EXPROPRIATION CLAIMS INVOLVING THE CUBAN SUGAR INDUSTRY

Matias F. Travieso-Diaz

The Cuban state currently owns both the sugar cane plantations and the sugar mills where the cane is processed. This situation is likely to remain unchanged until there is a transition to a free-market economy, because the current government has adamantly opposed selling those assets or even transferring title to them to joint ventures that involve private foreign investors. (Travieso-Diaz, 2004: 1001, 1035). The reconstruction of the Cuban sugar industry will require massive capital investment to repair and upgrade existing facilities, provide modern harvesting and transportation equipment, and reduce production costs. Since the state will most likely not be in a position to invest the funds needed to rebuild the sugar industry, the Cuban government will be left with no choice but to sell the sugar mills to foreign investors, either through private sales or auctions. The state may decide to "package" several facilities to be sold jointly to improve marketability, and may need to sell the sugar plantations that produce the cane to be processed at the mills, together with the mills themselves. Whatever the means, the sale of the sugar industry components to the private sector should occur quickly, since the state is unlikely to have the means to undertake the complete overhaul that the industry requires.

One of the legal problems that Cuba needs to address as a condition to a successful privatization of the sugar industry is the resolution of outstanding expropriation claims against sugar mills and plantations. As will be discussed in this chapter, Cuba has outstanding expropriation claims by many hundreds of thousands of its nationals, both in the island and abroad, as well as claims by almost six thousand U.S.

nationals whose assets in Cuba were expropriated without compensation during the early years of the Revolution. Many of these claims involve the sugar industry. As the experience of other countries that have undergone free-market transitions demonstrates, it is imperative to establish a framework for the resolution of expropriation claims before the privatization of state-owned enterprises can get fully under way (Fischer, 1992: 230-231).

Aside from privatization considerations, the resolution of outstanding property claims is also a pre-condition to major foreign capital flow into the Cuban sugar industry. As long as property titles remain unsettled, foreigners will perceive investing in Cuba as a rather risky proposition and may be discouraged from stepping into the country.[1]

SUGAR AND THE CUBAN CLAIMS ISSUE

The sugar industry dominated the economy of pre-revolutionary Cuba. In 1945, there were 894 sugarcane estates (0.5% of all farms) controlling 3.3 million hectares of land, or 33.1% of agricultural land. The key actors in sugarcane production were the *colonos* (sugarcane farmers), independent operators who produced sugarcane and supplied it to mills for processing. As sugarcane cultivation was dominant within the agricultural sector, so was sugar production within the industrial sector. In the 1950s, the sugar production complex consisted of 161 sugar mills, 21 sugar refineries, and numerous other plants producing sugar derivatives. The value of the sugar production complex in 1952 (value of mills, refineries, alcohol distilleries, and other plants producing sugar derivatives, but excluding the value of land) has been estimated at 1,159 million pesos,

[1]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 (Gray et al., 1993: 4).

over one third of the total capital stock of the manufacturing sector. Also serving the sugar industry was a massive transportation infrastructure consisting of railroads, roads, and shipping terminals (Pérez-López, 1991).

Foreign investment played a key role in the development of the Cuban sugar industry. According to data in Table 1, out of 184 sugar mills in operation, 101 (55%) were owned or controlled by Cubans, while foreigners owned or controlled 83 (45%), almost evenly split between U.S. citizens and citizens of other countries; foreign-owned or –controlled mills accounted for 63% of sugar production in 1926, indicating that the foreign mills were on average larger than the domestic mills. In the aftermath of an economic and banking crisis in the early 1930s, many Cuban sugar companies went into bankruptcy and were acquired by foreign interests. As a result, by 1939, the number of sugar mills owned or controlled by Cubans had fallen to 56 (32%) and those owned or controlled by foreigners had risen to 118 (68%). In the 1940s and 1950s there was a process of "Cubanization" of the sugar mills, so that by 1958, 131 of the existing 161 mills (81%) were owned or controlled by Cubans and only 40 (19%) were owned or controlled by foreigners. In the latter year, Cuban-owned or –operated mills accounted for over 62% of production.

