

RESOLVING U.S. PROPERTY EXPROPRIATION CLAIMS AGAINST CUBA

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One of the most important bilateral issues that need to be addressed by the United States and the Cuban Government in order to achieve normal commercial relations is the resolution of outstanding claims of U.S. nationals¹ for the uncompensated expropriation of their assets in the early years of the Cuban Revolution.² 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 date.³ U.S. laws require resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted; also, 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 U.S. conditions for the normalization of relations between the U.S. and Cuba and, more recently, the subject of discussions between the two countries.⁴

¹ The term "U.S. nationals" means, in the claims context, those natural persons who were citizens of the United States at 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).

² Equally important may be the resolution of claims by Cuban nationals, whether on the island or abroad. However, these claims are not addressed in this paper.

³ 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/>.

⁴ Since the resumption of diplomatic relations between the United States and Cuba effective July 1, 2015, representatives of the two countries have been meeting to discuss a possible resolution of the expropriation

The resolution of outstanding property claims is also a pre-condition to major foreign capital flow into Cuba, particularly investment involving U.S. nationals. Even third country nationals will perceive investing in Cuba as a risky proposition as long as property titles remain unsettled. Countries in Central and Eastern Europe that delayed the implementation of schemes to settle expropriation claims experienced a great deal of uncertainty over property rights. This uncertainty discouraged potential investors and delayed privatization efforts.⁵

Thus, 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.

This paper addresses and comments on several potential claim resolution alternatives that could be implemented to address the expropriation claims against Cuba of U.S. citizens, should Cuba decide it wants to resolve the issue. Where appropriate, the paper draws on experiences in Central and Eastern European countries in dealing with their own claims issues. The paper, however, does not offer a specific proposal on how the outstanding property claims of U.S. nationals should be handled.⁶ The viability of any proposed program will ultimately be determined by the circumstances under which a settlement of outstanding

claims issue. See, e.g., Frances Robles, *Cuba and U.S. to Discuss Settling Claims on Property*, NEW YORK TIMES, Dec. 5, 2015 at A4.

⁵ 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.

⁶ But see, Matías F. Travieso-Díaz, *RESOLVING U.S. EXPROPRIATION CLAIMS AGAINST CUBA: A VERY MODEST PROPOSAL* (to be published in in the Fall 2015 issue (vol. 21) of the *LAW AND BUSINESS REVIEW OF THE AMERICAS*), which discusses one potential approach for addressing the claims issue.

claims is undertaken, including the economic and political conditions in which Cuba finds itself when it deals with the issue.

HISTORICAL SUMMARY

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 1960.⁷ The process started in 1959 with the takeover of agricultural and cattle ranches under the Agrarian Reform Law;⁸ reached a critical stage in July 1960 with the promulgation of Law 851, which authorized the expropriation of the property of U.S. nationals;⁹ 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;¹⁰ and continued through 1963, when the last U.S. companies still in private hands were expropriated.¹¹ 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.¹² Nevertheless, in almost all cases, no compensation was ever paid.

⁷ 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").

⁸ Ley de Reforma Agraria, *Gaceta Oficial*, June 3, 1959 (hereinafter "AGRARIAN REFORM LAW").

⁹ Law 851 of Nationalization of July 6, 1960, *published in Gaceta Oficial*, July 7, 1960.

¹⁰ Resolution No. 1, August 6, 1960, *Gaceta Oficial*, August 6, 1960; Resolution No. 2, September 17, 1960, *Gaceta Oficial*, September 17, 1960; Laws 890 and 891 of October 13, 1960, *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").

¹¹ *THE CUBAN NATIONALIZATIONS*, at 105-106.

¹² 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

The expropriation claims by nationals of other countries were considerably smaller in number and value than those of U.S. and Cuban nationals, and for the most part have been settled through agreements between Cuba and the respective countries (Spain, France, Switzerland, United Kingdom and Canada).¹³ Claims have been settled at a fraction of the assessed value of the expropriated assets.¹⁴

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 government summary, those agreements have five important features in common: (1) they were negotiated over long periods of time; (2) all the agreements 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 scheduled 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 a combination of trade goods as well as currency; and (5) all agreements were

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.

