—a topic which will be briefly discussed in this article, this article will operate under the presumption that the confiscations of Cuban property under the Castro government were ineffective either because they were illegal takings under Cuban law or because the Castro government failed to provide compensation for an effective taking in accordance with Cuban law.[10]

Despite the presumptions under which this article operates, the likelihood of Cuba's transition to a free market democracy should be discussed, taking a moment to highlight the difference between a transition from a post-Castro government and a succession.[11] A transition in Cuba will be evinced by "[a] government defined by the presence of regularly scheduled, free and fair elections [with] [g]overnment actions [that] promote and respect internationally accepted definitions of human rights and other democratic rights and

7. Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 217–18 (1995) [hereinafter Travieso-Diaz, *Cuban Claims Resolution*]. *See also* Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 660.

8. Ortiz, *supra* note 6, at 336.

9. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 217 n.1.

10. *Id.* at 227, 244.

11. *See* CREIGHTON U. SCH. OF LAW & DEPT. OF POL. SCI., REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES 14 (2007) [hereinafter CREIGHTON REPORT].

norms."[12] A succession, however, will be indicated by a continuation of the current governmental regime in Cuba with simply a change in leaders within the same organization.[13] The United States undoubtedly favors a transition and mandates, in the Cuban Liberty and Democratic Solidarity Act, that Cuba convert to a democracy in order to re-establish bilateral relations between the United States and the island nation.[14] By all indications, Cuba is heading towards a succession as Fidel Castro has already seamlessly passed power to his brother, Raúl Castro, as of July 31, 2006.[15] "[T]he succession has proceeded in an orderly and mostly predictable manner . . . [and] has been largely successful in maintaining continuity in the government."[16] This sentiment was reaffirmed by Cuba's vice-president, Carlos Lage, who stated, "'continuity' is the word," when asked about the current political situation in Cuba in early 2007.[17] And continuity should come easy when it is considered that Raúl Castro has played "a major role in the [daily] operations of [Cuba]" since Fidel Castro came to power and all the key players of the Fidel Castro government remain in place, namely Ricardo Alarcón, head of the National Assembly, Felipe Peréz Roque, acting foreign minister, and Carlos Lage, vice-president and top economic advisor.[18]

Nevertheless, while the Castro government attempts incessantly to portray a united and strong government, dissention grows in the upper echelons of the Castro government as Fidel Castro withdraws from the political scene—dissention "created and fueled by Fidel himself . . . to prevent alliances [that could] threaten his rule."[19] In keeping with his desire to prevent uprising within his own government, Fidel Castro failed to create any institutions or policies which could be implemented at such time when he decided to transfer power.[20] Instead, Fidel Castro "resort[ed] . . . to charging a group

12. *Id.*
13. *Id.*
14. *Id.* at 15.
15. *Id.* at 25.
16. CREIGHTON REPORT, *supra* note 11, at 25.
17. Mark Frank, *Cuba Looks Past Raul for Future Leadership*, CANF, Jan. 23, 2007, http://canfl.org/artman/publish/cuba_news/Cuba_looks_past_Raul_for_future_leadership.shtml.
18. CREIGHTON REPORT, *supra* note 11, at 25–26.
19. Cuban Am. Nat'l Found., Summary: CANF Policy Recommendations in a Post-Fidel Castro Era (Jan. 23, 2007), http://canfl.org/artman/publish/analysis_on_cuba/Summary_CANF_Policy_Recommendations_in_a_post-Fidel_Castro_era.shtml [hereinafter CANF Policy Recommendations].
20. Cuban Am. Nat'l Found., CANF White Paper: Cuba in Transition 2006 (Jan. 23, 2007), http://canfl.org/artman/publish/analysis_on_cuba/CANF_White_Paper_Cuba_in_Transition_2006.shtml.

of his trusted followers with the responsibility of overseeing the continuation of his disastrous legacy," an action which has resulted in the erosion of trust amongst Castro's "inner circle."[21] While it appears in the short term that a successful succession has occurred, a transition to democracy in Cuba is still probable in light of several factors including, but not limited to, a possible civil uprising at the end of a charismatic regime, a worsening economy, dissention amongst the ruling members of Cuba, and an opportunistic elite class.[22] "While the masses may play a role in provoking or exacerbating a crisis of legitimacy on the island, they are not as likely to play as important a role as members of the elite in dismantling . . . the current regime—primarily because of the general weakness of civil society in Cuba."[23] This elite class transition will likely arise when the ruling class becomes frustrated with the political, social, or economic status quo and seeks to impose reforms on the post-Castro government.[24] Because little is known about the preferences of the elite and ruling class in Cuba, there is no way to tell what exactly will trigger these groups to transition to a democracy, but such a transition will likely arise when the members of these groups see a free market democracy as a valid and advantageous alternative to their current situation.[25] The future of Cuba is unclear, but what is clear, even to Cuban officials, is that "no single person can replace the 80-year-old Maximum Leader, who micromanaged projects, gave marathon speeches, and entertained [elite] visitors at dinners lasting until dawn" and, as such, some kind of change in the Cuba regime can be seen on the horizon.[26] Whether Cuba moves quickly towards democracy or evolves into a hybrid state of communism and capitalism like China, a post-Castro Cuban government will unquestionably have to deal with confiscated property claims in an equitable and legal manner, so as to encourage investment and enterprise in Cuba, and legitimize itself on the world stage.

Part II of this article provides a brief history of confiscations in Cuba, a necessary backdrop to understanding the applicability and appropriateness of restitution and compensation for Cuban takings. Part III similarly provides a brief survey of relevant Cuban, United States, and international property law, which should also be considered in the formulation of a restitution policy.

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21. *Id.*
22. *See* CREIGHTON REPORT, *supra* note 11, at 26–28.
23. *Id.* at 28.
24. *See id.* at 28–29.
25. *Id.*
26. Anita Snow, Cuban Am. Nat'l Found., Cuba's Post-Castro Transition Occurs without Major Changes (Jan. 22, 2007), http://canfl.org/artman/publish/cuba_in_transition/Cuba_s_post-Castro_transition_occurs_ without_major_changes.shtml.

Part IV of this article proposes the Step-Down Restitution Policy as an answer to claims for confiscated Cuban property. Part IV also defines the various facets of the policy and explores how such a policy would operate. Part IV concludes by justifying implementation of such a policy based on Cuban and international law and the experiences of the Baltic States and Europe, which have similarly implemented restitution and compensation policies in their endeavors to return to a democratic and free market society. Part V briefly presents the lessons Cuba could learn from Iran and Ethiopia, which established special courts to handle property claims and remedy the taking of seized property. Part VI concludes that the Step-Down Restitution Policy is an equitable resolution to violations of Cuban and international law by the Castro regime, allowing a post-Castro Cuban government the flexibility to manage and resolve what will be a multitude of claims against it by hundreds of thousands of Cuban Nationals and Cuban Americans and providing a future Cuba the opportunity to attract a return of capital to the country by Cuban-American Citizens, the United States, and foreign investors, alike. If Cuba wishes to cure its economic woes, and develop a free market, it will need to reach a settlement with the world, one which includes an equitable restitution scheme.[27]

II. A BRIEF HISTORY OF CONFISCATIONS IN CUBA

A. *Pre-Castro Regime*

Cuban property rights began with the first recognition of the right of an individual to own private property, found in Article 32 of the Constitution of 1901, Cuba's first since its independence from Spain.[28] Article 32 required a property owner who was dispossessed of his or her property by the Cuban government to be provided compensation for such a taking, or restitution of the property where compensation was not given.[29] After a period of political instability, Cuba enacted "[t]he Constitution of 1940 [which] guaranteed all

27. Ortiz, *supra* note 6, at 322–23.

28. *Id.* at 324.