Table 1
Cuban Sugar Mills and Production According to Nationality of Ownership or Control

Nationality	1926		1939		1958	
	Number of Mills	Output (%)	Number of Mills	Output (%)	Number of Mills	Output (%)
Cuba	101	n.a.	56	22.4	131	62.1
United States	41	63.0	66	55.1	36	36.7
Other foreigners	42	n.a.	52	22.5	4	1.2
Total	184	100.0	174	100.0	161	100.0

Source: Baklanoff (1975, p. 29), based on U.S. and Cuban statistics.

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 (Gordon, 1975). The process started in 1959 with the takeover of agricultural and cattle ranches under the Agrarian Reform Law ("Ley de Reforma," 1959); reached a critical stage in July 1960 with the promulgation of Law 851 ("Ley No. 851,"1960), which authorized the expropriation of the property of U.S. nationals; was carried out through several resolutions in the second half of 1960, again directed mainly against properties owned by U.S. nationals, although those of other foreign nationals were also taken;[2] and continued through 1963, when the last U.S. companies still in private hands were expropriated (Gordon, 1975: 105-106). 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. 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.[3] 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

[2] 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 FCSC (1972).

[3] Law 851 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 reduced 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. [4] 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/ and Gordon (1973).

through agreements between Cuba and the respective countries (e.g., Spain, France, Switzerland, United Kingdom and Canada).[4] Claims have been settled at a fraction of the assessed value of the expropriated assets: 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," 1994).

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.[5] 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) (FCSC, 1972: Exhibit 15). It certified 5,911 of those claims, with an aggregate amount of $1.8 billion; denied 1,195 claims, with an aggregate amount of $1.5 billion; and dismissed without consideration (or saw withdrawn) 1, 710 other claims (FCSC, 1972: Exhibit 15).

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. There were only 131 claimants -- 92 corporations and 39 individuals -- with certified claims of $1 million or more; only 48 claimants, all but

[4] 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/ and Gordon (1973).

[5] 22 U.S.C. §1643 *et seq*. (1988) (amended in 1994).

five of them corporations, had certified claims in excess of $5 million FCSC, 1972: 413). 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 January 2004, of over $6.5 billion (FCSC, 1972: 76) [6] 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.

U.S.-owned sugar mills and other assets associated with the industry were among the most important interests expropriated by Cuba. Table 2, compiled from FCSC records, shows that almost half (9 of the top 20) certified claims by U.S. nationals (identified by an asterisk next to their ranking) were for the expropriation of sugar industry assets. As the table above shows, there are outstanding sugar industry expropriation claims by U.S. nationals amounting to $2.2 billion (in current dollars). In addition, there are non-quantified, but undoubtedly comparable, claims by Cuban nationals whose investments in the sugar industry were also expropriated.

Table 2: Expropriations by the Cuban Government

Rank	Decision #	Claim #	Claimant Name	Certified Amount
1	4122	2578	Cuban Electric Company	$267,568,414.00

[6] 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.

2*	3578	2622	North American Sugar Industries, Inc.	$97,373,415.00
3	6049	2619	Moa Bay Mining Company	$88,349,000.00
4*	3824	2776	United Fruit Sugar Company	$85,100,147.00
5*	5969	665	West Indies Sugar Corporation	$84,880,958.00
6*	3969	2445	American Sugar Company	$81,011,240.00
7	5013	2615	ITT Corporation - Trustee	$80,002,794.00
8	3838	938	Standard Oil Company	$71,611,003.00
9*	6066	2500	Francisco Sugar Company	$58,505,859.00
10	5013	2615	International Telephone and Telegraph	$50,676,964.00
11	4546	1331	Texaco, Inc.	$50,081,110.00
12*	6020	2525	Manati Sugar Company	$48,587,848.00
13*	6034	2156	Bangor Punta Corp.	$39,203,334.00
14	6247	2624	Nicaro Nickel Company	$33,014,083.00
15	6818	1743	Coca-Cola Company	$27,526,239.00
16	6217	2355	Lone Star Cement Corporation	$24,881,287.00
17*	6817	1850	New Tuinucu Sugar Company, Inc.	$23,336,080.00
18	4547	730	Colgate Palmolive Company	$14,507,935.00
19*	6057	2526	Braga Brothers, Inc.	$12,612,873.00
20	3866	3548	Boise Cascade Corporation	$11,745,960.00
			Total for Top 20 Claimants:	$1,250,576,543.00
			Total for Sugar Mill Owners:	$530,611,754.00
			Dollar Percent of Sugar Claims:	42.5%

* Claim by U.S. nationals.
Source: FCSC (1972).

