SOME RECOMMENDATIONS FOR RESOLVING PENDING PROPERTY EXPROPRIATION CLAIMS IN CUBA

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I. INTRODUCTION

This paper examines one of the most important bilateral issues that need to be addressed by the United States and the Cuban Government, *i.e.,* the resolution of outstanding claims of U.S. nationals[2] and Cuban citizens for the uncompensated expropriation of their assets in the early years of the Cuban Revolution.

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

Resolution of the U.S. claims issue may not be practicable while the current Socialist regime is in power in Cuba. While Cuban officials have periodically expressed a willingness to discuss settlement of the claims issue with the United States,[3] such willingness is usually expressed in the context of setting off those claims against Cuba's alleged right to recover from the United States hundreds of billions of dollars in damages due to the U.S. trade embargo and other acts of aggression against Cuba.[4] To date, the Cuban government has given no indication that it is prepared to negotiate without preconditions a potential settlement of the U.S. expropriation claims with this country.

The expropriation of U.S. assets in Cuba was one of the leading causes of the deterioration in relations between the two countries in the early 1960s and the imposition of the U.S. embargo on trade with Cuba, which remains in place to this

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[3] *See, e.g., Alarcon: Nation 'U.S. Protectorate' With Helms Burton Bill*, PRENSA LATINA, Nov. 1, 1995, *available in* F.B.I.S. (LAT-95-215), Nov. 7, 1995, at 1 (hereinafter "ALARCON").

[4] This position is expressly set forth in Cuba's Law 80 of 1996, the "Law on the Reaffirmation of Cuban Dignity and Sovereignty," whose Art. 3 reads in relevant part:

> Art. 3. --The claims for compensation for the expropriation of U.S. properties in Cuba nationalized through that legitimate process, validated by Cuban law and international law referred to in the preceding article, may be part of a negotiation process between the Government of the United States and the Government of the Republic of Cuba, on the basis of equality and mutual respect.
>
> The indemnification claims due to the nationalization of said properties shall be examined together with the indemnification to which the Cuban state and the Cuban people are entitled as a result of the damages caused by the economic blockade and the acts of aggression of all nature which are the responsibility of the Government of the United States of America.

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

date.[5] The expropriation claims issue is widely recognized as one of the main obstacles to the re-establishment of normal relations between the United States and Cuba.

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

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[5] The trade embargo was officially imposed by President Kennedy in February 1962. *See,* Proclamation 3447, 27 Fed. Reg. 1085 (1962), 3 C.F.R., 1059-63 Comp., at 157. Previously, authorization had been suspended for most industrial export licenses to Cuba. 43 DEPT. STATE BULL. 715 (1960). President Eisenhower had also reduced the quota of Cuban sugar in the U.S. market to zero. Proclamation No. 3383, effective December 21, 1960, 25 Fed. Reg. 13131. Additional trade restrictions were imposed by other laws enacted in the 1960-1962 period. Therefore, by the time President Kennedy proclaimed a total trade embargo, trade between the U.S. and Cuba was already essentially cut off. For a Cuban perspective on the history of the embargo, *see* http://www.cubagob.cu/.

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

relief to Cuban nationals and U.S. claimants.[7] Indeed, one of the potential alternatives discussed in this paper is to have some U.S. nationals opt out of the formal U.S.-Cuba settlement process and seek resolution of their claims under Cuba's domestic claim resolution program. Therefore, both groups of claimants must receive due consideration when seeking solutions to the claims issue.

There is also little doubt that Cuba will at some point need to provide a remedy to those whose property was seized by the Revolutionary Government after 1959 and have not yet received compensation for the taking.[8] Such an assumption is based on the requirements of international and Cuban law, fundamental notions of fairness, and the evident political necessity to settle property disputes before Cuba can finally achieve political stability.

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

[8] It has been asserted that there is no legal or moral basis for providing a remedy for property losses and not compensating those who have suffered all manner of torts at the hands of the Cuban Government -- involuntary or uncompensated work, unjust imprisonment, loss of life or limb, loss of loved ones, physical or psychological abuse and harassment by agents of the state, discontinuance of pension payments, etc. Rolando H. Castañeda and George P. Montalván, *Transition to Cuba: A Comprehensive Stabilization Proposal and Some Key Issues, in* CUBA IN TRANSITION -- PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 11, 25 (1993) (hereinafter "ASCE-3"). (The authors conclude that, since the cost of providing compensation for tort claims "defies imagination," no remedies should be provided for either tort or property claims. *Id.* at 25, 30.) See also Rudi Dornbusch, *Getting Ready for Cuba After Castro,* BUS. WK., May 24, 1993, at 19 (arguing against restitution on the grounds that it would result in court deadlocks over conflicting claims to property, and delays in privatization); Jorge Sanguinetty, *The Transition Towards a Market Economy in Cuba: Its Legal and Managerial Dimensions, in* TRANSITION IN CUBA -- NEW CHALLENGES FOR U.S. POLICY 463, 479-481 (Lisandro Perez, ed., 1993) (hereinafter "TRANSITION IN CUBA") (suggesting that the resolution of the property claims issue be deferred until Cuba's economy has recovered, but pointing out that a formula for the settlement of claims must be arrived early in Cuba's transition to a free-market society.)

The resolution of outstanding property claims is also a pre-condition to major foreign capital flow into Cuba. As long as property titles remain unsettled, foreigners are going to perceive investing in Cuba as a rather risky proposition and may be discouraged from stepping into the country.[9]

There are two additional reasons why resolution of at least the outstanding property claims of U.S. nationals must be a matter of high priority for Cuba. *First*, U.S. laws require resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted and foreign aid can resume;[10] and *second,* apart from any legal requirements, resolution of U.S. nationals' expropriation claims has been since the days of President Kennedy's administration one of the stated

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[9] All countries in Central and Eastern Europe that have implemented schemes to settle expropriation claims have experienced a great deal of uncertainty over property rights. This uncertainty has discouraged potential investors and has delayed privatization efforts. CHERYL W. GRAY ET AL., EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE (World Bank Discussion Paper No. 209) 4 (1993) (hereinafter "GRAY ET AL."). While it appears inevitable that the claims resolution process will have some impact on Cuba's economic transition, the rapid development of a claims resolution plan would help minimize this impact.

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

U.S. conditions for the normalization of relations between the U.S. and Cuba.[11] These factors demand the eventual negotiation of an agreement between the U.S. and Cuba towards the resolution of the expropriation claims of U.S. nationals.

By contrast, no bilateral issues require that Cuba provide a remedy to domestic claimants for the expropriation of their assets by the government. Therefore, the resolution of the Cuban nationals' expropriation claims could proceed on a separate but parallel track, and may be handled by Cuba as a domestic political and legal issue.[12]

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

[12] Many Cuban nationals whose properties were seized by the Cuban Government subsequently moved to the United States and became U.S. citizens. Some of these Cuban-Americans have advocated being added to the U.S. claimants class (so they can be included in an eventual U.S.-Cuba settlement) or, alternatively, being recognized as not bound by an agreement between the U.S. and Cuba and being permitted to pursue their claims in U.S. courts. *See, e.g.,* Alberto Diaz-Masvidal, *Scope, Nature and Implications of Contract Assignments of Cuban Natural Resources (Minerals and Petroleum),* presented at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy, Miami, FL 54-62 (Aug. 1994).