¹³ 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).

¹⁴ The Spanish claims, for example, were valued at \$350 million but were ultimately settled for about \$40 million. Even this limited amount was not paid until 1994, 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.

negotiated between Cuba and the state that representing the claimants, without claimant participation.¹⁵

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, 1959.¹⁶ 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).¹⁷ It certified 5,911 of those claims, with an aggregate amount of \$1.8 billion;¹⁸ denied 1,195 claims, with an aggregate amount of \$1.5 billion; and dismissed without consideration (or saw withdrawn) 1, 710 other claims.¹⁹ It should be noted that 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, Romania, Vietnam, Iran, and others).²⁰ Although the Cuban Claims Act did not

¹⁵ See <http://www.cubavsbloqueo.cu/>.

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

¹⁷ 1972 FCSC REPORT, Exhibit 15.

¹⁸ *Id.*

¹⁹ 1972 FCSC REPORT, Exhibit 15. It should be noted that in 2005, pursuant to a request from then Secretary of State Condoleezza Rice, the FCSC conducted a Second Cuban Claims Program, whose purpose was to effect the adjudication and certification by the FCSC of claims for uncompensated taking of United States nationals' property by the Cuban government that arose after May 1, 1967, and were not adjudicated in the original Cuban Claims Program. The FCSC received a total of five new claims, denied three of them and certified the other two claims in the total principal amounts of \$51,128,926.95 and \$16,000.00, respectively. See U.S. Department of Justice, Foreign Claims Settlement Commission, Completed Programs – Cuba, at <http://www.justice.gov/fcsc/claims-against-cuba>.

²⁰ The combined certified amounts from expropriations by all other countries is approximately \$1.24 billion. FOREIGN CLAIMS SETTLEMENT COMMISSION 2013 ANNUAL REPORT at 50 (1994).

expressly authorize the inclusion of interest in the amount allowed, the FCSC concluded that interest should be added in a certifiable loss “in conformity with principles of international law, justice and equity, and should be computed from the date of loss to the date of any future settlement.” 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 \$1.8 billion principal yields a present value, as of January 2016, of nearly \$8 billion.

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

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 political and economic 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 U.S. 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;²¹ 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

²¹ 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.)

over a long period of time may be resisted politically by, among others, the generations that have come of age in the island after the expropriations were carried out.²²

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.²³ 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.²⁴ 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.²⁵

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.²⁶ The settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest, although a 1992

²² 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").

²³ *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.

²⁴ 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.

²⁵ *Id.*, 453 U.S. at 679-680; *Asociacion de Reclamantes v. United States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); RICHARD B. LILICH AND BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 6 (1975).

²⁶ 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).

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.²⁷

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.²⁸

This traditional settlement agreement would not appear, in itself, to be adequate to satisfy the expectations 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. Thus, a traditional settlement involving a very small amount of money would not satisfy claimants, who would express their dissatisfaction through the U.S. political system. A traditional settlement involving the payment by Cuba of a large sum of money, even if payment is spread out over time, would be likely to place Cuba in difficult financial straits over some period of time. Such a settlement could also have adverse political repercussions in the island, and potentially give rise to popular dissatisfaction.²⁹

Alternative 2: Methods not Involving Government-to-Government Negotiations

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 with the Cuban

²⁷ 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).

²⁸ See, *Shanghai Power Co. v. United States*, *supra*.

²⁹ See CUETO at 9-12, 34-36.

Government or through participation by the U.S. claimants in Cuba's formal claim resolution program.

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, under terms to be negotiated and before an impartial panel, 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.³⁰ 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

³⁰ 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.

(“Tribunal”) set up to resolve the expropriation claims of U.S. nationals against Iran.³¹ 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.³² This choice of rules allowed supervisory jurisdiction to the legal system of the Netherlands where the Tribunal was seated.³³ The nationals themselves thus both file the claims and present them, and also decide whether to withdraw or accept any settlement offer.

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 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 pyrrhic because no funds might be available from which to satisfy the award.