LEGAL BASES FOR THE EXPROPRIATION CLAIMS BY U.S. AND CUBAN NATIONALS

The expropriation claims by U.S. nationals and Cuban citizens have different legal foundations. For space considerations, their discussion here is abbreviated and most of the legal citations that supports it have not been included; they are available in full in Travieso-Díaz (1997). U.S. claims are based on well-recognized international law principles. 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, no currently accepted international law principles assist domestic claimants in obtaining redress for the expropriation of their assets by their government. Therefore, the legal standards for the resolution of the Cuban nationals' claims need to be found within Cuba's laws.

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. The "prompt, adequate and effective" compensation formulation was coined in 1938 by U.S. Secretary of State Cordell Hull. Under current practice, the "prompt" element of the Hull formula means payment without delay. The "adequate" element means that the payment should reflect the "fair market value" or "value as a going concern" of the expropriated property. The "effective" element is satisfied when the payment is made in the currency of the alien's home country; in a convertible currency (as designated by the International Monetary Fund); or in any other currency acceptable to the party whose property is being

expropriated. 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.

The legal bases for the right of Cuban nationals to a remedy for the uncompensated taking of their property by the State after 1959 has been discussed elsewhere (Travieso-Díaz, 1995). Suffice it to say that Cuba has the obligation to provide remedies to those whose property was confiscated without cause or expropriated, or else return the property.

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

Alternative 1: Government-to-Government Negotiations

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.[7] 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. 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 (Lillich and Weston, 1975: 6).

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

[7] 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, 453 U.S. at 688-689 and n.13. [8] Agreement Between the Government of the United States of America and the Government of the

confiscated assets. 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 include the payment of simple interest at the approximate annual rate of 3% from the time the U.S. properties were taken.[8] 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.

The above described traditional settlement agreement would not appear, in itself, to be adequate to satisfy the needs of the parties in the case of Cuba's sugar industry claimants. The amount of the outstanding certified claims by U.S. nationals with respect to sugar interests is so large (over $2 billion) that it would likely outstrip Cuba's ability to pay a significant portion of the principal, let alone interest. In addition, Cuba is already burdened already by a very large external debt: Cuba owed over $12 billion to international private and public lenders in the West at the end of 2002 , and has defaulted on its loan obligations. Also, Cuba owes Russia, as successor to the Soviet Union, some 20 billion U.S. dollars in loans that it has never repaid (U.S. Department of State, 2003). Any additional obligations to U.S. claimants would only exacerbate Cuba's debt situation.

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

---

Federal Republic of Germany Concerning the Settlement of Certain Property Claims, May 13, 1992, TIAS 11959.

. [8] 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.

It would be possible for the United States and Cuba to agree that individual claimants could waive their right to receive a share of a 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 distribution of state obligations. 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 (e.g., in the cited Dames & Moore v. Regan), in the case of Cuba such a flexible settlement may prove to be in the best interest of all parties. There are indications that at least some major U.S. claimants would be interested in alternative methods to settle their claims ("Amstar Says," 1996). There is also some precedent for such flexibility. The mentioned 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.

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. 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 set up to resolve the expropriation claims of U.S. nationals against Iran. 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;" (2) it may hear "official claims of the United States and Iran against each other arising out of contractual arrangements between them;" and (3) it may hear disputes between the United States and Iran regarding the interpretation or performance of any provision of the General Declaration or the claims of their nationals ("Declaration," 1981). One important aspect of the Tribunal's framework is the adoption of the United Nations Commission on International Trade Law's ("UNCITRAL") Arbitration Rules, which are designed to address international commercial arbitration (United Nations, 1976). This choice of rules allowed supervisory jurisdiction to the legal system of the Netherlands where the Tribunal was seated.

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 available to satisfy the

claims of U. S. nationals, and cannot be used for awards in favor of Iranian nationals or Iranian governmental counterclaims.

The structure of the Tribunal is thus largely self-contained in both its procedural operation and its ability to satisfy successful claims (for example, the UNCITRAL rules provide for the appointment of an authority to resolve disputes over the Tribunal's composition). 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. No such funds are likely to exist in the case of Cuba, so provisions would have to be made to have Cuba set up a 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.

