

Fall 1995

# Resolving Property Claims in a Post-Socialist Cuba

Kern Alexander

Jon L. Mills

*University of Florida Levin College of Law*, mills@law.ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>



Part of the [Property Law and Real Estate Commons](#), and the [Transnational Law Commons](#)

---

## Recommended Citation

Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 *Law & Pol'y Int'l Bus.* 137 (1995), available at <http://scholarship.law.ufl.edu/facultypub/702>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [outler@law.ufl.edu](mailto:outler@law.ufl.edu).

# RESOLVING PROPERTY CLAIMS IN A POST-SOCIALIST CUBA

KERN ALEXANDER\*  
JON MILLS\*\*

## I. INTRODUCTION

Fundamental disputes over major issues have plagued relations between the United States and Cuba since Fidel Castro's revolutionary government took power in 1959. The U.S. government has maintained a trade embargo against Cuba since 1962<sup>1</sup> and will not grant diplomatic recognition<sup>2</sup> until the Cuban government adopts meaningful political reforms, liberalizes its economy, and compensates expropriated U.S. entities and individuals who owned property in Cuba.<sup>3</sup> In recent years,

---

\* A.B., Cornell University, 1986; M.S., Oxford University, 1990; M.Phil., Cambridge University, 1992; J.D., University of Minnesota, 1994. Currently, Associate at Pattillo & McKeever, Ocala, Florida.

\*\* B.A., Stetson University, 1969; J.D., University of Florida, 1972; Honorary Doctor of Laws, Stetson College, 1986. Currently, Associate Professor of Law at the University of Florida and the Director of the Center for Governmental Responsibility.

1. The trade embargo was enacted pursuant to the 1917 Trading with the Enemy Act, ch. 106, 40 Stat. 411 (codified at 50 U.S.C. §§ 1-5(b) (1988 & Supp. V 1993)). The Trading with the Enemy Act (TWEA), except for § 5(b), was superseded in 1977 by the International Emergency Economic Powers Act. 50 U.S.C. §§ 1701-06 (1988 & Supp. V 1994). The trade embargo was strengthened in 1992 when President Clinton signed the Cuban Democracy Act, which prohibits foreign subsidiaries of U.S. companies from trading or investing with Cuba. Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. §§ 6001-10 (Supp. V 1994)). Moreover, the president has discretion to withhold foreign aid from any country that provides financial assistance or credit subsidies to Cuba. 22 U.S.C. § 6003. Most recently, the Chairman of the U.S. Senate Foreign Relations Committee, Jesse Helms, has proposed the Cuban Liberty and Democratic Solidarity Act, which would allow U.S. citizens, whose property had been expropriated by the Cuban government, to pursue claims in U.S. courts against foreigners who have invested in these properties. Christopher Marquis, *Raising the Heat on Cuba: Proposed Law Aims at Investors*, MIAMI HERALD, Feb. 10, 1995, at 18A. The Helms proposal has received bi-partisan approval, including support from Senator Bob Graham, D-FL. *Id.*

2. The U.S. government severed diplomatic relations with Cuba on January 3, 1961, primarily because the Castro government did not compensate U.S. parties for loss of expropriated property and, additionally, failed to adopt certain political reforms. Thomas L. Wolfe & John B. White, *Income Tax Consequences of Cuban Expropriations to Cuban Resident Aliens*, 19 U. MIAMI L. REV. 591, 592 (1964-1965).

3. The 1961 Foreign Assistance Act states:

Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished . . . to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United

due to the dramatic reduction in Russian financial support and the failure of many Cuban economic policies, the Cuban government has adopted certain limited economic reforms to attract foreign investment and promote economic growth.<sup>4</sup>

During the summer of 1994, nearly forty thousand Cuban refugees fled Cuba and arrived in southern Florida.<sup>5</sup> As a result, the United States and Cuba undertook secret negotiations that produced an agreement to end the crisis.<sup>6</sup> More recently, the countries secretly negotiated an agreement that allowed nearly 21,000 Cuban refugees at the U.S. naval base in Guantanamo Bay to migrate to the United States and required the U.S. government to repatriate all future Cuban refugees who attempt to enter the United States illegally by sea.<sup>7</sup> By entering

---

States or to receive any other benefit under any law of the United States, until the President determined that such government has taken appropriate steps according to international law standards to return to United States citizens, and to entities not less than 50 per centum beneficially owned by United States citizens, or to 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.

22 U.S.C. § 2370(a)(2) (1988). See also 22 U.S.C. § 283r (1988) (directing the U.S. government's representative to international financial institutions to oppose all loans and loan guarantees to expropriating governments that have not compensated expropriated investors in conformity with international law).

4. Jorge F. Perez-Lopez, *Islands of Capitalism in an Ocean of Socialism: Joint Ventures in Cuba's Development Strategy*, in CUBA AT A CROSSROADS 191-95 (Jorge F. Perez-Lopez ed., 1994). In 1982, the Cuban Council of State established a legal framework for foreign investment, which authorized the creation of joint ventures between Cuban entities and foreign interests in order to promote economic growth. *Id.* The amount of foreign investment has increased dramatically. See *Foreign Registered Businesses in Cuba*, CUBA REPORT (Cuba Newsletter, Inc., Miami, FL), Oct. 1993, at 1, 6.

5. Patricia Zengerle, *U.S. Base Prepares for Transfer of Cubans*, REUTERS LIMITED, BC CYCLE, Jan. 10, 1995, available in Lexis, CURNWS Library; Marquis, *supra* note 1, at 18A (reporting that Cuban refugees used boats and rafts to cross the Florida Straits from June to August in 1995).

6. The 1994 influx of Cuban "boat people" into Florida was reminiscent of the 1980 Mariel boatlift in which over 125,000 Cubans illegally entered southern Florida and caused immense embarrassment to the Carter administration. In response to the 1994 crisis, the Clinton administration undertook *ad hoc* negotiations with the Cuban government, leading to an agreement to increase the annual immigration quota for Cubans seeking residency in the United States to 20,000 in return for Cuba's best efforts at reducing the mass exodus. Christopher Marquis, *Cuba Agrees to End the Exodus*, MIAMI HERALD, Sept. 10, 1994, available in Westlaw, MIA-HRLD Database. See also, Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 99-100 (1995). The U.S. government also agreed to place all Cuban refugees found at sea in the U.S. naval base at Guantanamo Bay, Cuba. *Id.* at 100.

7. Joe Davidson et al., *White House, Reversing Policy, to Let Most Cubans at Guantanamo Immigrate*, WALL ST. J., May 3, 1995, at A3. The agreement allows most of the 21,000 Cuban refugees at the Guantanamo naval base in Cuba to obtain permanent resident status in the U.S. and requires that

into this agreement, the U.S. government reversed a long-standing policy of providing political asylum to all Cuban refugees who fled Cuba.<sup>8</sup> Although the United States disavows any intention to grant diplomatic recognition to Cuba, these recent agreements portend a new and higher degree of cooperation between the two countries in resolving other festering issues.<sup>9</sup> Moreover, as Cuban economic and social conditions continue to deteriorate, the Cuban government has shown a willingness to adopt certain political reforms, should the United States end its trade embargo. These occurrences suggest that a major political transformation may occur in the near future.<sup>10</sup>

As part of completing its transition into a post-socialist market economy, a future Cuban government must adopt a policy that, in some way, will address claims for expropriated property arising out of the 1959 revolution. In setting out a course of action to achieve this objective, the issues and problems that have confronted other post-socialist governments provide critical reference points. Some post-socialist states have enacted compensation laws that may violate international law by prohibiting specified groups of foreigners from asserting property claims.<sup>11</sup> Some post-socialist states have enacted laws favoring

---

all future Cuban refugees found at sea be returned to Cuba. *Id.* High-level delegations of officials from both governments negotiated the agreement. Parties to the negotiation included Under-Secretary of State Peter Tarnoff, the third-ranking official in the State Department, and Ricardo Alarcon, the Chairman of Cuba's National Assembly. Steven Greenhouse, *First Step on Cuba?*, N.Y. TIMES, May 4, 1995, at A3.