There is some precedent for including through *ad hoc* legislation the claims of individuals who were not U.S. citizens at the time of the expropriations in the settlement of U.S. claims against another country. Such an inclusion would require legislation amending the Cuban Claims Act along the lines of a bill that was passed by Congress in 1955 to include individuals who were U.S. citizens as of August 1955 in the U.S. war claims against Italy. *See* 22 U.S.C. § 1641c. There may be political pressures emanating from the Cuban American community in the United States to have such legislation enacted, particularly if it does not appear likely that the Cuban American claimants will find adequate redress under a parallel claims resolution program implemented in Cuba. Enactment of such legislation, however, will almost certainly be opposed by the existing certified U.S. claimants, whose share of a lump settlement would be decreased if the claimant class was enlarged and (as is likely to be the case) the negotiated settlement amount was less than 100% of the certified value of the claims. In addition, such legislation would raise numerous

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The expropriation claims by U.S. nationals and Cuban citizens also have different legal foundations. U.S. claims are based on well-recognized international law principles.[13] On the other hand, although a colorable argument can be made that international law is starting to recognize the right to own property as a fundamental "human right" entitled to domestic as well as international protection,[14] no currently accepted international law principles assist domestic claimants in obtaining redress for the expropriation of their assets by their government.[15] Therefore, the legal standards for the resolution of the Cuban nationals' claims need to be found within Cuba's laws.

The discussion that follows discusses and comments on several potential claim resolution alternatives that can be implemented to address the expropriation

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legal questions, including its potential inconsistency with well-settled international law principles under which a state can only act to protect the interests of those who were nationals of that state at the time of the expropriations. *See* D.W. GREIG, INTERNATIONAL LAW 530-31 (2d. Ed. 1976).

[13] *See* Section III, *infra.*

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

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

claims of U.S. citizens and Cuban nationals. This paper, however, does not offer a specific proposal on how the outstanding property claims of U.S. nationals and Cuban citizens should be handled. Several such proposals to do this have already been developed.[16] The viability of any proposed program will ultimately be determined by the circumstances under which a settlement of outstanding claims is undertaken, including the economic and political conditions in which Cuba finds itself when it decides to deal with the problem.

II. HISTORICAL SUMMARY

A. Synopsis of Cuba's Expropriations

Cuba seized the properties of U.S. and other foreign nationals on the island starting in 1959, with the bulk of the expropriations taking place in the second half of 1960.[17] The process started in 1959 with the takeover of agricultural and cattle ranches under the Agrarian Reform Law;[18] reached a critical stage in July 1960 with the promulgation of Law 851, which authorized the expropriation of the property of U.S. nationals;[19] was carried out through several resolutions in the second half of 1960, again directed mainly against properties owned by U.S. nationals, although

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[16] See, e.g., Nicolas Sanchez, *A Proposal for the Return of Expropriated Cuban Properties to their Original Owners,* in CUBA IN TRANSITION -- PAPERS AND PROCEEDINGS OF THE FOURTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 350 (1994); Kern Alexander and Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba,* 27 GEORGETOWN INT'L L. J. 137 (1995) (hereinafter KERN & MILLS).

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

[18] Ley de Reforma Agraria, *published in* Gaceta Oficial, June 3, 1959 (hereinafter "AGRARIAN REFORM LAW").

[19] Law 851 of Nationalization of July 6, 1960, *published in* Gaceta Oficial, July 7, 1960.

those of other foreign nationals were also taken;[20] and continued through 1963, when the last U.S. companies still in private hands were expropriated.[21] In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items were seized at various times between 1959 and 1968.[22]

The laws issued by the Cuban Government to implement the expropriations of the holdings of U.S. nationals contained undertakings by the state to provide compensation to the owners.[23] Nevertheless, in almost all cases, no compensation was ever paid.

The expropriation claims by nationals of other countries were considerably smaller than those of U.S. and Cuban nationals, and for the most part have been settled through agreements between Cuba and the respective countries (e.g., Spain,

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

[21] THE CUBAN NATIONALIZATIONS, at 105-106.

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

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

France, Switzerland, United Kingdom and Canada).[24] Claims have been settled at a fraction of the assessed value of the expropriated assets.[25]

B. The U.S. Claims Certification Program

In 1964, the U.S. Congress amended the International Claims Settlement Act to establish a Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States ("FCSC") was given authority to determine the validity and amount of claims by U.S. nationals against the Government of Cuba for the taking of their property since January 1, 1959.[26] The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims by U.S. corporations (1,146) and individual citizens (7,670).[27] It certified 5,911 of those claims, with an aggregate amount of $1.8 billion;[28] denied 1,195

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[24] Cuba has entered into settlement agreements with five foreign countries for the expropriation of the assets of their respective nationals in Cuba: France, on March 16, 1967; Switzerland, March 2, 1967; United Kingdom, October 18, 1978; Canada, November 7, 1980; and Spain, January 26, 1988. *See* http://www.cubavsbloqueo.cu/. *See also,* Michael W. Gordon, The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations other than the United States, 5 LAW. AM. 457 (1973).

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

[26] 22 U.S.C. §1643 *et seq*. (1988) (amended in 1994).

[27] 1972 FCSC REPORT, Exhibit 15.

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

The total amount certified by the FCSC is almost double the $956 million book value of all U.S. investments in Cuba through the end of 1959, as reported by the U.S. Department of Commerce. Jose F. Alonso and Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, *in* ASCE-3 at 168, 201. The valuation of the U.S. nationals'

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claims, with an aggregate amount of $1.5 billion; and dismissed without consideration (or saw withdrawn) 1, 710 other claims.[29]

Of the $1.8 billion in certified claims, over 85% (about $1.58 billion) corresponded to 898 corporate claimants, and the rest (about $220 million) was spread among 5,013 individual claimants.[30] There were only 131 claimants -- 92 corporations and 39 individuals -- with certified claims of $1 million or more; only 48 claimants, all but five of them corporations, had certified claims in excess of $5 million.[31] These figures show that the U.S. claimants fall into two general categories: a small number of claimants (mostly corporations) with large claims, and a large number of claimants (mainly individuals) with small claims.

Although the Cuban Claims Act did not expressly authorize the inclusion of interest in the amount allowed, the FCSC determined that simple interest at a 6% rate should be included as part of the value of the claims it certified. Applying such interest rate on the outstanding $1.8 billion principal yields a present value, as of April 2002, of approximately $6.4 billion. [32] This amount does not include the value of the claims that were disallowed for lack of adequate proof, nor those that were not submitted to the FCSC during the period specified in the statute.

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expropriation claims has never been established in an adversary proceeding. The FCSC certification process involved administrative hearings in which only the claimants introduced evidence on the extent and value of their losses. *See* 45 C.F.R. Part 531.

29 1972 FCSC REPORT, Exhibit 15.

30 *Id.*

31 *Id.* at 413.