Alternative 3: Participation in Cuba's Claim Resolution Program

Another alternative could be to allow U.S. nationals to participate in Cuba's domestic claims resolution program. Under such a program, 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.

ALTERNATIVE RECOMMENDATIONS FOR DEALING WITH CUBAN NATIONALS' CLAIMS

A system of remedies for the property expropriations carried out by a country's government 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.

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

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. Due to these differences, some countries addressing the issue have handled different types of property separately.

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. In setting up a claims resolution program, it would

be necessary to determine whether the various categories of claimants (for example, Cuban citizens residing abroad and those who have become citizens of another country) would qualify for remedies. Another question is which successors in interest, if any, of the original property owners would be entitled to remedies. Given the considerable amount of time that has passed since Cuba's expropriations and the likelihood that most of the former property owners will have died at the time a claims settlement process is implemented, Cuba will need to decide to what extent the heirs of former owners are entitled to share in the remedies, and if so which "heirs" will qualify for remedies.

Who Is to Administer the Remedies?

Some countries have established agencies for the sole purpose of administering the remedies. Other countries assigned responsibility for handling expropriation claims to the local property registries where the property at issue was located. 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.

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

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; 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 suggests that it is extremely important to have these mechanisms in place before seeking to resolve any claims.

What Remedies Should be Made Available?

a. Restitution Methods

Restitution of the actual property that was confiscated ("direct restitution") would be the solution that many U.S. and Cuban claimants who lost sugar industry assets might prefer, assuming such a choice was available under Cuba's claims resolution program. 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 (Foster, 1994: 93). Large industrial installations such as sugar mills 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.[9]

[9] 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. As noted earlier, almost half of the corporations owned sugar mills.

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. Also, in deciding whether to provide direct restitution, the Cuban Government will have to balance the rights and interests of the former owners against those 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 sugar industry 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 who retrieves a major asset such as a sugar mill in a better position than that of other claimants who receive other forms of recovery, such as partial compensation.

There may be instances in which direct restitution will be impractical, but both Cuba and the 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 sugar 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.

Direct and substitutional restitution programs implemented in certain Eastern European countries have been criticized on economic grounds. Gray et al. (1994: 4) summarize the restitution experience in Eastern Europe as follows: "Restitution-in-kind is complex and leaves many problems in its wake. The legal precedence typically given restitution over privatization has created great uncertainty among potential investors and has complicated privatization, particularly in the case of small business and housing. It is also leading to many disputes that are beginning to clog the courts. In Romania, for

example, restitution of agricultural land has led to more than 300,000 court cases." In addition, some analysts have concluded that the use of restitution in Cuba could be fraught with perils (Foster, 1994: 113).

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. and Cuban 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. 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.

b. Issuance of State Obligations

Some 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. For example, Hungary used compensation vouchers as the sole means of indemnifying expropriation claimants (Simonetti et al, 1994: 61). The means of compensation were interest-bearing transferable securities or "vouchers" known as Compensation Coupons, issued by a Compensation Office charged with the administration of the claims program. Compensation was given on a sliding scale with regard to the assessed value of the lost property (Gray et al, 1994: 70). The vouchers were traded as securities, and payed interest at 75% of the basic interest rate set by the central bank. The vouchers were not redeemable for cash, but could be used, among other things, as collateral for loans; to pay (fully or in

part) for property sold by the state, including shares in privatized enterprises; to purchase real estate put up for sale by the state; to be exchanged for annuities; or as investment instruments. In Hungary, vouchers could be used also to purchase farmland in auctions held by the state; however, only former owners of land could use their vouchers for that purpose.

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.[10] 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.

There are, however, potential drawbacks to a system of vouchers or other state-issued instruments. The instruments will fluctuate in value, and are likely to depreciate if Cuba's economy stagnates, as was the experience in the Czech and Slovak republics (Weibel, 1993: 920). In addition, to the extent the instruments are used as income-

[10] A Cuban economist has suggested the issuance of vouchers as one of the options for providing compensation to U.S. corporate claimants; the alternative he proposes would require the claimant to invest in Cuba an amount equal to the value of the coupons it received (Monreal, 1995).

generating devices (e.g., for the collection of annuities) the rate of return is likely to be very low, as has been the experience of Hungary (Simonetti, 1994: 78). 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.

c. Other Compensation Mechanisms

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

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.