8. Steven Greenhouse, *U.S. Will Return Refugees to Cuba in Policy Switch*, N.Y. TIMES, May 3, 1995, at A1. See 8 U.S.C. § 1255(h) (1994). The Cuban Adjustment Act effectively allowed all Cuban refugees to have their non-immigrant, political refugee status adjusted to the immigrant status of lawful, permanent resident of the United States. The part of the Act relevant to most Cuban refugees defines a refugee as a person who (a) is either outside of the country of nationality or has no nationality and is outside of the country in which that person last habitually resided and (b) "is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution, or a well-founded fear of persecution, on account of . . . political opinion." 8 U.S.C. § 1101(a)(42) (1994).

9. See Steven Greenhouse, *U.S.-Cuban Cooperation Noted: New Immigration Policy May Open Door to Broader Topics*, HOUSTON CHRON., May 4, 1995, at A20; Jose de Cordoba & Carla Anne Robbins, *Clinton, Congress Set to Collide on Cuba*, WALL ST. J. May 4, 1995, at A9. The U.S. policy of returning Cuban boat people has enraged many Cuban Americans who feel that all Cubans escaping their homeland should be treated as refugees under U.S. law, thereby becoming eligible for permanent resident status. *Id.*

10. Douglas Farah, *Foreign Investors Finding Cuba More Comfortable with U.S. Away*, WASH. POST, Sept. 12, 1995, at A14.

11. See *Arbitration Between the State of Kuwait and the American Independent Oil Co. (Aminoil)*, 21 I.L.M. 976, 1019-20 (1982) [hereinafter *Aminoil*] (finding that nationalizing one company but not another did not violate international law when there was no discrimination based

restitution as opposed to compensation as a remedy for expropriated claimants, resulting in considerable confusion over who owns what property.<sup>12</sup>

Based on these experiences, this Article assumes that a future Cuban government will provide some form of remedy—either restitution in kind or compensation—to expropriated property owners. In designing a program to reprivatize expropriated property, the relevant laws of the Cuban legal system and the rules of international law governing expropriation and compensation will be important for determining the degree to which, if at all, compensation or property is to be awarded to expropriated claimants.<sup>13</sup> In the event that a future Cuban government fails to comply with international law, it is reasonable to surmise that unsettled property claims will deter foreign investors from investing in Cuba, thereby causing the Cuban economy to suffer.

This Article analyzes some of the major Cuban and international legal issues confronting U.S. and Cuban claimants whose property was expropriated by the Cuban government. Part II reviews the history of the Cuban nationalizations and examines the historical development of the property protection provisions of the Cuban Constitution. Part III

on the nationality of the two companies and there were “adequate reasons” for distinguishing between them); International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petroleum Co./California Asiatic Oil Co. and the Government of the Libyan Arab Republic (U.S. v. Libya), 17 I.L.M. 1, 21–22 (1978) [hereinafter *Texaco*] (stating “the decision of a State to take nationalizing measures constitutes the exercise of an internal legal jurisdiction but carries international consequences when such measures affect international legal relationships in which the nationalizing State is involved”). For a discussion of such compensation laws in Poland and Czechoslovakia, as well as other former Eastern Bloc countries, see *infra* notes 122–41 and accompanying text.

12. For a description of this problem in East Germany, see *infra* notes 218–22 and accompanying text.

13. The terms “expropriation” and “nationalization” have been used interchangeably and with the same meaning, namely, a state’s direct taking of private property. However, in their specific application, terms take on different meanings. A nationalization occurs when a state takes private property as part of a large scale program of economic or social reform. The nationalization usually applies to a whole industry or economic sector. ISI FOIGHEL, NATIONALIZATION AND COMPENSATION 18–26 (1963). An expropriation occurs in a more specific context, however, when the government takes a specific property with or without compensation. See GILLIAN WHITE, NATIONALIZATION OF FOREIGN PROPERTY 11–24 (1961). Both terms essentially refer to a government’s direct taking of private property.

Some authors use the term “confiscation” to mean a *per se* unlawful government taking of property without compensation. See Matias Travieso Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, 16 U. PA. J. INT’L BUS. L. 217, 220 (1995). Other authors, however, define confiscation in a broader sense to include an uncompensated taking of private property by the state in the exercise of its police powers or as a criminal sanction. Since expropriations can occur without compensation, we will use the terms “expropriation” and “nationalization” in a broader sense, covering most instances of direct takings of property.

analyzes the implications of deciding which Cuban legal system should apply to the claims of expropriated property owners.

Part IV discusses the legal and procedural barriers to recovering expropriated property, focusing upon international law of claimant eligibility, abandonment of property, and compensation to expropriated investors. This Part also analyzes both the relevant rules of Cuban property law and the laws enacted by other post-socialist governments to address the claims of expropriated property owners. In addition, the authors discuss policy options, available to a future Cuban government, which would enable former property owners to receive some form of compensation.

Part V recommends that, for the most effective and equitable resolution of the property claims of Cuban and U.S. claimants, the Cuban and U.S. governments should agree to submit all such claims to an international arbitration tribunal. The two governments could authorize such a tribunal to adjudicate all Cuban and U.S. claims based upon rules of public international law and those domestic laws the tribunal deems appropriate. Such an agreement could provide expropriated Cuban and U.S. claimants with some realistic chance to recover compensation. To enter such an agreement, however, the U.S. government would have to negotiate with a government that it currently does not officially recognize.<sup>14</sup> As recent events have shown, the United States is willing to negotiate secretly with Cuba but avoids public exposure due to the political unpopularity of negotiating directly with the Castro regime. Because any resolution to the thousands of property claims will necessarily involve public scrutiny, U.S. policy makers will have to decide when

---

14. Although it is unlikely to enter into negotiations with Cuba in the near future, the U.S. government has in the past negotiated secretly with states with whom it had no official diplomatic relations. For example, in 1979, after the Ayatollah Khomeini's revolutionary government took power, Iran nationalized many sectors of its economy and expropriated many foreign-owned businesses. See generally Christine M. Chinkin, *The Foreign Affairs Power of the U.S. President and the Iranian Hostage Agreement*: Dames & Moore v. Regan, 32 INT'L & COMP. L.Q. 600 (1983). U.S. citizens and companies lost property worth over \$65 million. S.H. Amin, *Iran-United States Claims Settlement*, 32 INT'L & COMP. L.Q. 750, 750 (1983). President Carter responded by signing an order freezing all Iranian-owned assets, both in the United States and in U.S.-owned subsidiaries abroad, and suspending all diplomatic relations with Iran. See *Dames & Moore v. Regan*, 453 U.S. 654, 655-58 (1981) (upholding the president's power under the International Emergency Economic Powers Act to order that all U.S. claims against Iran be submitted to an Iran-United States claims tribunal). The U.S. government, however, undertook secret negotiations with the Iranian government that culminated in the United States-Iran Claims Settlement and Hostage Agreement of January 20, 1981. The Agreement required that all U.S. claims against the Iranian government be heard before an Iran-U.S. Claims Tribunal. See Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, DEP'T ST. BULL., Feb. 1981, at 1, reprinted in *Official Documents: Settlement of the Iran Hostage Crisis*, 75 AM. J. INT'L L. 418 (1981) [hereinafter *Algiers Declaration*].

the benefits of undertaking official negotiations with Cuba outweigh the political criticism that will accompany negotiations. This Article argues that whenever such negotiations begin, the most efficient and equitable resolution of expropriated property claims will be brought about through a Cuban-U.S. claims tribunal.