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

III. LEGAL BASES FOR U.S. NATIONALS' EXPROPRIATION CLAIMS

The expropriation claims by U.S. nationals are based on well established principles of international law that recognize the sovereign right of states to expropriate the assets of foreign nationals in the states' territory, but require "prompt, adequate and effective" compensation to aliens whose property is expropriated.[33] The "prompt, adequate and effective" compensation formulation was coined in 1938 by U.S. Secretary of State Cordell Hull.[34] Under current practice, the "prompt" element of the Hull formula means payment without delay.[35] The "adequate" element means that the payment should reflect the "fair market value" or "value as a going concern" of the expropriated property.[36] The "effective" element is satisfied

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[33] Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 240 (Ct. Cl. 1983), *aff'd mem.,* 765 F.2d 59 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 909 (1985); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 185-90 (1965). It has been held by U.S. courts that Cuba's expropriations of the assets of U.S. nationals violated international law because Cuba failed to provide adequate compensation, and because it carried the expropriations out in a discriminatory manner against U.S. nationals and conducted them for purposes of retaliation against the U.S. government. Banco Nacional de Cuba v. Sabbatino, 193 F.Supp. 375, 384 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); Banco Nacional de Cuba v. Farr, 272 F.Supp. 836, 838 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166, 184-85 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968). *See generally*, THE CUBAN NATIONALIZATIONS at 109-152.

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

[35] Ibrahim F. I. Shihata, Legal Treatment of Foreign Investment: The World Bank Guidelines 163 (1993) (hereinafter "LEGAL TREATMENT OF FOREIGN INVESTMENT").

[36] Alan C. Swan & John F. Murphy, Cases and Materials on the Regulation of International Business and Economic Relations 774-76 (1991) (hereinafter "SWAN & MURPHY"). Shihata explains the "adequacy" element of compensation as follows:

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

LEGAL TREATMENT OF FOREIGN INVESTMENT at 61. Shihata goes on to define fair market value as the amount that a willing buyer would normally pay to a willing seller after taking into account the

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when the payment is made in the currency of the alien's home country; in a convertible currency (as designated by the International Monetary Fund); or in any other currency acceptable to the party whose property is being expropriated.[37] Cuba has clearly failed to satisfy its obligations under international law with respect to providing compensation for the properties it seized from U.S. nationals.[38]

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

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nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors. *Id.* at 161-162.

37 *Id.* at 163.

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

IV. ALTERNATIVE RECOMMENDATIONS FOR DEALING WITH U.S. NATIONALS' CLAIMS

A. Introduction

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

There are also fundamental differences among the property interests covered by the claims, which suggests that certain remedies may be better suited for some types of property than for others. For example, restitution of residential property may be extremely difficult, both from the legal and political standpoints;[39] monetary compensation may be an inadequate remedy where the property is unique, such as in the case of beach-front real estate in a resort area.

Cuba will also be confronted with political, as well as financial, limitations to its ability to provide certain remedies. A settlement that involves huge financial obligations over a long period of time may be resisted politically by, among others, the generations that have come of age after the expropriations were carried out.[40]

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

[40] *See* Emilio Cueto, *Property Claims of Cuban Nationals,* presented at the Shaw, Pittman, Potts & Trowbridge Workshop on "Resolution of Property Claims in Cuba's Transition," Washington, D.C. 9-12 (Jan. 1995) (on file with author) (hereinafter "CUETO").

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

B. Cuban Claims Settlement Precedents

It is instructive to examine the precedent of the settlement agreements that Cuba has negotiated with other countries for the expropriation of the assets of their nationals. According to a Cuban summary, those agreements have five important facts in common: (1) They were negotiated over long periods of time; (2) none of the agreements adhered to the "Hull Formula", and in particular none implemented the "adequacy" standard, in that they were lump sum, country-to-country settlements that did not take into account either individually or collectively the amounts claimed by the nationals for the loss of their properties; (3) the payments were made in installments, rather than all at once; (4) the payment was in either the currency of the country advancing the claims or, as was the case with Spain and Switzerland, in trade goods as well as currency; and (5) all agreements were negotiated between Cuba and the state that representing the claimants, without claimant participation.[41]

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

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[41] *See* http://www.cubavsbloqueo.cu/.

C. Alternative 1: Government-to-Government Negotiations

1. Discussion of Alternative

The President of the United States has wide, but not plenary, power to settle claims against foreign governments for the uncompensated taking of property belonging to U.S. citizens.[42] The U.S. Department of State, under authority delegated by the President, acts on behalf of U.S. claimants in the negotiation of their claims with an expropriating foreign country.[43] Under the "doctrine of espousal," the negotiations conducted by the Department of State are binding on the claimants, and the settlement that is reached constitutes their sole remedy.[44]

In most agreements negotiated in the past, the United States and the expropriating country have arrived at a settlement involving payment by the expropriating country to the United States of an amount that is a fraction of the total estimated value of the confiscated assets.[45] The settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest, although a 1992 settlement with Germany over East Germany's expropriations of the assets of U.S. nationals did

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[42] Dames & Moore v. Regan, 453 U.S. 654, 688, 101 S. Ct. 2972, 69 L. Ed. 918 (1981); Shanghai Power Co. v. United States, *supra*, 4 Cl. Ct. at 244-245. The President's authority is limited by the rarely exercised power of Congress to enact legislation requiring that a settlement seen as unfavorable be renegotiated. Dames & Moore v. Regan, *supra*, 453 U.S. at 688-689 and n.13.

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[43] *See id.,* 453 U.S. at 680 and n.9, for a listing of ten settlement agreements reached by the U.S. Department of State with foreign countries between 1952 and 1981.

[44] *Id.*, 453 U.S. at 679-680; Asociacion de Reclamantes v. United States, 735 F.2d 1517, 1523 (D.C. Cir. 1984); RICHARD B. LILLICH AND BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 6 (1975).

[45] For example, the U.S. settled its nationals' claims against the People's Republic of China for $80.5 million, which was about 40% of the $197 million certified by the FCSC. Shanghai Power Co. v. United States, *supra*, 4 Cl. Ct. at 239; XVIII I.L.M. 551 (May 1979).

include the payment of simple interest at the approximate annual rate of 3% from the time the U.S. properties were taken.[46]

Under standard practice, U.S. claimants may not "opt out" of the settlement reached by the U.S. Government. Dissatisfied claimants are barred from pursuing their claims before U.S. courts or in the settling country.[47]

2. Comments on Government-to-Government Negotiations Alternative

The above described traditional settlement agreement would not appear, in itself, to be adequate to satisfy the needs of the parties in the Cuban situation. The amount of the outstanding certified claims by U.S. nationals is so large that it would likely outstrip Cuba's ability to pay a significant portion of the principal, let alone interest. In addition, Cuba's transition government will be burdened already by a very large external debt: Cuba owes over $11 billion to international private and public lenders in the West, and has defaulted on its loan obligations.[48] Also, Cuba owes Russia, as successor to the Soviet Union, 15 to 20 billion U.S. dollars in loans that it has never repaid.[49] Any additional obligations to U.S. claimants would only exacerbate Cuba's debt situation.

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

[47] *See,* Shanghai Power Co. v. United States, *supra.*

[48] *See,* http://www.odci.gov/cia/publications/factbook/geos/cu.html. Cuba's external debt is a staggering 58% of the country's Gross Domestic Product. *Id.*

[49] *Id.*

For those reasons, a traditional settlement involving the payment of a large sum of money, even if payment is spread out over time, would be likely to place Cuba in difficult financial straits. Such a settlement could also have adverse political repercussions.[50]

This is not to say that, even if other settlement alternatives were considered (see *infra*), there would be no need for a lump sum payment by Cuba. Such a payment (in the order of, say, $200 million) could be set aside to satisfy the claims of those for whom other alternative remedies would not be desirable or practicable. Lump sum settlement proceeds could, for example, provide limited monetary compensation to all claimants to the extent of their certified losses involving residential and small farm properties.[51] Alternatively, a lump sum payment of $200 million would provide over 50% principal recovery (but no interest) to the 5,013 certified claimants who are individuals.[52]

One potential source of funds for such lump payments could be blocked Cuban assets under the control of the U.S. Government. However, some if not all of these assets are likely to be unavailable because they have been made eligible, through legislation passed in 1996 and 2000, for recovery by those raising claims of

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[50] *See* CUETO at 9-12, 34-36.