29. Travieso-Diaz, *Alternate Remedies*, *supra* note 3, at 666. Article 32 specifically provides "[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." CONSTITUCIÓN DE LA REPUBLICA DE CUBA art. 32 (1901), *reprinted in* 2 AMERICAN CONSTITUTIONS: A COMPILATION OF THE POLITICAL CONSTITUTIONS OF THE INDEPENDENT NATIONS OF THE NEW WORLD 112, 119 (José Ignacio Rodriguez trans., 1905).

Cuban citizens extensive social and economic rights, including substantial property rights, . . . [through] Articles 24 and 87."[30] Article 24 stated:

> [c]onfiscation 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 payment of the corresponding indemnity in cash, judicially fixed. Non-compliance with these requisites shall determine the right of the person whose property has been expropriated, to be protected by the courts, and, if the case falls for it, to have his property restored to him. The reality of the cause of public utility or social interest, and the need for the expropriation, shall be decided by the courts in case of impugnation.[31]

In 1952, after a military coup d'état, Fulgencio Batista repealed the Constitution of 1940 and failed to reinstate the property protections found in said constitution.[32] When Fidel Castro rose to power, he used Batista's actions as a basis for his first attack on property rights, and made amendments to Article 24 of the Constitution of 1940 via the Fundamental Law of 1959.[33] These amendments were procedurally illegal under the amendment procedure of the Constitution of 1940,[34] which is significant considering that in 1959 "Judge Manuel Urritia, the person Castro chose to be Cuba's President, announced that the 1940 Constitution . . . would continue to be the law of the land."[35] Cuban exiles consider the Constitution of 1940, "'the last legitimate expression of the constitutional will of the Cuban people' and therefore still in effect today."[36]

B. *Post-Castro Regime*

Beginning "[i]n 1959, [Fidel] Castro led a communist revolution that systematically and progressively destroyed the fundamental human rights of the people on the island," despite his initial reenactment of Article 24 pursu-

30. Ortiz, *supra* note 6, at 326.

31. Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 666 (citing CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1940) art. 24 (Cuba), *translated in* 1 CONSTITUTIONS OF NATIONS 610, 614 (Amos J. Peaslee ed., 2d ed. 1956)).

32. Ortiz, *supra* note 6, at 327.

33. *Id.* at 328.

34. *Id.*

35. Kathleen S. Adams, Comment, *Subchapter III of the Helms Burton Act: A Reasonable Assertion of United States Extraterritorial Jurisdiction?*, 21 HAMLINE L. REV. 147, 151 (1997).

36. Grider, *supra* note 5, at 481.

ant to the Fundamental Law of 1959.[37] After Castro "confiscate[d] property and bank accounts [belonging to] General Batista . . . and his supporters," he initiated a nationalization agenda with the goals of "land reform, economic[] punish[ment] [against] the United States for cutting . . . sugar import[s]," and transformation of Cuba into a socialist state.[38] To effectuate these goals, Castro enacted the Agrarian Reform Act, which seized all agricultural estates over 165 acres.[39] In July of 1960, Castro seized all United States corporate property and virtually all Cuban businesses pursuant to Laws No. 851 and 890, respectively.[40] While both laws mandated compensation for such takings, no such compensation was ever provided by the Castro government.[41] In October of 1960, the Castro government enacted the Urban Reform law, which eliminated the private sale and rental of homes, transferred property to homeless Cuban citizens, canceled mortgages, and made all rent and mortgage payments payable to the state.[42] In effect, the Urban Reform Law made the Cuban government the primary landlord of all residential property, reducing homeowners to tenants on their own land.[43] Although the Urban Reform Law granted "title" to some Cubans Citizens in the transfer of property, this title was much more limited than the "classical notions of title" as it "was not freely alienable," transfers required state approval, and the Cuban government maintained "the right of first refusal" on all transfers of property.[44] The onslaught on property rights continued in 1961 with the passage of Law 989, which made "it illegal for Cubans to leave Cuba and penalized those who fled after the revolution by authorizing state agencies to seize their property."[45] The early years of Castro's regime were marked with massive departures of Cuban Citizens and the taking and redistribution of their real property.[46]

In 1976, Castro hammered the last nail in the proverbial coffin of Cuban property rights when he enacted the Constitution of 1976, which confiscated

37. Ortiz, *supra* note 6, at 322.

38. Bradley T. Gilmore, *U.S.-Cuba Compensation Policy*, 8 TEX. HISP. J.L. & POL'Y 79, 82 (2002).

39. *See* Ortiz, *supra* note 6, at 329.

40. *Id.* at 332.

41. *Id.*

42. Peñalver, *supra* note 1, at 126. "The [Urban Reform] Act rendered all existing leases [and mortgages] of urban property null and void" and fixed the price of home sales. Nicolás J. Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba*, 5 U. MIAMI Y.B. INT'L L. 51, 60 (1996).

43. Peñalver, *supra* note 1, at 126.

44. Grider, *supra* note 5, at 476.

45. Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 LAW & POL'Y INT'L BUS. 137, 165 (1995).

46. Peñalver, *supra* note 1, at 127.

or expropriated almost all property on the island.[47] Amendments to the Constitution of 1976 in 1992 expanded property rights for the first time since Castro's takeover by allowing foreign countries to purchase partial interests in commercial property tied to certain industries, such as tourism.[48] These amendments also had the effect of further complicating property rights in Cuba by allowing foreign countries to obtain interests in property belonging to United States citizens and United States corporations.[49] Offensive acts such as these and Castro's expropriations in general in the years following his rise to power, serve as the single greatest impediment in a future transition of post-Castro Cuban government to a free market society.[50]

III. LAW AND POLICY WHICH MUST BE CONSIDERED

When the tumultuous history of Cuban property rights is considered in conjunction with the disarray of the Cuban economy and legal infrastructure, it is evident that redressing confiscated property claims will be a monumental task. Since 1959, Cuba has seized property in three manners:

> (1) expropriation of Cuban and foreign-owned land . . . ; (2) confiscation of property from alleged "collaborators" of the Batista regime [and] "counterrevolutionaries" . . . ; and (3) seizure of real and personal property "voluntarily" "abandoned" by Cuban citizens who travelled [sic] abroad and failed to return within a specified time period.[51]

Given the disparate nature of the takings and the future claimants, no one set of governing principles will dictate the resolution of claims. Thus, a restitution and compensation policy may very well require the use of Cuban, American, and international law in the resolution of expropriated land claims.