Alternative 3: Participation in Cuba’s Claim Resolution Program

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. Such a program does not exist at this time, but Cuba could establish it in the future depending on how it chooses to “update” its economic model and the role that private property would play in the economy. Under such a program, there could be several alternative forms of compensation that could be made available to U.S.

³¹ See NORTON at 482-486.

³² 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>

³³ 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).

claimants (as well as to Cuban claimants). These alternative remedies include restitution, issuance of state obligations, and other forms of compensation.

(1) Restitution

Direct restitution of the actual property that was confiscated would be the solution that many U.S. corporate claimants might prefer, assuming such a choice was available under Cuba's claims resolution program.³⁴ 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 relatively easy to establish.³⁵

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. For instance, the property may have been destroyed or substantially deteriorated; it may have

³⁴ 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.*

³⁵ The top twenty certified U.S. claimants are all corporations. Their combined certified claims add up to \$1.3 billion (not counting interest), over 70% of the total claims certified. Most of the corporations owned sugar mills and other large industrial installations that would be identifiable.

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 to satisfy the claimant.

In addition, since the 1990s, Cuba (through state-owned enterprises) has entered into a number of joint ventures and other arrangements with foreign, non-U.S. investors. Many of these endeavors 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.

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.

(2) Issuance of State Obligations

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.³⁶ The vouchers could not be redeemed 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.³⁷

A 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.³⁸ 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.

³⁶ Hungary 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.

³⁷ *Id.* at 69-72. In Hungary, vouchers could be used also to purchase farmland in auctions held by the state; however, only former owners of land could their vouchers for that purpose. *Id.*

³⁸ 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). 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.

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 several potential drawbacks to a system of vouchers or other state-issued instruments.³⁹ The instruments will fluctuate in value, and are likely to depreciate if Cuba's economy stagnates.⁴⁰ 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.⁴¹ 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.

(3) 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

³⁹ 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.

⁴⁰ 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).

⁴¹ The experience in Hungary has been that vouchers used to collect annuities have yielded very disappointing results. SIMONETTI at 78.

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.

CONCLUSIONS

Since the resumption of diplomatic relations between the United States and Cuba effective July 1, 2015, representatives of the two countries have been meeting to discuss a possible resolution of the expropriation claims issue. Despite the limited economic reforms that Cuba has implemented under Raúl Castro since 2010, it is most likely that the claims negotiations now ongoing will be held while Cuba is besieged by a depressed economy.

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 claimants, 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 -- when and if such a program develops -- 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.

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. These claims are not part of the claims certified by the FCSC and their inclusion in the program is prohibited by U.S. law,⁴² but nevertheless these individuals may make a case before the U.S. Government that their claims also should be pursued. The addition of these claims to the claims certified by the FCSC would make the overall value of the claims potentially much higher. The U.S. Government 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.

Another important issue will be whether/how to consider the compensation claims of the Cuban Government against the United States Government for the "human and economic

⁴² See Section 304 of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (“Helms–Burton Law”), 22 U.S.C. § 6082 (5).

damages inflicted on the Cuban people by policies followed by several U.S. governments over more than fifty years"; a press release issued by Cuba's Foreign Affairs Ministry in September 2015 states that the issue above is one that Cuba intends to pursue.⁴³ A report on the embargo/blockade prepared by the Cuban government in July 2014 states that the U.S. actions had cause damages to Cuba estimated at \$116.9 billion.⁴⁴

⁴³ "Comunicado de Prensa de la Delegación Cubana a la Primera Reunión de la Comisión Bilateral Cuba-EE.UU." (September 11, 2015), <http://cubaeeuu.cubaminrex.cu/article/comunicado-de-prensa-de-la-delegacion-cubana-la-primera-reunion-de-la-comision-bilateral>.

⁴⁴ *Report by Cuba on Resolution 68/8 of the United Nations General Assembly entitled "Necessity of ending the economic, commercial and financial blockade imposed by the United States of America against Cuba* (July 2014), p. 37, http://www.cubavsbloqueo.cu/sites/default/files/informe_de_cuba_2014i.pdf