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

[52] A 50% level of recovery would exceed the recovery level in most "lump sum" settlements negotiated by the U.S. under the International Claims Settlement Act programs. *See* 1994 FCSC REPORT at 146.

personal injury or death as the result of actions by the Cuban Government.[53] Therefore, Cuba will need to identify some other source of funds to satisfy the lump sum payment portion of any settlement of U.S. national expropriation claims.

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

1. Introduction

Whether as part of a government-to-government settlement, or independently of it, U.S. claimants could be authorized to obtain relief directly from Cuba for their expropriation claims. This relief could be the result of private, individual negotiations

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

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

with the Cuban Government or through participation by the U.S. claimants in Cuba's formal claim resolution program. This section examines those alternatives.

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

a. DISCUSSION OF ALTERNATIVE

It would be possible for the United States and Cuba to arrive at a negotiated settlement that allowed alternative remedies beyond the up-front payment of money, and which included the possibility that individual claimants would waive their right to receive a share of the lump sum settlement proceeds and instead negotiate directly with the Cuban Government for restitution of their expropriated assets, investment concessions, payments in commodities other than cash, or compensation by means of state obligations.[54] While there is no direct precedent for such a procedure and the U.S. courts have ruled that individual claimants have no right to negotiate directly with the debtor government,[55] in the case of Cuba such a flexible settlement may prove to be in the best interest of all parties.[56]

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

[55] *See* Dames & Moore v. Regan, *supra.*

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

b. COMMENTS ON DIRECT CLAIMANT NEGOTIATIONS WITH CUBA

A direct settlement between a U.S. claimant and Cuba, if successful, should satisfy the claimant in that it would represent the best resolution that he was able to obtain through bargaining with Cuba. Such a settlement attempt, however, might not be successful. Therefore, if the direct negotiations alternative were authorized, the United States and Cuba would have to agree on a mechanism for assuring that those claimants who waived the right to be represented by the U.S. Government in the negotiations with Cuba received a fair and equitable treatment by Cuba, and that if such negotiations failed the claimant would not be left without a remedy.

One way of protecting the rights of the U.S. claimants who choose to negotiate directly with Cuba could be for the Cuban Government to agree to submit to binding international arbitration any claim that it was unable to settle with a U.S. national. Historically, however, arbitration of disputes between private citizens and states has resulted in inconsistent decisions on key issues. In Saudi Arabia v. Arabian American Oil Co. (ARAMCO), reprinted in 27 ILR 117 (1958), for example, the arbitration tribunal refused to apply the law of Switzerland (where the tribunal was located), even though Saudi Arabia had agreed to having the seat of the tribunal in Switzerland. By contrast, the arbitrator in Saphire International Petroleum v. National Iranian Oil Co., reprinted in 35 ILR 136 (1963), decided that the legal system of the place of arbitration would govern the arbitration. Likewise, inconsistent results on this issue were achieved in three other arbitrations between Libya and the nationals of foreign states that arose out of the nationalization of

Libyan oil in the early 1970s.[57] This lack of uniformity and predictability in the outcomes underscores the need to establish clearly and in advance the legal regime that would govern the arbitration of disputes between U.S. citizens and the Cuban government.

Predictability of applicable rules could be achieved if the United States and Cuba agreed in advance to a procedure analogous to that used by the Iran – U.S. Claims Tribunal ("Tribunal") set up to resolve the expropriation claims of U.S. nationals against Iran.[58] The Tribunal has three jurisdictional grants of power: (1) it may hear the "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States;"[59] (2) it may hear "official claims of the United States and Iran against each other arising out of contractual arrangements between them;"[60] and (3) it may hear disputes between the United States and Iran regarding the interpretation or performance of any provision of the General Declaration[61] or the claims of their nationals.[62] One important aspect of the

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

[58] *See* NORTON at 482-486.

[59] Declaration Of The Government Of The Democratic And Popular Republic Of Algeria Concerning The Settlement Of Claims By The Government Of The United States Of America And The Government Of The Islamic Republic Of Iran, 19 January 1981 ("Claims Settlement Declaration"), Art. II(1).

[60] *Id*., Art. II(2)

[61] Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 ("General Declaration"). *See*, Claims Settlement Declaration, Art. II(3).

[62] *Id*., Art. VI(4).

Tribunal's framework is the adoption of The United Nations Commission on International Trade Law's ("UNCITRAL") Arbitration Rules, which are designed to address international commercial arbitration.[63] This choice of rules allowed supervisory jurisdiction to the legal system of the Netherlands where the Tribunal was seated.[64]

The Tribunal has taken the view that the claims of nationals are the claims of a private party on one side and a Government or Government-controlled entity on the other.[65] In accord with this view, the procedures set up by the Tribunal require exhaustion of local remedies and provide that the private claimants themselves will present their claims to the Tribunal.[66] The nationals themselves thus both file the claims and present them, and also decide whether to withdraw or accept any settlement offer.

One of the most innovative structural elements of the Tribunal is that a Security Account held in trust by the Algerian Government – consisting of a portion of frozen Iranian assets – has been established for the purpose of guaranteeing that the awards of the Tribunal are capable of being satisfied. This Account is only

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

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

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

[66] Claims for less than $250,000 may be presented by the government of a national according to a supplemental clause. Claims Settlement Declaration, Art. III(3).

available to satisfy the claims of U. S. nationals, and cannot be used for awards in favor of Iranian nationals or Iranian governmental counterclaims.[67]

The structure of the Tribunal is thus largely self-contained in both its procedural operation and its ability to satisfy successful claims.[68] However, there are areas in which the Tribunal's relationship to the external world may need to be considered. For example, should the Security Account become depleted, enforcement of Tribunal decisions would become a significant issue.

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

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

a. INTRODUCTION

Assuming that it was not feasible to have direct negotiations between U.S. claimants and Cuba, another alternative could be to allow U.S. nationals to participate in Cuba's domestic claims resolution program. Under such a program,

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[67] General Declaration, para. 7 ("All funds in the Security Account are to be used for the sole purpose of the payments of . . . claims against Iran . . .").

[68] For example, the UNCITRAL rules provide for the appointment of an authority to resolve disputes over the Tribunal's composition. UNCITRAL Rules, Art. 9-12.

there would be several alternative forms of compensation that could be made available to the claimant (as well as to Cuban claimants). These alternative remedies are discussed next.

b. RESTITUTION METHODS

(1) Direct Restitution

Restitution of the actual property that was confiscated ("direct restitution") would be the solution that many U.S. corporate claimants might prefer, assuming such a choice was available under Cuba's claims resolution program.[69] Some types of expropriated property, e.g. large industrial installations, may lend themselves readily to direct restitution since the identity of the former owners is likely to be uncontested and the extent of the ownership rights may be easy to establish.[70]

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

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

[70] The top twenty certified U.S. claimants are all corporations. Their combined certified claims add up to $1.25 billion, or 70% of the total claims certified. Most of the corporations owned sugar mills and other large industrial installations that would be identifiable.