Finally, ad-hoc negotiations with individual claimants who are Cuban nationals 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.

A FINAL COMMENT

Whatever methods and procedures are used to resolve the expropriation claims involving Cuba's sugar industry, they must include setting a firm deadline for raising expropriation claims; any claims raised after the deadline would be disallowed, and the property in question would remain in the hands of the new owner. Although imposing deadlines may leave some expropriation claimants without remedy, it avoids holding the process of privatizing the sugar industry hostage to conflicting property claims.

Procedures to resolve conflicts between investors in sugar industry facilities and expropriation claimants will also have to be established. Germany provided a straightforward solution: successful claims against already privatized property did not result in restitution, but entitled the claimant to compensation from the government ("Germany, 1991). This method, however, may only be feasible to the extent funds can be made to finance such a compensation program, or if alternative compensation methods acceptable to the claimants are provided.

REFERENCES

"Amstar Says, Let's Make a Deal." 1996. *Cuba News* (January), 6.

Baklanoff, Eric N. 1975. *Expropriation of U.S. Investments in Cuba, Mexico and Chile*. New York: Praeger Publishers.

"Cuba to Compensate Spaniards for Property Seizures." 1994. Reuters Textline (February 15), available in LEXIS, World Library, Txtlne File.

"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." 1981. mimeographed.

Fischer, Stanley. 1992. "Privatization in East European Transformation," in Christopher Clague and Gordon C. Rauser, editors, *The Emergence of Market Economies in Eastern Europe*. Cambridge: Blackwell Publishers.

Foreign Claims Settlement Commission (FCSC). 1972. *Final Report of the Cuban Claims Program*. Washington: U.S. Government Printing Office.

Foster, Frances H. 1994. "Post-Soviet Approaches to Restitution: Lessons for Cuba," in Joan Klein, editor, *Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties*. Gainesville: Levin College of Law, University of Florida.

"Germany: Why Unification Has Made the Road to Economic Integration Difficult." 1991. *Euromoney Supplement* (July).

Gordon, Michael W. 1973. "The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations Other than the United States," *Lawyer of the Americas*.

Gordon, Michael W. 1975. *The Cuban Nationalizations: The Demise of Property Rights in Cuba*. Buffalo, New York: William S. Hein Co.

Gray, Cheryl W., et al. 1993. *Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe*. World Bank Discussion Paper No. 209. Washington: World Bank.

Lillich, Richard B., and Burns H. Weston. 1975. *International Claims: Their Settlement by Lump Sum Agreements*. Charlottesville, Virginia: University Press of Virginia.

"Ley de Reforma Agraria." 1959. *Gaceta Oficial* (June 3).

"Ley No. 851 de nacionalización." 1960. *Gaceta Oficial* (July 7).

Monreal, Pedro. 1995. "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., January (on file with author).

Pérez-López, Jorge F. 1991. *The Economics of Cuban Sugar*. Pittsburgh: University of Pittsburgh Press.

Simonetti, Katherine, et al. 1994. “Compensation and Resolution of Property Claims in Hungary,” in Joan Klein, editor, *Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties*. Gainesville: Levin College of Law, University of Florida.

Travieso-Diaz, Matías. 1995. “Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba,” *University of Pennsylvania Journal of International Business.*

.

Travieso-Díaz, Matías. 1997. *The Laws and Legal System of a Free-Market Cuba*. Westport, Connecticut: Quorum Books.

Travieso-Diaz, Matías. 2004. “Legal Foundations for a Successful Privatization Program in Cuba,” *Emory International Law Review.*

United Nations. 1976. *United Nations Commission on International Trade Law Arbitration Rules*, UNCITRAL rules. http://www.jus.uio.no/lm/un.arbitration.rules.1976

U.S. Department of State. 2003. *Cuba’s Foreign Debt*. Bureau of Western Hemisphere Affairs Fact Sheet (May 23). http://www.state.gov/p/wha/rls/fs/22743.htm

Weibel, Heather V. 1993. “Avenues for Investment in the Former Czechoslovakia: Privatization and the Historical Development of the New Commercial Code,” *Delaware Journal of Corporate Law.*