## II. HISTORY AND BACKGROUND

### A. *The Cuban Nationalizations*

On January 1, 1959, revolutionary forces led by Fidel Castro overthrew the Cuban government of Fulgencio Batista.<sup>15</sup> After amending and reactivating the Cuban Constitution of 1940 as part of a new Fundamental Law, the revolutionary government began an incremental process of collectivizing the economy.<sup>16</sup> During 1959, the government confiscated the property and assets of former Cuban public officials.<sup>17</sup> In addition, the government passed the first Agrarian Reform Law of 1959, which expropriated all large farms in excess of 400 hectares.<sup>18</sup> Although the law provided for compensation in the form of twenty year bonds, no compensation was ever paid to expropriated landowners.<sup>19</sup>

Next, as part of a more concerted effort to strengthen government

---

15. See generally HUGH THOMAS, *THE CUBAN REVOLUTION* 243-49 (1977).

16. MICHAEL GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF PROPERTY RIGHTS IN CUBA* 71-75 (1976). The Fundamental Law was enacted on February 7, 1959, and, although it technically replaced the 1940 Constitution, it retained most of its basic provisions in amended form, some of which were altered to promote the government's new ideological agenda. See *id.* at 71; Nicolas J. Gutierrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault On Private Ownership in Cuba* 3-7 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section of Int'l Law & Practice, Aug. 9, 1994) (on file with *Law and Policy in International Business*). Batista suspended the 1940 constitution in 1953 so that he could govern Cuba in an authoritarian manner. THOMAS, *supra* note 15, at 3-4; see also CARMELO MESA-LAGO, *THE ECONOMY OF SOCIALIST CUBA: A TWO DECADE APPRAISAL* 12 (1981) [hereinafter MESA-LAGO, *SOCIALIST CUBA*].

17. GORDON, *supra* note 16, at 73 n.17 (including the President, Vice President, all cabinet members, and all Senators and Representatives). Some of the property confiscated had been embezzled. See MESA-LAGO, *SOCIALIST CUBA*, *supra* note 16, at 12. However, some government officials whose property was confiscated were guilty of nothing more than having served in the Batista government. GORDON, *supra* note 16, at 73.

18. MESA-LAGO, *SOCIALIST CUBA*, *supra* note 16, at 12. The Agrarian Reform Law was finalized on June 4, 1959, limiting ownership in land to small- and medium-sized farms, cooperatives, and special arrangements deemed to be in the best interests of Cuban economic progress. GORDON, *supra* note 16, at 75.

19. GORDON, *supra* note 16, at 76. The law provided that the bonds would accrue at 4.5% interest, payable in non-convertible instruments. *Id.*

control over the economy, the government expropriated all rental housing and seized factories and warehouses that it deemed abandoned.<sup>20</sup> The government created several agencies authorized to increase state control of the economy.<sup>21</sup> On July 6, 1960, as tensions reached a climax between the Cuban and U.S. governments,<sup>22</sup> the U.S. Congress passed a new sugar law granting the president broad authority to adjust the Cuban sugar quota to any level.<sup>23</sup> On the same day, just a few hours before President Eisenhower decided to drastically reduce the sugar quota, Castro announced the nationalization of all properties owned by U.S. nationals.<sup>24</sup> By the end of 1961, the Cuban government had extended its collectivization program to reach most Cuban owned industries, all foreign-owned refineries, and all U.S.-owned properties, including sugar mills, banks, railroads, and telephone and electric companies.<sup>25</sup> The expropriations measures and the failure of the 1961

---

20. MESA-LAGO, SOCIALIST CUBA, *supra* note 16, at 12–13. The Urban Reform Law of October 14, 1960 authorized the expropriation of all rental housing. *Ley de Reforma Urbana*, published in *Gaceta Oficial*, Oct. 14, 1960, spec. ed., at 1. The Cuban law that authorized the expropriation of all abandoned property was Law 989 of December 5, 1961. See *infra* notes 147–49 and accompanying text. The government, however, did not seize small parcels of land, homes, or personal property owned by Cuban nationals who did not flee the country after the revolution. Diaz, *supra* note 13, at 219. Moreover, currency controls were imposed in September of 1959 that prohibited the transfer of funds abroad. GORDON, *supra* note 16, at 79.

21. MESA-LAGO, SOCIALIST CUBA, *supra* note 16, at 12. The most prominent agency was the National Institute of Agrarian Reform (INRA). *Id.* Although the INRA was authorized to implement rules for compensating expropriated landowners, it never implemented any compensation program.

22. See GORDON, *supra* note 16, at 98. On that day, the U.S. government had reduced Cuba's sugar quota in the United States. *Id.* The Cuban government responded immediately by passing Law No. 851, which authorized expropriation measures against all U.S.-owned property. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 635 (1991) (discussing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

23. An Act to amend the Sugar Act of 1948, 74 Stat. 330 (1960); GORDON, *supra* note 16, at 97 (The bill gave the President this authority until March 31, 1961.). Moreover, on June 30, 1960, the Cuban government had intervened in the management of all foreign-owned oil refineries that had refused to process crude oil imported from the Soviet Union. See *id.* at 94–96.

24. GORDON, *supra* note 16, at 98–99. President Eisenhower reduced the remaining Cuban sugar quota for 1960 from 739,752 tons to 39,752 tons, which resulted in a significant loss of sales for the Cuban government. *Id.* The nationalization of U.S. properties was enacted in accordance with the Fundamental Law of 1959. The law authorized the payment of compensation by the issuance of 30 year bonds with 2% interest, whereas the Agrarian Reform Law had authorized the issuance of 20 year bonds paying 4.5% interest. *Id.* at 98. The government, however, failed to fulfill its obligations under the Agrarian Reform Law and the Fundamental Law to provide compensation to expropriated property owners. *Id.*

25. U.S. corporations that had investments expropriated by the Cuban government included: General Motors, Chrysler, Ford, IBM, AT&T, RCA, Eastman Kodak, United Fruit, Avon Products,



Bay of Pigs invasion led the U.S. government to break diplomatic relations with Cuba in 1961 and impose a trade embargo in 1962.<sup>26</sup> By enacting the second Agrarian Reform Law in 1963, which nationalized all farms larger than sixty-seven hectares, the revolutionary government essentially completed the liquidation of the former capitalist system.<sup>27</sup>

In 1964, Congress amended the 1954 Foreign Claims Settlement Act, authorizing the Foreign Claims Settlement Commission (FCSC) to administer and adjudicate all U.S. claims for expropriated property in Cuba.<sup>28</sup> Today, there are an estimated 8000 outstanding property claims held by Cubans<sup>29</sup> and foreign nationals against the Cuban government.<sup>30</sup> Though Cuba has concluded lump sum settlement agreements

Gillette, Woolworth, and Proctor & Gamble. Sidney Freidberg & Bert Lockwood, Jr., *The Measure of Damages in Claims Against Cuba*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 117 n.3 (R. Lillich ed., 1972).

26. See 22 U.S.C. §§ 6001–10 (Supp. V 1994); CARTER & TRIMBLE, *supra* note 22, at 635; Cf. BORIS GOLDENBERG, THE CUBAN REVOLUTION AND LATIN AMERICA 261–75 (1965).