A. *Cuban Property Law: Then and Now*

Legal protection of property rights at the time of Castro's initial takings was found in Article 24 of the Constitution of 1940,[52] which to this day "still

47. Ortiz, *supra* note 6, at 332–33.
48. *Id.*
49. *Id.* at 333–34.
50. *See* Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 623 (1996).
51. *Id.* at 651.
52. Garibaldi & Kirby, *supra* note 4, at 233.

commands respect and enjoys legitimacy among the heirs to the democratic Cuban tradition."[53] "Under Article 24, a governmental taking" is illegal if a court failed to certify the public purpose the government asserts as grounds for the taking, or if the government fails to provide compensation in cash.[54] Certain takings, such as those made pursuant to Law No. 989, would then be violative of this standard and unconstitutional as no public purpose was ever legitimized by the court and compensation was never paid to those Cuban citizens who fled the country during the early years of the Castro regime and refused to return.[55] The illegality of seizures made pursuant to Law No. 989 is underscored when it is considered that confiscated property was not voluntarily abandoned, but instead left behind by Cuban citizens who fled the country for fear of political persecution.[56] Where acts of the Cuban government can be proven unconstitutional under the Constitution of 1940, which as referenced above was reinstituted by the Castro regime, Cuban domestic law will be sufficient to validate a restitution program.[57] However, "whether the Fundamental Law of 1959 is valid or the original 1940 Constitution is still the law of the land, compensation was [nevertheless] required but [never] paid."[58]

B. *Relevant United States Law*

Confiscated property claims by United States citizens and corporations were initially based on the 19th century "international law principle[] [which] require[s] 'prompt, adequate and effective' compensation to aliens whose property is confiscated."[59] However, the applicability of this principle as an international standard and the requirements of compensation for expropriations were called into question by the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*,[60] where it provided evidence of Soviet countries who refused to provide just compensation, if at all, for their takings.[61] Since the early 1960s, United States law has developed several

53. *Id.* at 251.

54. Alexander & Mills, *supra* note 45, at 146. *See also* 2 AMERICAN CONSTITUTIONS, *supra* note 29, at 117.

55. *See* Grider, *supra* note 5, at 483.

56. *See id.* at 483–84.

57. *Id.* at 482.

58. Alexander & Mills, *supra* note 45, at 148.

59. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 222.

60. 376 U.S. 398 (1963).

61. Peñalver, *supra* note 1, at 141 n.220. *See also Banco Nacional de Cuba*, 376 U.S. at 428–30.

legal justifications upon which a compensation program could be based, such as "the Foreign Assistance Act of 1961, the Cuban Claims Program under the International Claims Settlement Act of 1949, the Cuban Democracy Act of 1992, and the Cuban Liberty and Democratic Solidarity Act of 1996."[62] The Cuban Liberty and Democratic Solidarity Act of 1996, also known as the Helms-Burton Act, was developed "to discourage foreign investment in Cuba and to hasten the demise of Fidel Castro's communist regime."[63] Title III of the Helms-Burton Act provides:

> any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages in an amount equal to the sum of . . . the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and . . . court costs and reasonable attorneys' fees.[64]

The Helms-Burton Act allows Americans and American corporations who have had property confiscated to sue any person who has derived some sort of economic benefit from the use or purchase of expropriated property.[65] This "private cause of action" stands as an avenue of compensation for injured parties and also serves to deter "foreign investment in Cuba."[66] Overall, the Helms-Burton Act represents the United States "unwavering stance against Cuba's illegal seizure of [United States] property, a clear violation of

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> Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

Banco Nacional de Cuba, 376 U.S. at 429–30.

62. Gilmore, *supra* note 38, at 84–85. "The Cuban Claims Program . . . active between 1966 and 1972," certified 5911 claims made by United States corporations and citizens in the amount of $1.8 billion. *See also* Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 220.

63. David M. Shamberger, *The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime*, 21 B.C. INT'L & COMP. L. REV. 497, 497 (1998).

64. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, § 302, Pub. L. No. 104-114, 110 Stat. 785, 815.

65. Grider, *supra* note 5, at 485.

66. Shamberger, *supra* note 63, at 517.

international law, and punishes those individuals and corporations who are . . . reaping benefits from this stolen property."[67]

C. *Don't Forget International Law*

International law is as vast as it is undefined, but grounds for a compensation scheme can be found throughout its principles. "Under the human rights model . . . [of] international law," the unjustified expropriation of property without proper compensation constitutes a violation of the property owner's individual rights, standing in staunch contrast to classical international law which placed the state sovereignty above the property owner and individual rights.[68] In keeping with this notion, in 1948, the United Nations passed a resolution, entitled the Universal Declaration of Human Rights, which "stated, in Article 17, that everyone has the right to own property and to not be arbitrarily deprived of that property."[69] "In 1974, the United Nations adopted Resolution 3281 of the Charter of Economic Rights and Duties," which required appropriate compensation to be paid by the state that is undertaking the expropriation of property.[70] The importance of compensation after the expropriation of properties was supported by the adoption of chapter 11 of the North American Free Trade Agreement (NAFTA), which provides for a tribunal to determine compensation where "a state actor has [either blatantly] expropriated foreign investment property" or adopted regulation that has the effect of expropriation of such property.[71] Although the definition of compensation in chapter 11 "does not mention the word 'adequate,' that term has long been understood to mean fair market value, which NAFTA unequivocally requires."[72]

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67. *Id.* at 500–01.

68. *See* Peñalver, *supra* note 1, at 134–35.

69. *Id.* at 154.

70. Ortiz, *supra* note 6, at 339.

> Article 2.2(c) of [U.N.] Resolution 3281 provides each state has the right [to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to . . . controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.

Id.

71. Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J 110, 110 (2002).

72. *Id.* at 113.

IV. STEP-DOWN RESTITUTION EXPLORED

Despite the availability of Cuban, United States, and international property law as a legal foundation for confiscated property claims, one group of claimants, Cuban exiles, finds itself in the doldrums of legal protection when it comes to redress for seized property.[73] Cuban exiles do not have standing under United States or international law to invoke the protection of foreign countries against Cuba because the property takings occurred when the exiles were nationals of Cuba.[74] "Moreover, the Castro regime enacted laws prohibiting Cuban exiles who fled Cuba after the revolution from asserting property claims in Cuban courts."[75] The lack of redress for Cuban exiles is astounding when it is considered that the aggregate amount of confiscated property claims by Cuban nationals is thought to exceed $7 billion, more than three times that of United States claimants.[76] Given the inequities in current property law, and Cuba's need to transition into a free market society, a future post-Castro Cuban government will have to enter into a treaty with the United States that provides a new legal framework through which to address confiscated property claims.[77] This "new legal framework must" proclaim all takings by the Castro government as illegal and invalid and implement an equitable restitution policy for all victims of Castro's regime, preferably through a future dedicated court.[78] A post-Castro Cuban government should institute the Step-Down Restitution Policy.[79] While the presumptive remedy in this policy is the return of confiscated property, a Cuban court or tribunal will have the flexibility on a case-by-case basis to award other remedies such as the substitution of property and monetary compensation.[80] Such a policy will allow the Cuban government, with its limited financial resources and struggling economy, to begin to provide redress for its

73. *See* Alexander & Mills, *supra* note 45, at 156–60.