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

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

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

ecological impacts from operation of the facility have occurred or are expected to occur in the future. Many other issues are likely to come up in individual cases.

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

(2) Substitutional Restitution

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

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

(3) Comment on Restitution Methods

Direct and substitutional restitution programs implemented in certain Eastern European countries have been criticized on economic grounds.[71] In addition, some

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[71] Gray et al. summarize the restitution experience in Eastern Europe as follows:

Footnote continued on next page.

analysts have concluded that the use of restitution in Cuba could be fraught with perils.[72] The restitution of properties in Cuba to U.S. claimants has also been specifically opposed because it would "be tantamount to insisting that nationalistic feelings in Cuba due to foreign ownership of the country's principal assets never had a basis in fact."[73]

Footnote continued from previous page.

Restitution-in-kind is complex and leaves many problems in its wake. The legal precedence typically given restitution over privatization has created great uncertainty among potential investors and has complicated privatization, particularly in the case of small business and housing. It is also leading to many disputes that are beginning to clog the courts. In Romania, for example, restitution of agricultural land has led to more than 300,000 court cases. GRAY ET AL at 4. They level the same criticism against the programs instituted in Czechoslovakia. *Id.* at 49.

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

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

Finally, 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. *See* FOSTER at 113 (footnotes omitted).

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

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

Despite these concerns and criticisms, restitution -- whether direct or substitutional -- is likely to be an important ingredient in the mix of remedies granted to U.S. claimants under Cuba's claims settlement program. It will be inappropriate in many instances, and even where appropriate, its use should be tempered by the realization that restitution will often be a slow and difficult process, and one subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others.[74] In addition, if a variety of remedies are offered, care must be taken to assure that the benefits received by those availing themselves of the restitution alternative are neither better nor worse off than those receiving other types of remedy.

c. ISSUANCE OF STATE OBLIGATIONS

(1) Discussion of Alternative

A number of Eastern European countries have used state-issued instruments, which will be generally referred to here as "vouchers," to provide full or partial compensation to expropriation claimants.[75] The vouchers may not be redeemed for cash, but can be used, among other things, as collateral for loans; to pay (fully or in part) for property sold by the state, including shares in privatized enterprises; to

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

[75] Hungary has used compensation vouchers as the sole means of indemnifying expropriation claimants. Katherine Simonetti et al*., Compensation and Resolution of Property Claims in Hungary, in* OPTIONS at 61, 69 (hereinafter "SIMONETTI"). The means of compensation are interest-bearing transferable securities or "vouchers" known as Compensation Coupons, issued by a Compensation Office charged with the administration of the claims program. *Id.* Compensation is given on a sliding scale with regard to the assessed value of the lost property. GRAY ET AL at 70. The vouchers are traded as securities, and pay interest at 75% of the basic interest rate set by the central bank.

purchase real estate put up for sale by the state; to be exchanged for annuities; or as investment instruments.[76]

The voucher system provides a potential way of resolving many of the U.S. nationals' expropriation claims in Cuba, particularly those of the former owners of small and medium enterprises who may not be interested in recovering the properties they once owned because of the obsolescence or physical deterioration of the facilities.[77] The system recognizes the limits of the country's ability to pay compensation claims, and avoids the dislocation costs and disputes associated with direct restitution systems. As with restitution remedies, an issue that would need to be resolved at the outset would be the level of compensation to be offered in proportion to the loss.

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

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

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

(2) Comments on Issuance of State Obligations

There are several potential drawbacks to a system of vouchers or other state-issued instruments.[78] The instruments will fluctuate in value, and are likely to depreciate if Cuba's economy stagnates.[79] In addition, to the extent the instruments are used as income-generating devices (e.g., for the collection of annuities) the rate of return is likely to be very low.[80] Also, the basic underpinning of a voucher system is confidence in the state's ability to make good on its commitments. Therefore, the security, transferability, and marketability of the compensation instruments is a serious concern that the Cuban Government will need to overcome in order for the remedy to have acceptability with the claimants.

d. OTHER COMPENSATION MECHANISMS

(1) Discussion of Alternative

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

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[78] *See* CUETO at 26-28 for a brief discussion of some of the valuation and financing issues that will surface if Cuba seeks to implement a voucher compensation scheme. See also, CASTAÑEDA AND MONTALVÁN at 14-16.

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

[80] The experience in Hungary has been that vouchers used to collect annuities have yielded very disappointing results. SIMONETTI at 78.

hoc, case-by-case negotiations would need to be conducted, at least to resolve the most significant claims.[81]

(2) Comments on Other Compensation Mechanisms

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

V. ALTERNATIVE RECOMMENDATIONS FOR DEALING WITH CUBAN NATIONALS' CLAIMS

Resolution of the Cuban nationals' expropriation claims is a political as well as legal issue. From the legal standpoint, the main area of inquiry is the validity and legal effectiveness of the expropriations under applicable Cuban law at the time they took place. If the expropriations were lawful, or at least legally effective, the problem is reduced to determining what remedy should the former property owners be given for the taking of their assets. On the other hand, if the expropriations were unlawful and legally ineffective, the Cuban Government may be said to have unjustly enriched itself at the expense of the owners and may be holding the properties in the equivalent of a "constructive trust" for the benefit of the owners, with the obligation to eventually return them.[82]

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[81] A.R.M. Ritter, Financial Aspects of Normalizing Cuba's International Relations: The Debt and Compensation Issues, in TRANSITION IN CUBA at 559-560.

[82] Ben A. Wortley, Expropriation in Public International Law 96 (1977).

From the political standpoint, the handling of the claims depends on a number of domestic and international factors that will come into play at the time the issue is addressed.[83] One important factor that will shape the process is Cuba's ability to provide restitution of the expropriated assets or pay (either immediately or in the long run) compensation to the claimants, given the vast sums at stake.[84]

A. Right to Private Property Ownership Under Cuban Law

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

> Art. 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, may be established by law.[85]

Throughout the period during which the Revolutionary Government was taking measures to expropriate the assets of Cubans and foreign nationals, it left unmodified this broad constitutional declaration of private property rights. Art. 87 was not deleted until Cuba enacted a new Constitution in 1976, by which time all the

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

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

[85] CONSTITUTION OF 1940, *published in* Gaceta Oficial, July 5, 1940, art. 87.

expropriations had been accomplished. Even then, ownership of private property was not abolished, although it was significantly curtailed. The 1976 Constitution still recognized the right of small farmers to own their lands and other means of production (art. 20), the right of farmers to band together in cooperatives to own land (art. 21), and the right of individuals to own personal property (art. 22).

The recognition of private property rights remains embedded in Cuba's legal framework, including the Constitution. Articles 19, 20 and 21 of Cuba's current Constitution are essentially equivalent to Articles 20, 21 and 22 of the 1976 Constitution.[86] Art. 23 of the 1992 Constitution recognizes the further right of private property ownership by joint ventures and other economic enterprises:

> Art. 23. The State recognizes the right to property by mixed enterprises, corporations and economic associations established in accordance with the law.
>
> The use, enjoyment and disposition of the assets which are the property of the above mentioned enterprises shall be governed by provisions of the laws and treaties, as well as by the enterprises' own articles of incorporation and bylaws.[87]

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

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[86] 1992 CONSTITUTION, *published in* Gaceta Oficial, August 1, 1992 ("1992 CONSTITUTION").