27. See MESA-LAGO, SOCIALIST CUBA, *supra* note 16, at 14–15. Later, in 1966, the Cuban government infringed upon intellectual property rights by taking the copyrights of works of authors who were nationals of countries that had broken relations with Cuba. GORDON, *supra* note 16, at 107. The government's nationalization program reached a conclusion in March 1968 when Castro announced that all small private businesses would be outlawed, with the exception of some small agricultural businesses. *Id.*

28. See The Cuban Claims Act of 1964, 78 Stat. 1110 (codified at 22 U.S.C. § 1643 et seq. (Supp. V 1994)). Pursuant to Title V of the International Claims Settlement Act of 1949, Congress authorized the International Claims Commission (ICC) to adjudicate and administer certain expropriation claims held by U.S. entities. 78 Stat. 1110–11, 22 U.S.C. § 1643b(b). The ICC was renamed in 1954, becoming the FCSC. In 1964, Congress authorized the FCSC to administer and adjudicate against the Cuban government expropriation claims belonging only to U.S. nationals or companies organized under U.S. law whose claims arose on or after January 1, 1959. 22 U.S.C. § 1643c(a).

29. Cuban expatriates hold claims with an estimated value of around US\$6.9 billion, based on values recorded in 1957, with an estimated value in 1993 of over US\$20 billion. Jose F. Alonso & Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, in 3 CUBA IN TRANSITION 202–04 (George P. Montalvan ed., 1994).

30. At present, the U.S. government has certified 5911 claims of U.S. entities (U.S. citizens or companies) against the Cuban government for property that was valued at US\$1.8 billion. Delissa A. Ridgway, Historical Development Perspective of U.S. Expropriation Claims Against Cuba, Remarks at Cuba in Transition Workshop 12 (Jan. 26, 1995) (transcript available at Shaw, Pittman, Potts & Trobridge and on file with *Law and Policy in International Business*). Because all adjudicated claims bear simple interest at the statutory rate of six percent, the Cuban expropriation claims that are registered with the FCSC are now worth more than \$5.6 billion. FOREIGN CLAIMS SETTLEMENT COMM'N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM 412 (1972); cf. Ridgway, *supra*, at 12 (discussing those claims). By law, the claims of non-U.S. nationals and entities cannot be adjudicated by the FCSC unless Congress amends the Claims Act to provide that such non-U.S. claimants can in fact invoke the protection of the U.S. government in certain proceedings. For a

with a few nations, including France, Switzerland, and Spain,<sup>31</sup> no such agreement has been made with the United States or Cuban expatriates. In gauging the magnitude of Cuba's expropriations, it is helpful to note that the value of the Cuban takings far exceeded the value of property expropriated by the nations of Eastern Europe after World War II and by the Soviet Union after the 1917 Bolshevik revolution.<sup>32</sup>

B. *Comparison to East European Nationalizations*

Because the experiences of the former Communist countries of Central and Eastern Europe provide a context in which to assess the parameters of any future program to resolve Cuban property claims, the expropriation history of the region will be outlined briefly. As did Castro's government in Cuba, the Communist governments that came to power in Eastern Europe during the late 1940s enacted large-scale nationalization programs covering many sectors of their economies.<sup>33</sup> Especially in the case of agricultural expropriations, those states assumed ownership of many large private agricultural holdings, often without providing compensation.<sup>34</sup> Other East European Communist governments expropriated non-agricultural properties without providing any compensation.<sup>35</sup> Since 1989, most of the post-socialist regimes in Eastern Europe and the Commonwealth of Independent States have

---

discussion of agreements to waive the nationality requirements of the standing rule, see *infra* notes 113-21 and accompanying text.

31. Freidberg & Lockwood, *supra* note 25, at 129. See RICHARD B. LILlich & BURNS WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 208-14, 239 (1975) (discussing the inadequacy of lump sum settlements in compensating losses). The Spanish government signed a lump sum agreement with Cuba that settled over US\$350 million in Spanish claims for just over US\$40 million. Diaz, *supra* note 13, at 221 n.14.

32. See FREIDBERG & LOCKWOOD, *supra* note 25, at 129.

33. See, e.g., Katherine Simonetti et al., Compensation and Resolution of Property Claims in Hungary 61, 61-63 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section of Int'l Law & Practice, Aug. 9, 1994) (on file with *Law and Policy in International Business*) (discussing major Hungarian nationalizations of agricultural, mining, industrial, and other facilities and massive real and personal property expropriations); Ewa Gmurzynska, Reprivatization in Poland—An Example for Cuba? 33, 37-44 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section of Int'l Law & Practice Annual Meeting, Aug. 9, 1994) (on file with *Law and Policy in International Business*) (discussing Polish nationalization and expropriation laws).

34. See, e.g., Simonetti et al., *supra* note 33, at 62; Gmurzynska, *supra* note 33, at 37-44.

35. Cf. Mark Ellis, *Drafting Constitutions: Property Rights in Central and Eastern Europe*, 19 YALE J. INT'L L. 197 (1994) (comparing the constitutional rights of property ownership among Eastern European nations).

enacted reprivatization laws providing some form of compensation or restitution in kind to specified groups of former property owners.<sup>36</sup> Even though most post-Communist countries maintain an official policy of restitution or compensation, difficult issues have emerged over the standard of compensation to apply and the eligibility of claimants.

### C. *Property Protection Under the Cuban Constitution*

Cuba's first constitution as an independent nation was enacted in 1901.<sup>37</sup> The 1901 Constitution's property protection provision, Article 32, provided that no person could be deprived of property unless a competent government based the deprivation on a just cause, had a public purpose, and indemnified the owner.<sup>38</sup> Similarly, the framers of the 1940 Cuban Constitution enshrined the right to property as a natural right—guaranteeing to all Cubans the right to own and use property freely.<sup>39</sup> The two most important provisions protecting property are Articles 24 and 87.

Under Article 24, a government taking of property without judicial determination of just cause and public purpose is illegal, and any government taking must be accompanied by "indemnity in cash."<sup>40</sup> If

36. *See id.*

37. CONSTITUCION DE LA REPUBLICA DE CUBA (1901) [Constitution] art. 32 (Cuba), translated in BRITISH AND FOREIGN STATE PAPERS 1900–1901 554 (Augustus H. Oakes & Willoughby Maycock eds., 1904) [hereinafter CONSTITUCION DE 1901]. *See* Rebeca Sanchez-Roig, Cuban Constitutionalism and Rights: An Overview of the Constitutions of 1901 and 1940 7 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section on Int'l Law & Practice, Aug. 9, 1994) (on file with *Law and Policy in International Business*). Before 1940, Cuba had been governed by eight constitutions and various reforms, amendments, and statutes, most of which were enacted by Cuban revolutionary leaders who had sought Cuban independence from Spanish colonial rule. *Id.* at 4–8.

38. CONSTITUCION DE 1901 art. 32.

39. *See* Ignacio E. Sanchez, Constitutional Protection of Cuban Property Rights 6 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section on Int'l Law & Practice, Aug. 9, 1994) (on file with *Law and Policy in International Business*).

40. The specific language of Article 24 reads:

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 the corresponding indemnity in cash, as fixed by a court.