74. *Id.* at 156–57. *See also* CREIGHTON REPORT, *supra* note 11, at 109.

> Many Cuban nationals whose property was taken by the Castro regime fled Cuba and settled in the United States, where they eventually acquired the status of permanent residents or citizens of the United States. While their claims arose in Cuba, they seek the protection of the U.S. government. Such protection could not be granted because expatriates were not U.S. citizens when their claims arose.

Alexander & Mills, *supra* note 45, at 158.

75. Alexander & Mills, *supra* note 45, at 158.

76. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 221.

77. Ortiz, *supra* note 6, at 334, 336.

78. *Id.* at 336, 341.

79. *See id.*

80. *See id.* at 342.

confiscations in a timely fashion in an attempt to jump start its future as a free market society.[81]

At the inception of Cuba's march towards a free market society, Cuba will encounter its greatest obstacle, "the absence of an existing" commercial and real estate market from which to accurately gauge the value of seized properties and industries.[82] Nevertheless, an appropriate remediation policy in Cuba must ensure restitution or equitable compensation to former property owners and must not be too strict in execution as to harm the economy by deterring foreign investment or destabilizing blossoming economic markets.[83] A restitution system must also attempt to meet the following, albeit at times inconsistent, objectives:

> 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 aggregate cost of the remedies within the financial means of the country.[84]

To meet these goals, a policy implementing Step-Down Restitution will require the establishment of commissions, tribunals, or courts with the legal authority to settle claims on an individual basis by virtue of a well defined body of procedures, eligibility guidelines, and evidentiary standards.[85] A post-Castro Cuban government through these tribunals or courts "will have to balance the rights and interests of the former owners against" the rights of third party foreign investors and the rights of any lessees or occupants on the property at the time of settlement of the claim.[86] This is especially true due to the presumptive remedy of restitution of the confiscated property offered by the Step-Down Restitution Policy.[87] Moreover, the post-Castro Cuban government will have to determine and establish clear guidelines regarding if and/or how different types and sizes of property will be treated under the law as the former Czechoslovakian government did when it enacted legislation

81. *Id.* at 336.
82. Grider, *supra* note 5, at 457.
83. Alexander & Mills, *supra* note 45, at 168.
84. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 244–45.
85. Ortiz, *supra* note 6, at 341.
86. Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 678.
87. *See* Ortiz, *supra* note 6, at 342; Travieso-Diaz, *Alternate Remedies*, *supra* note 3, at 676–77; Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 245.

distinguishing between small, large, and agricultural properties.[88] Lastly, regardless of the effectiveness or ineffectiveness of confiscations by the Castro government, the post-Castro Cuban government must take up the duty to adequately and equitably provide redress to Cuban exiles, Cuban nationals, and all foreigners, alike.[89]

A. *Sum of Its Parts*

The first step in the Step-Down Restitution Policy is direct restitution.[90] As noted above, the term restitution has been used interchangeably to refer to all forms of remediation for confiscated property claims.[91] However, under this restitution policy, the term restitution is used to mean the return of the expropriated property "to the original owner or [the original owner's] heirs."[92] Direct or natural restitution is often used to specifically connote the "return of the actual property expropriated during the communist era."[93] Where return of the actual confiscated property is impossible or impracticable, substitution restitution, as the second step in the policy, provides for the replacement of property equivalent to that which was illegally seized.[94] However, courts should also have the option of returning confiscated property to the original owner even though such property is currently being used in a manner that would be incongruent with the former owner's regular use, such as in the case where the property is being used for a governmental or utility purpose, where a change in the use of the property would be detrimental to the public welfare, or where the property is serving as the primary residence of an individual or individuals. Direct restitution in such a case would not serve as a tool which the claimant could use to remove individuals, businesses, or government buildings from the property, but instead would be the avenue through which the claimant could seek and recover current and past rent for the use of the property.[95]

The third step in the Step-Down Restitution Policy is compensation, which refers to financial remediation in exchange for the expropriated property.[96] One form of compensation, as used by Lithuania, Estonia, and Latvia

88. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 246–47.
89. *Id.* at 247.
90. *See* Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 245.
91. *See* Ortiz, *supra* note 6, at 342.
92. Gilmore, *supra* note 38, at 93.
93. Foster, *supra* note 50, at 633–34.
94. *Id.* at 635.
95. *See* Ortiz, *supra* note 6, at 342–43. *See also,* Travieso-Diaz, *Alternate Remedies*, *supra* note 3, at 677.
96. Foster, *supra* note 50, at 636.

(hereinafter the Baltic States), "consists generally of [a] lump-sum payment[] approximating the actual value of property at the time of nationalization."[97] Under a voucher system of compensation, "former owners receive vouchers, certificates, bonds, or shares redeemable for property 'similar in value' to their confiscated assets, for shares in a compensation fund, or for stock or 'investment checks' in newly privatized enterprises, housing or land parcels."[98] Some Eastern European countries have decided to offer vouchers as compensation, but have limited their versatility by not allowing such vouchers to be redeemable for money, but nevertheless available as collateral for loans, as payment for property sold by the government, and in exchange for annuity investments.[99] Hungarian law, for example, defines the vouchers as "interest bearing transferable securities that can be traded on the Budapest Stock Exchange, but can not be exchanged for cash."[100] The last step of the Step-Down Restitution Policy constitutes a miscellaneous category comprised of alternative remedies considered equitable remediation for expropriation claims that can not be resolved in the previous steps.[101] A list of potential alternate remedies includes:

> (1) credits on taxes and duties to the extent of all or part of the claim amount; (2) the ability to exchange the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, and preferences in government contracting; and (3) other benefits [available through individual negotiations].[102]

B. *Step-Down in Detail*

Restitution and compensation each have their own advantages and disadvantages.[103] While direct restitution is the preferred remedy in the Step-Down Restitution Policy, equitable resolution to varying property claims will require the use of all forms of redress in a pragmatic and flexible manner.[104]

> In general, restitution strategies have the advantages of 1) making a decisive break with a previous regime; 2) clearly establishing the

97. *Id.*
98. *Id.*
99. Travieso-Diaz, *Alternate Remedies*, *supra* note 3, at 681.
100. Alexander & Mills, *supra* note 45, at 176.
101. *See* Travieso-Diaz, *Alternate Remedies*, *supra* note 3, at 682.
102. *Id.*
103. *See* Ortiz, *supra* note 6, at 342–43.
104. Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 678.