[87] 1992 CONSTITUTION, art. 23.

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

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

Confiscation is the seizure of private property by the state without compensation, usually to punish the person whose property is seized for who he is or for what he has done. Confiscations are ordered for political, religious, legal or other reasons relating to the person subjected to the taking, and not to the property itself.[88] Expropriation, on the other hand, is the taking by the state, subject to compensation, of specified for some public purpose, with the taking being independent of the acts or identity of the owner.[89]

1. Confiscation

Confiscation of private property had always been prohibited by the Cuban constitutions prior to 1959. Art. 24 of the 1940 Constitution declared, in relevant part: "Confiscation of property is prohibited." A few weeks after the triumph of the Revolution, however, the new government issued a Fundamental Law to replace the 1940 Constitution.[90] The Fundamental Law created an exception to the prohibition against confiscation. Art. 24 of the Fundamental Law of 1959 read in relevant part:

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

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

[90] Ley Fundamental of February 7, 1959 *published in* Gaceta Oficial, February 7, 1959.

> Art. 24. Confiscation of property is prohibited, but it is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasury, or who are enriching themselves, or who have enriched themselves, unlawfully under the protection of the public authorities.[91]

Thereafter, Cuba's Revolutionary Government created increasingly wide exceptions to the prohibition against the confiscation of private property. Nonetheless, Cuba has continued to explicitly recognize that the state does not have an unfettered right to seize private property but most do so, if at all, in accordance with the law.[92]

2. Expropriation

Cuban constitutions have always recognized the right of the state to expropriate private property, provided the taking is for a legitimate public purpose

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

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

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

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

CONSTITUTION OF 1976, art. 59. Art. 60 of the 1992 Constitution contains identical language.

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

and compensation is paid to the owner. In the 1940 Constitution, the state's right to expropriate private property is defined in art. 24 in the following terms:

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

When the Revolutionary Government issued a Fundamental Law in 1959 to replace the 1940 Constitution, it retained unchanged the text of art. 24 as it referred to the state's limited expropriation rights. However, art. 24 was amended on July 5, 1960 to authorize the massive takings of the properties of U.S., and later of Cuban, citizens.[93] The state's right to expropriate private property was made even more explicit in the 1976 Constitution, which declared in art. 25:

> Art. 25. The expropriation of property for reasons of public utility or social interest and with due compensation is authorized.
>
> The law establishes the procedure for the expropriation and the bases on which the need for and the utility of this action is to be determined, as well as the form of the compensation considering the interests and economic and social needs of the owner.[94]

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[93] The amended art. 24 read:

> Art. 24. .... No other natural person or corporate entity shall be deprived of his property except by competent authority, for a justified cause of public utility or social or national interest. The procedure for the expropriations and the methods and forms of payment will be established by law, as well as the competent authority to declare the cause of public utility or social or national interest and the necessity for the expropriation.

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

[94] CONSTITUTION OF 1976, Art. 25. Art. 25 of the 1992 Constitution contains identical language.

[94] CONSTITUTION OF 1976, Art. 25. Art. 25 of the 1992 Constitution contains identical language.

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

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

Cuba's takings of the property of its nationals proceeded by three means: (1) confiscations of the property of alleged officials of the Batista Government and collaborators with that government, and subsequent confiscations of the property of alleged counter-revolutionaries; (2) expropriations pursuant to major economic reform laws, such as the Agrarian Reform Law of 1959 and the Urban Reform Law of 1960; and (3) takings of the property of individuals leaving the country as "abandoned property." The first category of property takings was carried out in 1959 and 1960. During those years, the government seized, brought under the control of a newly created Ministry for the Recovery of Stolen Property, and ultimately confiscated the assets of hundreds of individuals charged with being government officials during the 1952-58 period, or with having benefited from graft during the Batista years. These seizures were accomplished summarily, and the burden was placed on the subject of the confiscation to prove that he had not improperly

benefited from his association with the former government.[95] An estimated $200 million worth of property was confiscated in this manner.[96]

The second, and probably most significant category of takings, occurred between 1959 and 1961 through a series of laws intended to transform Cuba's economic structure to that of a socialist nation. The most important of these were: (1) the Agrarian Reform Law of 1959, which expropriated land holdings in excess of 30 *caballerias* (1,000 acres);[97] (2) Law 890 of October 1960, which expropriated a wide range of Cuban-owned industries and businesses;[98] (3) the Urban Reform Law of October 1960, which ordained the forced sale to the state of all the rental residential property in private hands;[99] and a directive issued in March 1968 taking over all remaining small, privately-owned businesses.[100]

The third class of takings was conducted pursuant to the "abandoned property" law of December 1961.[101] This law confiscated all properties of those who

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[95] Law 78 of February 13, 1959, *published in* Gaceta Oficial, February 19, 1959. Subsequently, the confiscations were expanded to cover persons found guilty of counterrevolutionary activities, whether in Cuba or abroad. Law of November 22, 1959.

[96] THE CUBAN NATIONALIZATIONS at 73, n.18.

[96] THE CUBAN NATIONALIZATIONS at 73, n.18.

[97] Ley de Reforma Agraria, *supra.* A subsequent Agrarian Reform Law issued in October 1963 expropriated all land holdings above 5 caballerias (165 acres).

[98] Law 890 of October 13, 1960, *published in* Gaceta Oficial, October 15, 1960.

[99] Ley de Reforma Urbana, *published in* Gaceta Oficial, October 14, 1960.

[100] N. Y. TIMES, Mar. 14, 1968, p. 1. There appears to have been no formal legislation ordering the takings, which affected many thousands of small property owners.

[101] Law 989 of December 5, 1961, *published in* Gaceta Oficial, December 6, 1961.

left Cuba and did not return within a brief period of time.[102] Such properties were deemed "abandoned" by the owners and seized by the state.

The effects of the property takings by Cuba's Revolutionary Government must be assessed from two standpoints: (1) Were the takings lawful under the laws in effect at the time the takings took place, or under pre-existing laws if the laws in place at the time of the takings were invalid? (2) Assuming the laws in effect at the time of the takings were invalid, were the takings nonetheless legally effective in terms of passing title to the state?[103]

4. Validity of the Property Takings Under Existing Laws

The methods used by the Revolutionary Government for its takings of property in the 1959-1968 period were founded on changes to the 1940 Constitution that were made in the Fundamental Law of February 1959. One such change was the above-cited modification to art. 24 that allowed the confiscation of the property of officials in the Batista Government and others. Another important change to the Constitution was the inclusion in the Fundamental Law of a new article 232 that gave

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

[103] In discussing the validity of Cuba's expropriation laws, it is important to keep in mind the distinction between the *legitimacy* of a revolutionary regime and the *legal validity* of certain of its acts. Some equate both; for example, Kelsen argues that legitimacy is created when the state's power is exercised with both a presumption by the rulers that they have the right to govern and a corresponding recognition by the governed of that right; such legitimacy renders the acts of the rulers valid and legally effective. This is known as the doctrine of "revolutionary legality." HANS KELSEN, GENERAL THEORY OF LAW AND STATE 117, 187-88 (1961). Others, on the other hand, distinguish between the legitimacy of a government -- which they feel is a question of politics and morality and thus not amenable to legal adjudication -- and the validity or binding nature of its norms, which can be judicially assessed. Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law,* 27 CORNELL INT'L L.J. 49, 148-50 (1994) (hereinafter "MAHMUD").