CONSTITUCION DE LA REPUBLICA DE CUBA (1940) [Constitution] art. 24 (Cuba), translated in 1 CONSTITUTIONS OF NATIONS 626 (Amos J. Peasle ed., 2d ed. 1956) [hereinafter CONSTITUCION DE 1940].

the government fails to comply with these requirements, the dispossessed owner may be entitled to restitution of his or her property.<sup>41</sup> Article 87 recognizes the right to “private property in its broadest concept,” which cannot be limited except for public necessity or for “social interest” as established by law.<sup>42</sup>

In addition, Articles 285 and 286 of the 1940 Constitution impose comprehensive procedures for amending the Constitution—procedures that preserve the importance of the property protections. Article 285 provides alternative procedures for initiating the amendment process: a proposed amendment must be either signed by at least 100,000 people or by at least one-fourth of Congress.<sup>43</sup> Once the process has begun, Article 286 sets forth the procedure for ratifying a proposed amendment.<sup>44</sup> After the people initiate a “partial” or “specific” amendment, the amendment must be submitted to a referendum at the next general election. A partial amendment initiated by the Congress must be approved by a vote of two-thirds of both the House and the Senate in a joint assembly.<sup>45</sup> A total revision of the Constitution, however, requires the election of delegates to attend a constitutional assembly where they address all issues pertaining to a complete revision of the Constitution.<sup>46</sup>

On March 10, 1952, Batista overthrew the government of President Prios by leading a military *coup d'état*.<sup>47</sup> In April of 1952, Batista issued a Constitutional Act repealing the 1940 Constitution and its property protection provisions.<sup>48</sup> Batista appointed a Council of Ministers that

---

41. *See id.*

42. Article 87 stated:

The Cuban nation 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, are established by law.

CONSTITUCION DE 1940 art. 87; *see also* INTERNATIONAL COMMISSION OF JURISTS, CUBA AND THE RULE OF LAW 7, 80, 87 (1962) [hereinafter JURISTS] (discussing the 1940 Cuban Constitution and subsequent amendments).

Articles 88–96 are the remaining provisions addressing other specific property rights, such as intellectual property and “latifundios” (large landholdings). CONSTITUCION DE 1940.

43. CONSTITUCION DE 1940 art. 285.

44. *Id.* art. 286.

45. *Id.*

46. *Id.*

47. JURISTS, *supra* note 42, at 82; Sanchez, *supra* note 39, at 10.

48. *See* JURISTS, *supra* note 42, at 83.

had the power to amend the Constitutional Act by a two-thirds vote.<sup>49</sup> Although the newly-appointed Council of Ministers reenacted many of the provisions of the 1940 constitution, it did not reinstate the Constitution's property protection provisions.<sup>50</sup> Batista's seizure of power had the practical political effect of abrogating the property protection provisions of the 1940 Constitution without following the amendment procedures set forth in Articles 285 and 286.

After Castro came to power, the Fundamental Law of 1959 replaced the 1940 Constitution and essentially reenacted Article 24, which provided that the state may only take private property for a public purpose and if compensation is paid. Significantly, the new version authorized government agencies other than the judiciary to expropriate private property.<sup>51</sup> Nevertheless, the amended version of Article 24 required the government to pay compensation, either in bonds or in cash.<sup>52</sup> As we know, however, compensation was never paid.

Some observers have argued that because property rights were made fundamental rights under Articles 24 and 87, changes to those articles constitute a complete revision of the Constitution and thereby require a constitutional convention.<sup>53</sup> Therefore, they argue, Castro's appointment of ministers, who could amend the 1940 Constitution by enacting a Fundamental Law, usurped the authority granted under the 1940 Constitution.<sup>54</sup> Accordingly, under this view, the provisions of the Fundamental Law amending the property protection provisions of the 1940 Constitution are void and the terms of the original 1940 Constitution are still law. Yet, whether the Fundamental Law of 1959 is valid or the original 1940 Constitution is still the law of the land, compensation was required but not paid.

49. Sanchez, *supra* note 39, at 10–11.

50. *See id.*

51. JURISTS, *supra* note 42, at 103–04; Diaz, *supra* note 13, at 232 n.51. In fact the Fundamental Law retained most of the original Article 24 language. In the original 1940 text, Article 24 provided that only a “competent judicial authority” could authorize the expropriation of property, whereas the Fundamental Law was amended in 1960 to delete the term “judicial” and to add the terms “competent authority.” *Id.* Thus, any competent Cuban government agency or official could authorize an expropriation so long as it was in the public interest and compensation was paid. *See id.*

52. GORDON, *supra* note 16, at 70–77.

53. *See* Sanchez, *supra* note 39, at 9–10; *Cf.* Gutierrez, *supra* note 16, at 4–8 (describing a constitutional challenge to the Agrarian Reform Act of June 3, 1959 as violative of Articles 24 and 87 of the Constitution).

54. *Cf.* Gutierrez, *supra* note 16, at 6–7 (suggesting that the Ministers' actions received automatic approval from the “Castro-controlled judiciary”).

Complicating matters, Castro decreed a new Communist constitution in 1976, wherein he essentially codified the government's de facto policy of refusing to compensate expropriated property owners.<sup>55</sup> Before 1976, the government's refusal to pay compensation for the expropriation measures taken pursuant to the Fundamental Law of 1959 had been considered a temporary deviation from the general requirement that compensation be made to expropriated owners. The 1976 Constitution, however, replaced the 1959 Fundamental Law and eliminated most of the government's obligations under previous Cuban law to compensate former property owners.<sup>56</sup>

Article 9 of the 1976 Constitution provides that all laws "are to echo only the will of the working people" and that only "socialist legality" binds the state.<sup>57</sup> Article 9 provides broad powers for the state to control most aspects of social and economic activity.<sup>58</sup> Article 14 prescribes general principles for a socialist economy that include "the socialist ownership" of "the means of production" and the "abolition of the exploitation of man by man."<sup>59</sup> Article 15 eliminates any property rights that expropriated claimants may have had by specifying which properties became "irreversibly established" as property of "the entire people":

The socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to the small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources and flora and fauna in the marine area over which it has jurisdiction, woods, the waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders and the bourgeoisie; as well as over the people's farms, factories, enterprises and economic, social, cultural and sports facilities built, fostered or purchased by the state and those which will be built, fostered or purchased by the state in the

---

55. CONSTITUCION DE LA REPUBLICA DE CUBA (1976) [Constitution] art. 4 (Cuba), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CUBA 1, 9 (Albert P. Blaustein & Gisbert H. Flanz eds., Pamela Falk trans., 1979) [hereinafter CONSTITUCION DE 1976].

56. *Id.*

57. CONSTITUCION DE 1976 art. 9; see Gutierrez, *supra* note 16, at 13.

58. CONSTITUCION DE 1976 art. 9; see Gutierrez, *supra* note 16, at 13.

59. CONSTITUCION DE 1976 art. 14.

future.<sup>60</sup>

In sum, the state's power to take private property without compensation was broadened by the 1976 Constitution. In 1992, the Cuban government, responding to a dramatic reduction in Russian subsidies and the continued deterioration of the Cuban economy, authorized the establishment of *empresas mixtas*, which are joint business ventures with foreign entities.<sup>61</sup> *Empresas mixtas* usually award a controlling interest to the Cuban government and allow foreigners to invest capital in certain industries, such as tourism, mining, communications, real estate, petroleum, manufacturing, sugar, and construction.<sup>62</sup> In addition, Article 15 of the 1976 Constitution was amended to authorize a form of "state capitalism" to foster the creation of *empresas mixtas*.<sup>63</sup>

This review of Cuban legal history demonstrates the confusion that exists over the legal status of private property ownership in Cuba. Before Batista's *coup d'état* in 1952, the Cuban Constitution had a strong legal framework for protecting private property rights. But the combination of Batista's abrogation of the property protection provisions of the 1940 Constitution, coupled with Castro's refusal in the early 1960s to abide by the compensation requirements of Cuba's new laws, significantly eroded private property protections under Cuban law. The damage caused by this erosion of constitutional property protection is exacerbated by the looming questions about the procedural legality of the various constitutional amendments that have affected private property expropriation and compensation. Resolution of the expropriation claims will turn largely on which system of Cuban laws will be applied to claimants.