> priority and validity of property rights; 3) costing the state treasury less than paying compensation to previous owners would cost; 4) providing a clear title for owners of restituted property, which may ease issues of property governance and encourage new investment; and 5) stimulating markets in property and thereby leading to higher economic efficiency uses. . . .
>
> [Conversely], [c]ompensation programs [may] help avoid many [of these] problems, [b]ut they are likely to be very costly, fail to make a decisive break from prior regimes and their policies and practices, open the question who will eventually gain control of these properties . . . and generally are paid at only a small percentage of any value that might be placed on the property.[105]

Thus, a flexible policy which allows for the usage of both remedies—albeit favoring restitution—provides the post-Castro government with the opportunity to maximize the advantages of both remedies while limiting the disadvantages.[106] The remedies provided in the Step-Down Restitution Policy and the manner in which they are offered have been recognized and utilized by the Baltic States.[107] However, in the execution of such policies, the Baltic States have learned practical lessons that can serve as guidelines and regulatory gap fillers in a remediation policy used by a future, post-Castro Cuban government.[108] While the successes and failures of the Baltic States and European countries in their attempts toward a free market society will later justify the implementation of the Step-Down Restitution Policy, they will also serve to strengthen its application in a democratic Cuba.[109]

Although direct restitution is the presumptive remedy in the Step-Down Restitution Policy, situations will arise where direct restitution will be appropriate only with the enforcement of certain conditions.[110] In Lithuania, a former owner may have confiscated property returned but may not reoccupy such property if the property currently houses tenants who lived on the property during the communist regime.[111] While title of property under such circumstances will return to the previous owner, the owner will be limited in his ability to reoccupy the land until the current tenants find an alternative place

105. CREIGHTON REPORT, *supra* note 11, at 88–89.
106. *See id.*
107. Ortiz, *supra* note 6, at 344–47.
108. *Id.* at 353.
109. *See id.*
110. *See, e.g., id.*, at 345–50; Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 677–81; Alexander & Mills, *supra* note 45, at 172.
111. Ortiz, *supra* note 6, at 346.

to live.[112] However, Lithuania does allow restituted property owners to charge rent in these situations.[113] Given the nationalization and redistribution of residential property and the socialist goal of expanding "home-ownership" to a greater number of Cuban citizens,[114] Cuba will likely face the same problem as Lithuania and should adopt such a policy so as to avoid conflict between U.S. Citizens and returning Cuban exiles and Cuban Nationals. In Germany, "[w]hen property is returned, the former owner may have to pay for any improvements to the property that increased its value [but] . . . if the value of the property decreased as a result of the confiscation, the former owner is compensated for the decrease."[115] Restitution programs operate on the underlying principle that a former property owner, foreign or domestic, has the right to the return of the confiscated property where the confiscation by the state was illegal or ineffective[116]—a policy which should be at the heart of any Cuban remediation program.

"The possibility of returning the actual property seized by the government, however, [may] depend[] on . . . economic and social considerations" and whether the original property may be clearly identified in the face of changes to that property.[117] Similar to the proposed Step-Down Restitution Policy, "Baltic schemes attempt to" indemnify owners of confiscated property by providing substituted property where it has become impossible or impracticable to provide direct restitution.[118] Direct restitution may be impossible because the property has "been devoted to a use not easily reversed or providing substantial public utility."[119] However, as referenced above, courts in such a situation may have and should implement the option of returning the confiscated property to the original owner on the condition that the original owner will not expel current tenants or seek the removal of buildings on the returned property, but with the understanding that future, and perhaps past, rent may be collected.

Return of confiscated property "has been the preferred" and presumptive remedy in Germany, Czech Republic and Slovakia, the Baltic States, Bulgaria and Romania.[120] However, countries like the Czech Republic and Slovakia have passed legislation which provides claimants and their succes-

112. *Id.*
113. *Id.*
114. Peñalver, *supra* note 1, at 126.
115. Ortiz, *supra* note 6, at 347.
116. Alexander & Mills, *supra* note 45, at 172.
117. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 251.
118. Ortiz, *supra* note 6, at 345.
119. Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 677.
120. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 252.

sors with compensation in situations where the expropriated "property has been destroyed, irrevocably altered, or improved through use" and a substitute can not be found.[121] In these situations, "international arbitration tribunals have held that the state must pay compensation in an amount that would make the former owner[s] whole again."[122] These are but a few samples of the determinations Cuba will have to make once it implements the Step-Down Restitution Policy as such decisions will allow Cuba to adequately manage claims with unique issues under a broader restitution policy. While lessons from the Baltic States and Eastern Europe serve as guiding principles in the execution of a remediation program, they also serve to justify the implementation of not only a remediation, but specifically the policy proposed in this article. Ultimately, Cuba and a special dedicated court should implement the proposed policy with the understanding the policy operates on the underlying principle that property illegally and unjustly seized should be returned to the true owner.

C. *Justification from Around the World*

In the Twentieth Century, the world witnessed a series of intrusions into private property rights on account of rising political and military conflicts, which resulted in the confiscation of property from millions of people.[123] Countries ravaged by attacks on private property rights have used differing systems of settling property disputes and their experiences prove invaluable to understanding the problems Cuba will face in its transition to a free-market democracy with re-instituted property rights.[124] As such, justification for the implementation of the Step-Down Restitution Policy can be seen from, not only the interpretation of Cuban law, but also the remedial actions and results of the international community.[125] Restitution should be identified as the preferred form of redress in Cuba "because it encourages property owners to repatriate with their entrepreneurial talent and capital . . . [and] minimizes costs for the government [by reducing the payment] of funds to previous owners."[126] Moreover, restitution has been said to accomplish three major goals:

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121. Ortiz, *supra* note 6, at 349–50.

122. Alexander & Mills, *supra* note 45, at 172.

123. CREIGHTON REPORT, *supra* note 11, at 37.

124. *See id.*

125. *See, e.g.*, Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 680–83; Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 241–56; Foster, *supra* note 50, at 625–49; Merrill, *supra* note 71, at 114–16; Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L BUS. L. 315, 337–51 (1993).

126. Gilmore, *supra* note 38, at 93.

> [f]irst, restitution promotes rapid, efficient transition to a market economy by transferring state and collective property to private owners and, at the same time, "restoring the value of property" in the minds of citizens; [s]econd, it is "morally the right thing to do" to remedy past "injustices"; [and] [t]hird, restitution reinforces governmental claims to continuity with pre-[Communist] regimes and thus, serves "as a vehicle for the construction of a post-Communist national identity."[127]

Restitution programs in place in Central and Eastern Europe and the Baltic States, as well as Cuban and international law in place at the time of the takings, provide clear justification for a restitution policy in a post-Castro Cuba.[128] In addition, tribunals established in Iran and Ethiopia shed light on the issues that a future Cuban property court will face.[129]

1. Lessons from the Baltic States and Europe

"[T]he former [c]ommunist countries [in] Central and Eastern Europe provide a context in which to assess the parameters of any future [restitution] program" and, through their experiences, many of the justifications for the adoption of such a flexible restitution policy.[130] As stated above, the Baltic States have favored direct restitution of property, business, and residential buildings[131] and have adhered to the principle "that their citizens are entitled to resume their lives as they were prior to the communist takeover."[132] The use of restitution as the main remedy was also utilized because most of the countries ravaged by attacks on property rights were extremely cash poor.[133] However, the Baltic States like the Czech Republic have allowed "for compensation in cash and securities where restitution [has been] impossible."[134] Unlike other countries in the region, Hungary has favored a compensation policy that provided confiscated property owners with "interest-bearing certificates, which [could] be used to purchase state-owned property" and shares in business placed on sale by the state.[135] While the incorporation of monetary and voucher compensation "recognizes the limits of Cuba's ability to

127. Foster, *supra* note 50, at 626.
128. *Id.* at 625.
129. *See* CREIGHTON REPORT, *supra* note 11, at 38–58.
130. Alexander & Mills, *supra* note 45, at 145.
131. Foster, *supra* note 50, at 634.
132. Ortiz, *supra* note 6, at 344.
133. CREIGHTON REPORT, *supra* note 11, at 73.
134. Gelpern, *supra* note 125, at 337.
135. Ortiz, *supra* note 6, at 349.

pay compensation claims and avoids the dislocation costs and disputes associated with direct restitution,"[136] over-reliance on this form of remediation could create disastrous results and create enormous difficulties for Cuba in the infancy of its development into a free market society.