the Council of Ministers (the Cabinet) the power to amend the Constitution, with the approval of the President, without needing to follow the amendment procedures set forth in articles 285 and 286 of the 1940 Constitution.[104] This provision was the constitutional source of power for later legislation issued by the Cabinet that directly (and sometimes indirectly) amended the Constitution.[105]

It has been argued that the 1940 Constitution was never effectively repealed, and that the Fundamental Law of 1959 and subsequent constitutions are invalid since they were enacted without following the procedures set forth in articles 285 and 286 of the 1940 Constitution.[106] As a result, the argument goes, laws deriving their authority from the Fundamental Law of 1959 (such as the Agrarian Reform Law) are invalid.[107]

This argument is based on the implicit assumption that the Revolutionary Government lacked the power to overturn the existing legal norms, including the

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

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

[105] The Council of Ministers exercised this authority to incorporate certain important legislation into the Fundamental Law. Thus, the Agrarian Reform Law includes as its "Final Additional Provision" a declaration that the Council of Ministers, in exercise of "its Constitution-making power," made the Agrarian Reform Law an integral part of the Fundamental Law. The same declaration is contained in the "Final Provision" of the Urban Reform Law.

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

[107] CONSUEGRA-BARQUIN at 899.

Constitution. It is generally accepted, however, that a successful revolution has the power under certain conditions to annul an existing Constitution and create a new set of fundamental legal norms.[108] These conditions have been variously stated, but essentially boil down to political control over the country and acceptance (or at least acquiescence) by the population to both the revolutionary regime and its changes to the Constitution and laws.[109]

There is little doubt that the requirements cited in the cases for validating the acts of revolutionary regimes have been met in Cuba. The Revolutionary

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

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

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

Government has been in firm control of the country for over 44 years, and throughout that period there has been general acquiescence by the population to the legal changes made by the government, including the enactment of two constitutions and the passage of legislation that drastically changed the island's political and economic structure. The people's acquiescence in the government's actions validates them.[110]

From this result follows that the expropriation laws that are founded on, and consistent with, the Fundamental Law of 1959 are valid. For example, the Agrarian Reform Law of 1959 would be valid under art. 24 of the Fundamental Law because the properties were taken for an asserted public purpose (i.e., eliminate large landholdings, which were said to be an obstacle to the development of the national

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

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

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

economy);[111] the state's obligation to provide compensation to the owners of the expropriated lands was expressly acknowledged;[112] and mechanisms for providing such compensation were established.[113] Similar features were contained in the Urban Reform Law of 1960 and some of the other expropriation laws.[114]

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[111] Agrarian Reform Law, Preamble.

[112] Art. 29 of the Agrarian Reform Law reads as follows:

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

[113] Art. 31 of the Agrarian Reform Law provides:

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

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

[114] Art. 37 of the Urban Reform Law also sets up a compensation program for owners of expropriated buildings; Law 890 of October 13, 1960 establishes, with respect to the expropriation of Cuban-owned industries and businesses, that "(t)he means and forms of payment of the indemnification that will be due to natural or juridical persons whose properties are expropriated under this Law, will be established in subsequent legislation. "

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

Another argument raised occasionally against the validity of the Revolution's constitutional changes and property expropriation laws contends that all the laws enacted by the Revolutionary Government are invalid due to the *de facto* nature of that government.[115] This argument fails for the same reason as the preceding one, i.e., the laws of a revolutionary regime that is fully in control and meets popular acquiescence are valid regardless of the initial legitimacy of the regime. Also, as a practical matter, the success of a blanket challenge to the Revolution's legislation would be troubling, for it would also imply that all laws issued by the Batista regime after the 1952 *coup d'état* were invalid, as well as all laws issued by several other *de facto* regimes that have ruled Cuba.[116] Moreover, a future Cuban government could be *de facto* in nature, therefore its laws (including those dealing with property issues) would subsequently be subject to the same attack as the Revolutionary Government expropriations. In short, a successful challenge to the validity of all the post-1959 laws for lack of constitutional legitimacy by the enacting government could lead to complexities that could make it difficult for the country to govern itself.[117]

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

Under the theory that the Fundamental Law of February 1959 and other constitutions enacted by the Revolutionary Government are invalid and the 1940

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[115] This argument is suggested, for example, in Nestor Cruz, Legal Issues Raised by the Transition: Cuba From Marxism to Democracy, 199?-200?, in ASCE-2 at 51.

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

[117] *See* CONSUEGRA-BARQUIN at 899.

[118] Gregorio Escagedo, Jr., Posibles Problemas que Confrontaremos en Cuba: Sus Soluciones, in ASCE-3 at 250.

Constitution is still in place, it has been further argued that the property expropriations conducted in the 1959-1968 period were invalid because the government failed to comply with the requirement in art. 24 of the 1940 Constitution that cash compensation be paid in advance to the owners of the expropriated property.[118]

Even if the 1940 Constitution were held to have remained in effect during the Revolution, it does not necessarily follow that the Cuban courts would find laws like the Agrarian Reform Law and the Urban Reform Law to be invalid.[119] While those laws expropriated many assets from the private sector, the laws undertook to establish compensation mechanisms that, if implemented, would have provided payment over time to the owners.[120] A court could find that such compensation schemes might have been insufficient or inadequately carried out, but were not in violation of the provisions of art. 24.

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[118] Gregorio Escagedo, Jr., Posibles Problemas que Confrontaremos en Cuba: Sus Soluciones, in ASCE-3 at 250.

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

[120] See, e.g., art. 31 of the Agrarian Reform Law, *supra.*

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

6. Effectiveness of the Expropriations

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

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

might obtain restitution of the property. Thus, unless and until a court ruled that restitution should take place, title to the property remained with the state.[121]

7. Conclusions on Effectiveness of Property Takings

The above discussion suggests that most of the Revolutionary Government's takings of private property from Cuban nationals could well be held by a reviewing court to have been effective in transferring title of the properties to the state, even if the takings were invalid.

This does not mean, however, that the state has no remaining duties to its citizens for the takings. It does not appear that compensation was ever paid to the former owners for any of the expropriations, even where (as with the Agrarian Reform Law) a mechanism was set up by the law to provide indemnification. Therefore, Cuba still has the legal obligation to comply with art. 24 of the Fundamental Law of 1959 (or the 1940 Constitution) and provide remedies to those whose properties were confiscated without cause or expropriated, or else return the properties.[122] Definition and implementation of the remedies are tasks that should

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

[122] As noted earlier, the validity of the confiscations of the property of individuals accused of graft during the Batista regime presents a special case that should be handled separately. If no basis
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be addressed through new laws issued by a transition government.[123] The next section illustrates some of the decisions that would need to be made in the process of providing those remedies.

C. Remedies for the Cuban Nationals' Expropriations

A system of remedies for the property expropriations carried out by a Socialist regime against its citizens must seek to implement several somewhat inconsistent objectives. Those objectives include: first, to provide predictable and substantially fair treatment to all interested parties; second, to create in the shortest possible time a regime of clear, secure and marketable rights to property; third, to promote the expeditious privatization of state-held assets; fourth, to encourage the early onset of substantial foreign investment; and fifth, to keep the aggregate cost of the remedies within the financial means of the country.[124]

As a government tries to implement these objectives, it needs to make decisions on a host of substantive and procedural questions that generally will not arise in a negotiated settlement of the claims of U.S. nationals, but which will be

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for some of the confiscations is found, the claims to those properties could be handled as part of the expropriation claims program.