---

60. CONSTITUCION DE 1976 art. 25. Article 25 also mentions compensation for expropriation:

The expropriation of property for reasons of public benefit or social interest and with due compensation is authorized.

The law establishes the method for the expropriation and the bases on which the need for and usefulness of this action are to be determined, as well as the form of compensation, taking into account the interest and the economic and social needs of the person whose property has been expropriated.

*Id.* Although Article 25 recognizes the principle of compensation, it provides the government with discretion in deciding the amount of compensation, based on the "interests and economic and social needs of the owner." *Id.*

61. *Cf.* Perez-Lopez, *supra* note 4, at 195-98 (discussing recent joint ventures in tourism, services, and manufacturing).

62. Gutierrez, *supra* note 16, at 14-15.

63. *See* CONSTITUCION DE 1976 art. 15.

III. WHICH CUBAN LEGAL SYSTEM SHOULD APPLY TO CLAIMANTS?

A future Cuban government will have to decide which system of Cuban law to apply to expropriation claims. As demonstrated by other post-Communist governments, such as those of Poland, Latvia, and Hungary, one of three different methods can be applied to expropriation claims: (1) use the laws of the pre-Communist government to determine the legality of the taking; (2) determine whether the Communist state violated its own laws when taking its citizens' property or; (3) apply the legal system of the new post-Communist government to determine the legality of the taking. Former Cuban property owners therefore should understand the implications of determining which legal system applies to their claims.

A. *Did the Taking Violate Pre-Communist Law?*

To address the claims of former property owners, Poland has applied the laws of pre-1939 Poland.<sup>64</sup> This policy derives from a legal tradition that respects the concept of the continuity of law. Many of today's Polish laws were enacted during the pre-World War II era and were maintained by the Communist regime.<sup>65</sup> The post-Communist government has also decided to maintain the laws adopted during the Communist era that do not violate the laws that were in effect in pre-1939 Poland.<sup>66</sup> Today's Polish government recognizes expropriations performed during the Communist era provided that they were not undertaken in violation of pre-1939 Polish laws.<sup>67</sup>

Following this approach, lawyers for Cuban expatriates have argued that the Castro expropriations were illegal under the property provisions of the 1940 Cuban Constitution. Article 24 of the 1940 Constitution protected the right of private property and permitted the government to take property only if it offered indemnification or compensation to its owners.<sup>68</sup>

Despite Batista's suspension of the 1940 Constitution and the subsequent failure to reenact its property protection provisions, the Castro

---

64. See Gmurzynska, *supra* note 33, at 53 (discussing the Polish Commercial Code of 1934, which has been the foundation for legal regulation of commercial activity in pre-Communist, Communist, and post-Communist Poland).

65. *Id.*

66. *See id.*

67. In fact, until 1994, the Communist Constitution of 1952 remained in force, although it had been amended substantially. *Id.*

68. For a discussion of property rights in the 1940 Cuban Constitution, see *supra* notes 39-42 and accompanying text.



government essentially reenacted those property provisions in 1959, though with significantly amended language.<sup>69</sup> Among these changes brought by the 1959 Fundamental Law was the addition of Article 232, which authorized the Council of Ministers, with the approval of its president, to amend the Constitution without following the amendment procedures set forth in Articles 285 and 286 of the Constitution.<sup>70</sup> Recall that under the 1940 Constitution all constitutional amendments required a super-majority of the National Assembly or the convening of a plebiscitary assembly.<sup>71</sup> The Council of Ministers thereafter amended Article 24 to permit the nationalization of property belonging to "natural persons or corporate bodies liable for offenses against the national economy or public treasury . . ." <sup>72</sup> The changing of the 1940 Constitution's amendment process and the subsequent amending of the Constitution to allow the nationalization of property made the Council of Ministers' actions technically invalid under the law of pre-revolutionary Cuba. The Council impermissibly changed the 1940 Constitution's amendment process and then used that improper process to "constitutionalize" the nationalization of private property.

Under another approach, the laws authorizing the expropriations could be considered null and void because the Castro government was not duly constituted in accordance with the 1940 Constitution. The weakness of this argument is that it fails to recognize the significance of Batista's suspension of the Constitution before the 1959 revolution and the refusal of his Council of Ministers to reenact its property provisions.

---

69. Gutierrez, *supra* note 16, at 2-3. The 1959 Fundamental Law authorized Castro to appoint a Council of Ministers, which had the power to enact laws to enforce the Fundamental Law and to amend the provisions of the 1940 Constitution, most of which had been reenacted in the language of the Fundamental Law. *Id.* For further discussion of the Fundamental Law as it relates to property rights, see Diaz, *supra* note 13, at 230-33.

70. Gutierrez, *supra* note 16, at 2. Article 232 stated:

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.

Diaz, *supra* note 13, at 236 n.58 (quoting Ley Fundamental, art. 32, published in *Gaceta Oficial*, Feb. 7, 1950, at 1.

71. Article 285 of the 1940 Constitution allowed constitutional amendments to be approved by referendum or by "super-majority" of Congress. CONSTITUCION DE 1940 art. 285. Article 286 provided that major changes of the Constitution could only occur with the approval of a Constitutional Convention followed by a referendum. CONSTITUCION DE 1940 art. 286. See also *supra* notes 43-46 and accompanying text.

72. Gutierrez, *supra* note 16, at 2 (quoting JURISTS, *supra* note 42, at 87).

Since the Batista government seldom relied on the 1940 Constitution as a source of its power, it is open to dispute whether Castro, when he came to power, was bound by a Constitution suspended seven years beforehand.<sup>73</sup> Because of the questionable status of the 1940 Constitution when Castro came to power, a future government that decides to apply pre-Communist law to expropriation claims most likely will apply only those provisions of the 1940 Constitution reenacted by the Fundamental Law of 1959.

B. *Did the Takings Violate Communist Law?*

Cuba's potential post-socialist government could analyze the taking of private property by the Castro government's application of its own socialist law. In Poland, where the Communist government expropriated parcels of less than fifty hectares in direct contravention of the Communist Constitution,<sup>74</sup> most claimants seek either the return of the property or compensation reflecting its fair value. The Polish court system has not yet resolved these claims.<sup>75</sup>

The Castro government expropriated property pursuant to amendments and statutes enacted between 1959 and 1976. In 1960, the Cuban Council of Ministers amended Article 24 of the Fundamental Law to permit the expropriation of property without compensation in cases where the property owners had committed crimes against the state.<sup>76</sup> Moreover, the Agrarian Reform Law of 1959 conformed with the amended version of Article 24 because the takings were for a public purpose,<sup>77</sup> and procedures for providing compensation had been established.<sup>78</sup> In addition, the Urban Reform of 1960 established a compensa-

---

73. *Cf. id.* at 3-7.

74. Gmurzynska, *supra* note 33, at 38-41.

75. *Id.* at 50.

76. The Cuban government enacted the Constitutional Reform Law of July 5, 1960, which amended Article 24 to state: "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 . . ." Diaz, *supra* note 13, at 230-31 n. 46 (quoting Ley de Reforma Constitucional, *published in Gaceta Oficial*, July 5, 1960, at 1).

77. The nationalization of large landholdings was part of a government policy to redistribute land to rural farmers in an effort to increase agricultural production. Diaz, *supra* note 13, at 239.