Compensation when used in isolation as the sole remedy for confiscated property claims causes the privatizing governments to incur huge "debts, as seen in Hungary and Poland, which forces governments to choose between servicing the debt and funding needed social programs."[137] This is evident as Hungary changed its voucher compensation program over the years by limiting the amount of capital private companies could draw from state-paid vouchers and the amount of revenue agricultural property owners could collect from the state.[138] Moreover, Hungary's voucher program provides inadequate compensation for the takings as "the vouchers [have] trad[ed] at less than 50% of their face value."[139] Most attempts at remediation by virtue of financial compensation have resulted in insignificant redress for illegal takings.[140] In the Czech Republic and Slovakia, claims redressed only by financial compensation were limited to approximately $1000 per claimant and were limited as to the amount of land for which one individual claimant could recover.[141] Financial compensation has even caused problems in those Baltic States where multiple remedies were provided.[142]

> Due to budgetary constraints, Baltic States have been effectively restricted in their capacity to offer extensive financial compensation. All three countries have limited hard currency reserves . . . Estonia has attempted to address this situation by creating a special "compensation fund," consisting of fifty percent of all amounts received from privatization sales.[143]

"Voucher privatization has also encountered problems . . . [a]ccording to recent reports . . . for many Estonians, such certificates have turned out to be little more than a 'packet of waste paper.' The Estonian government allegedly issued an estimated eight to nine times more securities than it had property to sell."[144]

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136. Travieso-Diaz, *Alternative Remedies*, *supra* note 3, at 681.
137. Gilmore, *supra* note 38, at 92.
138. Gelpern, *supra* note 125, at 345–46.
139. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 256.
140. *See* Gelpern, *supra* note 125, at 355.
141. *See id.*
142. Foster, *supra* note 50, at 643.
143. *Id.*
144. *Id.* at 644.

Restitution policies have provided beneficial results in countries such as the Czech Republic and Slovakia where it has been said to "'enhanc[e] the credibility of economic reform by increasing its irreversibility,' providing a way to resolve claims without impacting the country's depleted treasury, and lending political legitimacy to the government and the democratization process."[145] A transitional Cuban government will not likely "have access to adequate" capital and other financial resources to compensate all claimants for confiscated property and, as such, "restitution may be the preferred option," especially if Cuba is unable to get international financing.[146] One commentator has argued that restitution has actually harmed the economies of the Baltic States because delays in the resolution of property claims resulted in delays of mass privatizations and unclear titles, thereby deterring foreign investment.[147] However, most of the justifications for a restitution policy found in Cuban law and the Cuban experience, explained below, directly controvert those very allegations.[148]

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145. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 253 (quoting Claus Offe et al., *A Forum on Restitution*, 2 E. EUROPEAN CONST. REV. 30, 31 (1993)).

146. CREIGHTON REPORT, *supra* note 11, at 78.

147. Foster, *supra* note 50, at 646–47. *See also* Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 253 n.128.

> 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 [S]tates, 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, the examples of 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 émigrés) 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 50, at 649–50.

148. *See* Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 241–54; Alexander & Mills, *supra* note 45, at 145–78.

2. Reflections on Cuban Law and Cuba's Present State

The common justification for restitution of expropriated Cuban property is that all the takings were illegal because the acts were conducted by an illegitimate government and constituted transgressions against established property law protections.[149] However, such arguments fail as the acts of revolutionary governments are usually given credit once said government is in complete control.[150] While this may be so, the takings may be illegal based on the very laws and actions promulgated by Castro himself. As noted above, Judge Urritia declared that the 1940 Constitution would remain "the law of the land."[151] If this is true, the confiscation by Castro of any Cuban property, without a decree by a court certifying the public purpose for which the property was confiscated or the failure of the Castro government to pay financial compensation for such taking, would be tantamount to an invalidation of said taking. If the Fundamental Law of 1959 is considered the first valid promulgation of law by the Castro government—despite the failure to adhere to proper amendment procedures—such takings would nevertheless be legally ineffective as compensation for such takings were still required under Castro's own law but never paid.[152] Recalling that this article presumes Cuba will make a move towards democracy on its own accord, a post-Castro Cuban government will likely invalidate such takings because an affirmation of the legitimacy of such takings could be viewed as a discriminatory taking in violation of any foreseeable future property laws Cuba may promulgate in addition to current international law.[153]

Restitution is further substantiated by Cuba's Civil Code and its version of adverse possession, known as *usucapio*,[154] which would disregard the claims made by occupants of confiscated property and allow for restitution of such property. The Spanish Civil Code, which served as the basis of Cuba's

149. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 241–42.

150. *Id.* at 241.

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

Id. at 241–42.

151. Adams, *supra* note 35, at 151.

152. Alexander & Mills, *supra* note 45, at 148.

153. *Id.* at 164.

154. *Id.* at 167.

Civil Code defined two forms of adverse possession, "ordinary" and "extraordinary."[155] Under the former, "a possessor's legal right in land vested only if he or she had possession of the land for an uninterrupted period of twenty years and had no knowledge of other legal title to the land."[156] No occupant of Cuban property would be able to satisfy these elements as the Castro regime took possession of all residential property pursuant to the Urban Land Reform and the Constitution of 1976.[157] The 1988 Cuban Socialist Code further substantiated such a conclusion when it explicitly prohibited adverse possession against the state.[158] Under these circumstances, an occupant of expropriated property would not be able to raise a valid claim on the property and attempt to prohibit restitution of such property. However, as referenced above, special conditions should be placed on property inhabited by Cuban citizens so as to avoid the potential for confrontations and evictions.[159]

The public policy reasons for enacting a remediation policy with a restitution element far outweigh the legal conclusions from which such a policy can be launched.

> [R]estitution would have powerful symbolic value. It would mark the advent of a new post-socialist era. It would formally repudiate Marxist principles and schemes for state and collective ownership and recognize, even exalt, private property rights. It would provide a moral as well as legal condemnation of the past. In so doing, restitution would help a post-socialist Cuban government establish legitimacy in the eyes of the world community. This would dovetail neatly with current Western rhetoric and policy, which make progress toward "democracy" and a "free market economy" prerequisites for foreign assistance and support. Restitution would also advance the reconstitution of a Cuban national identity. It would allow Cuba to emerge from the rubble of the world communist "empire" with a clearer sense of nationhood and national purpose. It could promote reconnection with former citizens and ultimately lead to reintegration of émigrés into a single community of Cuban nationals. Restitution could also help Cuba forge ties with the United States. Because of its proximity, wealth, and influence, the United States has the potential to play a major role in securing Cuba's economic future. Yet, until Cuba makes a meaningful effort to recognize and satisfy outstanding U.S. claims for

155. *Id.*
156. *Id.*
157. *See* Alexander & Mills, *supra* note 45, at 150.
158. *Id.* at 167.
159. *See, e.g.*, Ortiz, *supra* note 6, at 346.