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

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

important in Cuba's domestic claims process. The discussion that follows considers some of these questions.

1. How are Different Types of Property to be Treated?

A key issue is whether different types of property (industrial, commercial, agricultural, residential, and personal) should be treated differently. Some types of expropriated property may lend themselves readily to direct restitution. On the other hand, restitution of residential property is likely give rise to numerous disputes among a variety of claimants, including former owners and their successors, current occupants, and others.[125] Due to these differences, some countries addressing the issue have handled different types of property separately.

2. Who is entitled to a remedy for property expropriations?

The universe of potential claimants under Cuba's remedies program may include registered U.S. claimants who are allowed to "opt-out" of a U.S. - Cuba settlement (assuming such opting out is permitted), non-registered U.S. claimants, Cuban nationals acquiring U.S. citizenship after their properties were confiscated, other Cuban nationals abroad, and Cubans still in the island.[126] In setting up a claims resolution program, it would be necessary to determine whether the various

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[125] In the former Czechoslovakia, restitution of residential property led to numerous disputes between original owners and current occupants, as well as disputes between competing claimants, resulting in clogged courts. GRAY ET AL at 49; GELPERN at 360. In addition, "the legal precedence given restitution over privatization has created great uncertainty among potential investors and has complicated privatization, particularly in the case of small businesses and housing." GRAY ET AL. at 49.

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

categories of claimants (for example, Cuban citizens residing abroad and those who have become citizens of another country) would qualify for remedies.[127] Another question is which successors in interest, if any, of the original property owners would be entitled to remedies.[128] Given the considerable amount of time that has passed since Cuba's expropriations and the likelihood that most of the former property owners will have died at the time a claims settlement process is implemented, Cuba

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

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

[128] The examples of Hungary and Czechoslovakia again serve to illustrate the different approaches that can be taken to the successor in interest issue. Czechoslovakia was in this regard the more liberal of the two countries: all of its restitution laws allowed former owners, as well as their co-owners and partners, to recover for the expropriations. In addition, all testamentary heirs or immediate family members could claim in proportion to their share of the owner's inheritance. *Id.* at 340. In Hungary, by contrast, if the former owner was dead, the descendants could claim compensation. However, if any of the descendants was dead, the survivors did not share in the decedent's share. The surviving spouse of a dead claimant was only entitled to compensation if there were no surviving descendants and if the surviving spouse was married to and living with the decedent both at the time of the expropriation and at the time of his or her death. *Id.* at 346-347.

Other countries seeking to define the eligible claimants for expropriation remedies have adopted a variety of definitions. For example, Estonia allowed claims for individuals who were Estonian citizens or were citizens of the country at the time of the country's annexation by the USSR, as well as the owner's testamentary heirs or (if the owner died intestate) the spouse, parents, and children of the owner. FOSTER at 96-97. Latvia allowed claims by previous owners and their heirs, regardless of their present citizenship. *Id.* at 97. Lithuania restricted restitution to current citizens and permanent residents of the country, and only extended the right to claim to former owners, and (if deceased) to their surviving parents, spouses, children and grandchildren. *Id.* at 98.

will need to decide to what extent the heirs of former owners are entitled to share in the remedies, and if so who will qualify as an heir for the purpose of eligibility for remedies.

3. Who Is to Administer the Remedies?

Some countries have established agencies for the sole purpose of administering the remedies. Hungary, for example, established compensation offices in each county and in Budapest, and an appellate National Compensation Office in the capital. Decisions of the local offices could be appealed to the appellate office, whose decisions could be reviewed by a designated civil court in Budapest.[129]

Other countries, like Germany, assigned responsibility for handling expropriation claims to the local property registries where the property at issue was located.[130] Czechoslovakia chose not to establish an agency to administer or review restitution claims, but left the matter to negotiation between the former owner and the person occupying the property and, if agreement was not reached by negotiation, through court adjudication -- which occurred frequently.[131]

Given the large number and contentious nature of the claims that can be expected to be asserted in Cuba, it would probably be necessary to establish an independent agency of the Cuban Government with jurisdiction over the

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[129] SIMONETTI at 66-67.

[130] Dorothy A. Jeffreys, Resolving Rival Claims on East German Property Upon German Reunification, 101 YALE L.J. 527, 543-44 (1991).

[131] GELPERN at 342. The Federal Land Law, called for the involvement of the local Land Office in the resolution of restitution claims against land. The Land Office could veto, compel, or amend an agreement to return land to its former owner on a variety of public interest grounds. *Id.* at 343-44.

determination of the validity of claims to title over confiscated property and the dispensation of remedies. Also, adequate staff and personal training should be provided in advance; inventories of the subject properties would need to be made; and valuation methods would need to be developed.

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

The procedures for handling property claims would need to set fairly short time limits for filing remedy requests;[132] define the means and procedures for proving title; establish mechanisms for adjudicating title disputes, dispensing remedies, and appealing agency determinations; define and enforce the duties of those who are granted restitution of properties (e.g., payment of taxes, environmental cleanup, economic use of the property); and put in place the administrative procedures and bureaucratic apparatus needed to identify and implement the applicable remedy in each case. The experience in other countries demonstrates that it is extremely important to have these mechanisms in place before attempting to consider any claims.[133]

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

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

5. What Remedies Should be Made Available?

The remedies that would be available to Cuban nationals under Cuba's claims settlement program would be the same discussed above for U.S. nationals who chose to "opt out" of the government-to-government settlement procedure. Following is a brief recapitulation of that discussion, as it relates to Cuban nationals.

a. RESTITUTION

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

b. STATE OBLIGATIONS ALTERNATIVE

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

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[134] SIMONETTI at 78.

understand and use the voucher system wisely, and with the complexity of the entire process.[135]

The experience with Hungary's compensation scheme also raises a number of questions, including what are the bases for valuating the expropriated property and for settling the compensation scale, and what forms of payment other than vouchers could be used (annuities, bonds, promissory notes, stock certificates in privatized enterprises, and combinations of several forms).[136] Also to be considered are the adequacy of the amount offered in proportion to the loss, and the security of the compensation instruments.

c. OTHER REMEDIES

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

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[135] *Id.* The use of vouchers may also prove inadequate if the privatization program does not make satisfactory progress. WEIBEL at 920.

[136] See CUETO at 26-28 for a brief discussion of some of the valuation and financing issues that will surface if Cuba seeks to implement a compensation scheme.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

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

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

The types of remedies available to U.S. nationals opting to participate in a parallel Cuban domestic claims program would of necessity have to be few in number, relatively straightforward in execution, and demand little in the way of up-front cash outlays by the state. The results of a domestic Cuban process are likely to leave many dissatisfied. Therefore, both the Cuban government and the claimants should be prepared to exhibit flexibility in working towards as fair and

reasonable a resolution of the claims as can be achieved under those constrained circumstances.

B. RECOMMENDATIONS

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

These and other policy issues should be examined in the near term by a multi-agency task force, perhaps with the assistance of outside experts. The task force's mandate should be to identify what policy issues will need to be addressed by the U.S. Government in the process of negotiating a resolution of the claims issue with Cuba, recommend solutions to those issues, and propose legislation to be enacted if the proposed issue resolution requires appropriations or some other form of legislative action.