78. Article 31 of the Agrarian Reform Law states:

The indemnification 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 Republic's Budget for each year

tion program for the owners of expropriated apartment buildings.<sup>79</sup> However, the Cuban government's failure to fulfill its obligation to compensate former owners violated its own nationalization laws.<sup>80</sup>

In addition, the law authorizing the expropriation of "abandoned" property may have violated existing constitutional law, since it was passed to punish those who left Cuba for political reasons and not to promote any public purpose as required by Article 24.<sup>81</sup> In fact, punishing a class of people for certain political beliefs violated Article 33 of the 1940 Constitution, which was reinstated by the 1959 Fundamental Law.<sup>82</sup> Even if the reasons for the expropriations were valid, the abandonment law still failed to pass constitutional muster because it did not provide a procedure for compensating those individuals deemed to have abandoned their property.<sup>83</sup>

The Cuban expropriations of 1959, which denied compensation to former Batista government officials, appear to have complied with the Fundamental Law and its procedural rules. However, the large-scale nationalizations authorized by the Agrarian laws of 1959 and 1963 and by the amendments to the 1959 Fundamental Law passed in 1959 and 1960 appear to have violated the requirement imposed by those laws that compensation be paid to expropriated property owners.<sup>84</sup>

### C. *Did the Taking Violate Post-Communist Law?*

The third way to recognize the validity of Cuban property claims under domestic law would require a post-socialist Cuban government to enact laws that would retroactively apply to the Castro expropriations

shall include the necessary amount to finance the payment of interest, amortization and expenses of the issuance.

Diaz, *supra* note 13, at 239 n.78 (quoting Ley de Reforma Agraria, published in *Gaceta Oficial*, June 3, 1959, at 2).

79. Diaz, *supra* note 13, at 239 n.79.

80. *Id.* at 239.

81. Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, RUTGERS L. REV. 873, 903-04 (1994) (discussing Law 989 of December 6, 1961).

82. *Id.* at 904.

83. *Id.*

84. Even under the more "socialistic" 1976 Constitution, the state has a general obligation to provide compensation for seized property. Article 59 of the 1976 Constitution provides: "Confiscation of property is only applied as a punishment by the authorities, in the cases and by the methods determined by law." CONSTITUCION DE 1976 art. 59. See also Consuegra-Barquín, *supra* note 81, at 896-97.

by requiring compensation or restitution for the former owners. Many post-Communist governments have adopted this approach. The Estonian and Latvian governments both invalidated all laws that nationalized or expropriated private property between 1940 and 1980.<sup>85</sup>

In 1989, the Hungarian government passed a law compensating persons resettled, relocated, or unlawfully convicted during the Communist period for the costs they incurred as well as for the property they lost.<sup>86</sup> The most aggressive Hungarian compensation laws were passed in 1991 and 1992 and applied retroactively to most of the expropriations and nationalizations that occurred during the Communist period.<sup>87</sup> Similarly, a future Cuban government assuming power could reenact the 1940 Constitution without any of the amendments or laws passed by the Castro government. If the Constitution were applied retroactively to the period covering the Batista and Castro era, then claimants would have a stronger argument for restitution or maximum compensation because of the stringent indemnification provision of Article 24. Moreover, as part of its efforts to obtain full value compensation for expropriated claimants, the U.S. government could exert diplomatic and economic pressure on a transition Cuban government to recognize the original property protection provisions of the 1940 Constitution.

#### IV. LEGAL AND PROCEDURAL BARRIERS TO RECOVERY

Significant legal barriers confront the expropriated Cuban property claimant because both international law and the national law of the expropriating state will determine the availability of remedies. The strict claimant-eligibility rules of customary international law may invalidate claims held by the many thousands of Cubans who fled Cuba after the revolution and later became nationals of other countries. Accordingly, such claimants may be deemed to have abandoned their property both under international and Cuban law. But, under international law, these claimants may be entitled to some form of compensation, the value of which depends on the legality of the expropriation, another tenet of international law. Lastly, many factors will go into determining the amount of any compensation; for example, U.S. claim-

---

85. During the period of the 1940s to 1980s, both governments enacted their expropriation measures. Frances Foster, *Post-Soviet Approaches to Restitution: Lessons for Cuba* 93, 95 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section on Int'l Law & Practice, Aug. 9, 1994) (on file with *Law & Policy in International Business*).

86. Simonetti et al., *supra* note 33, at 65, 74.

87. *Id.* at 66-69, 88.

ants will incur income tax liability on compensation received to the extent that such compensation was initially deducted as a loss in previous tax years.

### A. Claimant Eligibility

A preliminary, but fundamental, issue in determining the rights of expropriated property claimants is who has standing to assert a claim for expropriated property. Customary international law has strict rules governing who may assert claims against states for violations of international law: an individual may not bring a claim directly, but may invoke the protection of her or his home state to remedy alleged infringements of rights under international law.<sup>88</sup> These principles of international law will be discussed first. This section will then continue by addressing domestic laws, which also may impose constraints against claimants who seek to recover expropriated property. In passing such laws, governments are constrained both by basic principles of fairness and by practical policy goals, which seek to limit claims to a number that the government can feasibly resolve. To accomplish this, some governments have limited the time period in which claims can be brought.<sup>89</sup> Other countries also have adopted restrictions that permit claims to be brought only if based on property that was expropriated during a certain time period.<sup>90</sup> Another approach has been to prohibit corporations, religious institutions, and other organizations from asserting property claims.<sup>91</sup> More controversially, and possibly in violation of international law, some governments have prohibited foreign nationals and their own citizens who live abroad from asserting claims.<sup>92</sup>

#### 1. Claimant Eligibility Under International Law

Under customary international law, claimants who were Cuban nationals at the time of the expropriation do not have standing to invoke the

88. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1059 (2d ed. 1987).

89. For a discussion of domestic limits on claimant eligibility, see *infra* Part IV.A.2.

90. See, e.g., Law of the Republic of Estonia on the Principles of Property Reform, art. 6 (June 13, 1991), translated in RESTORATION OF THE REPUBLIC OF ESTONIA: SELECTION OF LEGAL ACTS 55, 56 (Advig Kiris ed., 1991) [hereinafter *Estonian Property Reform Principles*]. Under Estonian law, illegal expropriations occurred between June 16, 1940 and June 1, 1981. *Id.* Latvian law recognizes expropriations from "the 1940s to 1980s." Republic of Latvia Law on the Return of Buildings to their Legal Owners ¶ 1 (Oct. 30, 1991) (translation obtained from the Latvian Embassy to the United States) (on file with *Law and Policy in International Business*).