> nationalized property, the United States is likely to continue to impede rather than advance Cuban economic development. At the very least, Cuban support for restitution could signal its willingness to acknowledge and discuss U.S. claims.[160]

Moreover, restitution should be the preferred remedy because "[a] transitional government in Havana . . . is not liable to have access to adequate financial resources to pay compensation" at a large scale.[161] Ironically, if Cuba were to prefer compensation, it would likely need to secure a favorable loan from the United States to make such payments and, when it is considered that most of the Cuban nationals that would receive such payments are residents of the United States and would not prefer compensation, the United States is not likely to grant the loan with the expectation of Cuba making those payments.[162] The community of Cuban Nationals and Cuban Americans armed with their newly restituted properties would likely be among the first to return to the island nation and seek business and investment opportunities and "jump-start" a newly established Cuban, free-market economy.[163] "However, if the property claims of the Cuban-American exile community are left unresolved, their political and economic power could be turned against stabilizing a new government in Cuba, much to the detriment not only of the island, but also to potentially fruitful Cuba-U.S. relations."[164]

Despite the doubt that arises regarding Cuba's ability to compensate confiscated investors and property owners, "Cuba [nevertheless] possesses the necessary human infrastructure and natural resources to attract . . . investment . . . [armed with] many thousands of Cubans [who] are trained in foreign languages, the advanced sciences, and math[] . . . [the] great potential for tourism, and vast energy resources."[165] "As for its [natural] resources, joint ventures in Cuba [in] nickel and cobalt industries brought in $1.3 billion in 2005, while estimates of offshore oil reserves are at 5 billion barrels and of natural gas reserves at 10 trillion cubic feet."[166] In addition, in 1991, Cuba instituted a policy which sought the development of renewable energy re-

160. Foster, *supra* note 50, at 649.
161. CREIGHTON REPORT, *supra* note 11, at 78.
162. *See generally id.*
163. *Id.* at 109–10.
164. *Id.* at 110.
165. Alexander & Mills, *supra* note 45, at 178.
166. Alex Davidson, *After Fidel*, FORBES, July 23, 2007, *available at* http://www.forbes.com/forbes/2007/0723/168.html.

sources.[167] "For many years Cuba's sugar mills have burned waste cane solids (*bagasse*) as fuel to power their boilers, but the process is inefficient due to the age and condition of the turbines."[168] However, with the emergence and prominence of sugar cane ethanol, as seen in places such as Brazil,[169] Cuba can once again turn to sugar cane to help establish a new industry in Cuba and provide the economy with a much needed boost as it helps the world wean off of fossil fuels.[170] The existence of these and other natural resources further substantiated the direct restitution of property.

> [F]ull 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 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.[171]

Due to its location and natural resources, Cuba also attracts nearly two million tourists a year which "will appeal to hotel companies and cruise operators, as well as to corporate farmers in need of equatorial sunshine."[172] Bottom line, Cuba is a blank canvas ready for the paint of investment from international companies. Without the reinstitution of property rights, Cuba's economy will never fully recuperate as is evident by the continued decline in

167. Jorge R. Piñon, *Cuba's Energy Challenge: Fueling the Engine of Future Economic Growth* 17 (Inst. for Cuban & Cuban-Am. Stud. Occasional Paper Series, Mar. 2004), *available at* http://www6.miami.edu/iccas/Exploration.pdf.

168. *Id.*

169. *See* Joel K. Bourne, Jr., *Green Dreams*, NAT'L GEOGRAPHIC, Oct. 2007, at 38. While ethanol produced by corn only yields 1.3 gallons of ethanol to every gallon of fossil fuels used in the process, the production of sugar cane ethanol is much higher with the production of eight gallons of ethanol to every one gallon of fossil fuels. *Id.* To make the sugarcane ethanol production even more efficient, production plants burn the aforementioned bagasse to power their plants and, thus, do not even consume fossil fuels at any point in the process. *See id.*

170. Piñón, *supra* note 167, at 17.

171. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 254–55 n.131.

172. Davidson, *supra* note 166.

the number of foreign companies investing and operating in Cuba.[173] "Joint ventures between Cuba's communist state and foreign investors fell to 236 at the end of 2006, down from 258 a year ago and 313 at the end of 2004."[174] This trend will likely continue until Cuba makes the initial steps towards a free market society at which point it will have the capital and man power to implement a flexible remedial policy such as the Step-Down Restitution Policy, which will work in tandem with the blossoming economy.

3. And Now a Word on International Law

International law serves both to justify a restitution policy as well undercut the legitimacy of Castro's takings. "[T]he Cuban government maintains that" its confiscations of property belonging to individuals who left the country for a specified time were appropriate as the property was abandoned under Cuban law.[175] However, when it is considered that many Cuban citizens fled Cuba due to fear of political persecution, international law dictates such action did not constitute property abandonment.[176]

> Necessity serves to protect a party against the consequences of a wrongful act if the act was deliberately taken to safeguard an "essential interest" of the party against a "grave and imminent peril." The essential interests of individuals include their right to avoid political persecution. Similarly, an essential interest of a business entity would be to avoid a state-imposed dissolution or expropriation of its assets.[177]

Moreover, general principles of international law allow citizens "to flee their country in times" of revolutions when they are experiencing political persecution without fearing that their property will be dispossessed.[178] Thus, the taking of exiles' property under these principles should be construed as illegal and merit the restitution of the expropriated property.

While international law does not specifically call for the restitution of expropriated property, restitution can be deemed necessary to redress takings according to the human rights model of international law, which considers

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173. Reuters, *Number of Foreign Firms in Cuba Fell in 2006*, CANF, Jan. 29, 2007, http://canfl.org/artman/publish/Other_news/Number_of_foreign_firms_in_Cuba_fell_in_2006.shtml.

174. *Id.*

175. Alexander & Mills, *supra* note 45, at 164–65.

176. *Id.* at 165–66.

177. *Id.* at 166.

178. *Id.*

the confiscation of property a violation of human rights.[179] Justification for restitution can only be inferred from international law, but international law unequivocally calls for compensation for the expropriation of property belonging to foreigners.[180] Although compensation is generally thought to constitute a fair market value payment for seized property, it is unclear exactly what compensation standard to apply under international law.[181]

> Where a state takes possession of an enterprise [or property], as through nationalization, two techniques for ascertaining fair market value are "net book value" and "going concern value." The former is a backward-looking approach that is based on the historical prices of assets (preferably adjusted for inflation), less liabilities and depreciation. The latter is a forward-looking approach that relies upon an estimate of what future earnings [or value] would have been absent the expropriation, discounted to present value . . . .[182]

Moreover, NAFTA's measure of compensation "is a restatement of . . . basic . . . American constitutional law of compensation."[183] American law also requires dispossessed property owners to receive fair market value for their property; defining fair market value as "the amount that a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker."[184] Regardless of the definition of compensation employed, the price of compensation must be construed from circumstantial evidence and is highly subjective, relying on the discretion of the administering body and only constrained by a future restitution policy.[185] However, it is in this discretion where justification for restitution, or at least a policy that offers restitution as a possible remedy, can be found because a compensation policy employing such definitions would usually provide incomplete compensation,[186] failing to consider the benefits conferred to the former owner derived with the seized property and any loss incurred by the former property owner because of the taking.[187]

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179. *See* Peñalver, *supra* note 1, at 135.
180. *See* Ortiz, *supra* note 6, at 339. *See also* Merrill, *supra* note 71, at 110.
181. Merrill, *supra* note 71, at 113.
182. *Id.* at 113–14.
183. *Id.* at 115.
184. *Id.* at 116.
185. *Id.* at 119–20.
186. Merrill, *supra* note 71, at 111.
187. *Id.* at 119.

V. IMPLEMENTATION

The Step-Down Restitution Policy should be implemented by way of a special tribunal or court established by agreement between the United States and Cuba. Such an agreement must include a provision in which both countries commit "to act in good faith so as to promote the mutual prosperity of their nations and citizens."[188] A post-Castro Cuban government must pledge to create a special court to resolve all confiscated property claims "by Cuban nationals who became nationals of the United States after the date of accrual of such claims."[189] This court will have independent and limited jurisdiction within the Cuban judicial system.[190] In implementing the Step-Down Restitution Policy, a future Cuban property claims court can turn to the lessons learned in Iran and Ethiopia, where similar courts were introduced to handle confiscated property claims.[191]

A. *Lessons from Iran*

In 1982, Iran and the United States established a dedicated tribunal for the redress of property claims akin to the one needed in Cuba to implement the Step-Down Restitution Policy.[192]

> The need for a claims tribunal in the case of Iran was prompted by the Islamic Revolution of 1979. Forces acting in support of the Ayatollah seized not only the U.S. Embassy in Tehran, but also many privately held American assets. Correspondingly, the necessity of claims tribunals in the case of Cuba was prompted by Castro's revolution in 1959, and the still-uncompensated property seizures that went along with it. The two situations thus present similarities in terms of the emotional and political aspects of the breakdown in relations.[193]

Like the Iran-U.S. Claims Tribunal, a future Cuban property claims court implementing the Step-Down Restitution Policy will have to apply law and policy in a flexible manner, granting jurisdiction over a series of claims that arise in differing circumstances, taking law and policy from various sources including Cuban and international law, and granting different redress

188. CREIGHTON REPORT, *supra* note 11, at 150.
189. *Id.*
190. *Id.* at 6.
191. *See id.*, at 38–58.
192. *Id.* at 46.
193. CREIGHTON REPORT, *supra* note 11, at 38.

depending on the circumstances.[194] However, in issuing remedies, a future Cuban property claims court should do well to consider that Cuba, unlike Iran, has low-valued currency and limited or no funds with which to pay compensation claims—claims that may include payment of the value of property, interest, lost profits, and/or past unpaid rent.[195] As such, the preferred remedy of direct restitution should be granted where possible. An important lesson Cuba can learn from Iran is that "much can be done with informal structures and the good will of [the] participants."[196] Because the Step-Down Restitution Policy does not provide for the expulsion of tenants and businesses on confiscated properties, informal mediations could facilitate the settlement of property claims where the true owner simply seeks reinstitution of title and would be content with collecting rent from tenants on the property. Given the proximity of Cuba to the United States and the sizeable Cuban/Cuban American population residing in the United States, relations with Cuba and the establishment of a Cuban property claims court will not likely suffer the delays and set-backs faced in Iran given the limited cultural boundaries and understood motivations amongst the groups with interests in Cuba.[197]

B. *Lessons from Ethiopia*

The Eritrea-Ethiopia Claims Commission is another example of a property claims tribunal created by bilateral treaty.[198] While the Ethiopian Commission was given broad jurisdiction—even so far as to include tort claims—in a post war scenario, a future Cuban property claims court implementing the Step-Down Restitution Policy may nevertheless find applicable case law stemming from the Ethiopian court because of their stance on confiscated property.[199] The Ethiopian Commission stated:

> A belligerent is bound to ensure insofar as possible that the property of protected persons is not despoiled or wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions pro-

194. *See id.* at 40.
195. *Id.* at 38.
196. *Id.* at 39.
197. *See id.*
198. CREIGHTON REPORT, *supra* note 11, at 49.
199. *Id.* at 50–51.

> viding for the property's protection and its eventual disposition by return to the owners or through post-war agreement.[200]

Such a proclamation is at the heart of the Step-Down Restitution Policy and should be at the heart of any remediation treaty, program, or policy implemented by Cuba.

VI. CONCLUSION

Cuba will eventually take its first step towards the long road to a free market society. In this endeavor, Cuba should implement the Step-Down Restitution Policy as a means of achieving a prompt and efficient resolution to hundreds of thousands of property claims. The presumptive remedy of restitution will allow many Cuban exiles to take up their property and begin to make improvements to it immediately with the resources they have amassed while living elsewhere, mainly the United States. While situations may arise where former property owners find occupants currently living on the expropriated property, the Cuban government should take measures to prevent conflict between the parties and the eviction of these individuals. Given the poor housing sector, Cuba will likely have to implement legislation calling for the construction of affordable housing for Cuban Nationals living on the island currently occupying confiscated property, who do not have their own confiscated property to which to return. Restitution is most appropriate for commercial properties which have undergone little or no change during the Castro regime. Given its proximity to the United States, Cuba will surely attract an enormous number of tourists from the United States and will most likely become a "stop" on the itineraries of many vacation cruise lines, like Puerto Rico and the Bahamas. With the potential for sudden interest in the country, Cuba will need to provide fast and efficient remedies to corporate claimants. With the award of direct restitution, corporate claimants may immediately use their property or alienate their property to corporations who have the resources and are ready to invest in industries such as tourism and mining. The greatest strength of restitution is the symbolism of the act. Restitution represents returning Cuba to its pre-Communist days of individual success and economic prosperity.

The greatest strength of the Step-Down Restitution Policy, however, is the flexibility afforded to the fledgling democratic Cuban Government in its ability to award appropriate remedies on a case-by-case basis. With the adoption of such a policy, a healthy body of case law will quickly be estab-

200. *Id.*

lished and allow for the dispensation of property claims based on differing scenarios. Although Cuba has limited land resources to offer in the form of substituted restitution, varying forms of compensation coupled with restitution or alternative remedies will allow Cuba to adequately, efficiently, and equitably handle confiscated property claims. The different types of claimants which will approach Cuba seeking restitution and the various forms of property expropriated during the Castro regime should force Cuba to avoid applying a one-size-fits-all resolution to confiscated property claims. Such a sweeping method aimed to settle all claims quickly will infuriate those on the short end of the remediation arrangement. The Step-Down Restitution Policy, with its varying remedies, allows for former owners to seek justice for Cuba's transgressions by allowing them to receive individualistic and equitable remediation.