91. See Simonetti et al., *supra* note 33, at 66–68 (discussing Hungary's Compensation Laws).

92. For examples of prohibited claims see *infra* notes 122–37 and accompanying text.

diplomatic protection of a foreign state. They must pursue their claims through the Cuban court system because, absent a treaty or agreement to the contrary, international law provides no redress for individual claimants against one's own state unless the claim arises from the state's breach of a fundamental norm of international law.<sup>93</sup> Expropriation of property without compensation does not rise to the level of violation of a peremptory norm. Likewise, a company which has its primary place of operation in Cuba and/or was incorporated in Cuba has no standing to invoke the protection of a foreign state.<sup>94</sup> By contrast, a company that conducted business in Cuba, but was incorporated in and had its primary place of operation in another state, may invoke the diplomatic protection of its home state against Cuba for damages suffered as a result of any infringement of its rights by the Cuban government.<sup>95</sup> International tribunals, however, have not decided the issue of whether shareholders may invoke the protection of their home state against the foreign state under the laws of which the shareholders' company was organized.<sup>96</sup>

Customary international law permits a state to assert a claim against another state on behalf of its nationals or citizens when their rights under international law have been infringed by the respondent state.<sup>97</sup> Individuals, however, have no legal capacity to assert claims under international law against foreign states because only states, and not

93. International law distinguishes between rules of customary international law and peremptory norms. Peremptory norms are fundamental principles (*jus cogens*) that include prohibitions against slavery, piracy, unlawful use of force, and certain basic political and social rights enumerated in the international human rights conventions. See HENKIN ET AL., *supra* note 88, at 1000. When the domestic state has violated a peremptory norm of international law against one of its nationals, a foreign state may invoke its diplomatic protection on behalf of the aggrieved individual. *Id.* at 999-1001, 1019. The foreign state's right of diplomatic protection derives from the obligation of all states *erga omnes* (to the world community) not to violate peremptory norms of international law, because all states suffer injury as a result of such violations. *Id.* at 1019. By contrast, when an individual suffers injury as a result of its state's violation of customary international law, but the violation itself does not rise to the level of a breach of a peremptory norm, a foreign state may not invoke its diplomatic protection. *Id.* In the latter case, a state may only assert the claim of an individual if it has a diplomatic link with the aggrieved party. See Case Concerning the Barcelona Traction, Light, and Power Co., Ltd. (Belgium v. Spain) Second Phase, 1970 I.C.J. 3 (Feb. 5) [hereinafter *Barcelona Traction*].

94. See *Barcelona Traction*, 1970 I.C.J. 3.

95. *Id.* at 37. These legal criteria become more difficult to identify as the ownership, management and workforces of multinational enterprises become increasingly transnational. See ROBERT REICH, *THE WORK OF NATIONS* 137-53 (1991).

96. See, e.g., *Barcelona Traction*, 1970 I.C.J. at 48.

97. *Id.* at 34-35. See also EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 356-57 (1916).

individuals, are subjects of international law.<sup>98</sup> In addition, an individual has no international legal right to compel his or her home state to assert a claim against a foreign state for an alleged injury suffered by the individual in violation of international law;<sup>99</sup> the state has discretionary power in deciding whether to assert a claim on behalf of its nationals.<sup>100</sup>

To invoke the diplomatic protection of his or her state, a claimant must have been a national of the protecting state at the time the claim arose and continuously until the claim is filed.<sup>101</sup> Therefore, for the U.S. government to specifically represent injuries suffered by a U.S. national, it must be able to show in fact both that the claimant presently is a U.S. national and that the individual seeking compensation was a U.S. national or citizen at the time the claim arose.

Many Cuban nationals whose property was taken by the Castro regime fled Cuba and settled in the United States, where they eventually acquired the status of permanent residents or citizens of the United States. While their claims arose in Cuba, they seek the protection of the U.S. government. Such protection could not be granted because expatriates were not U.S. citizens when their claims arose. Moreover, the Castro regime enacted laws prohibiting Cuban exiles who fled Cuba after the revolution from asserting property claims in Cuban courts.<sup>102</sup>

98. See CARTER & TRIMBLE, *supra* note 22, at 860; see also Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 24 (Apr. 6). The Permanent Court of International Justice best articulated this doctrine:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser.A) No.2, at 12 (Aug. 30).

99. *Barcelona Traction*, 1970 I.C.J. at 44.

100. *Id.* The I.C.J. held, *inter alia*, the state, "retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case." *Id.*

101. HENKIN ET AL., *supra* note 88, at 1068-69 (discussing the positions of the *Restatement* and the U.S. Department of State).

102. MESA-LAGO, SOCIALIST CUBA, *supra* note 16, at 12.

These exiled Cubans and Cuban-American citizens are trapped in a gray area of the law where the strict application of the standing rules of customary international law leaves them with no recourse.

Corporations face different dilemmas. A corporation's right to invoke diplomatic protection derives from the state under the laws of which the entity is incorporated and maintains a registered office.<sup>103</sup> Indeed, some states have granted diplomatic protection to companies solely because their seat of management, or "center of control," was located in the state's territory.<sup>104</sup> Although no absolute test has emerged, most states require a "genuine connection" between the company and the state the protection of which it seeks.<sup>105</sup> The International Court of Justice applied this rule in the *Barcelona Traction* case.<sup>106</sup> There, the court held that Belgian shareholders of a company doing business in Spain, but organized under Canadian law, could not invoke the protection of Belgium to assert a claim against Spain for allegedly violating the rights of the Canadian company's Spanish branch.<sup>107</sup> The court reasoned that *Barcelona Traction's* direct links to Canada, and to no other country, entitled only the Canadian government to bring a claim on its behalf.<sup>108</sup> Only the company, not the shareholders, could benefit from any rights the company possessed under international law.<sup>109</sup> Moreover, although the Belgian shareholders had suffered an economic loss, none of their rights as shareholders under Spanish law had been infringed, and therefore they had no privilege to invoke the protection of the Belgian government.<sup>110</sup>

The court refused to answer the question of whether Belgium would

---

103. *Barcelona Traction*, 1970 I.C.J. at 42.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The Court held that only Canada, and not the state of the company's shareholders (Belgium), could assert a claim on behalf of *Barcelona Traction* because the company had its headquarters in Canada and it was incorporated under Canadian law. *Id.*

108. *Id.* at 35.

109. *Id.* The I.C.J. held:

[T]he mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. . . . Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

*Id.*

110. *Id.* at 35, 37.



have had standing if Barcelona Traction had been organized under Spanish law, but it recognized in *dicta* that “a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company.”<sup>111</sup> Under this theory, foreign shareholders of a company organized and doing business under the laws of Cuba conceivably could have standing to invoke the protection of their home states against the Cuban government for alleged violations of either the rights of the shareholders or of the company under international law.<sup>112</sup>

To circumvent these standing issues, states may enter agreements waiving the nationality requirements of the standing rule by allowing themselves or third party states to bring claims on behalf of injured aliens. Such negotiated concessions generally take the form of bilateral agreements or treaties.<sup>113</sup> The U.S. government has entered such agreements, most recently with the government of Albania.<sup>114</sup> The Albanian-U.S. agreement allows the U.S. government to assert claims on behalf of “dual United States-Albanian nationals” if “those nationals are domiciled in the United States currently or for at least half the period of time between the taking of their property in Albania and the date [of] entry into force of the agreement.”<sup>115</sup> The agreement permits the U.S. government to assert claims on behalf of individuals who did not become U.S. nationals until after their respective claims arose against the Albanian government.<sup>116</sup>

111. *Id.* at 48. The court refused to give this theory any further consideration.

112. *See id.* at 49.

113. HENKIN ET AL., *supra* note 88, at 1001, 1068–69. Moreover, in 1955 Congress amended the Italian Claims Act to permit the inclusion of claimants who were not U.S. citizens at the time the Italian government expropriated their property but who had become U.S. citizens by the time the U.S. government had agreed to a settlement with the Italian government. *See* 22 U.S.C. § 1641(c) (1988). Congress likely would not approve a similar amendment to the Cuban Claims Act because it may be opposed by the existing certified U.S. claimants, whose share of any future lump sum award would be reduced if the claimant class were enlarged and the negotiated final award were less than 100%. Every post-World War II U.S. lump sum agreement has been for an amount less than 100% of the property’s adjudicated value. *Cf.* LILLICH & WESTON, *supra* note 31, at 236–40. For other reasons why amending the Cuban Claims Act to expand the number of claimants would be problematic, see generally Robert C. Helander, *Creditors’ Rights: Claims Against Cuban Confiscated Assets*, in *INVESTING IN CUBA: PROBLEMS AND PROSPECTS* 37, 42 (1994).

114. *See* Marion Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT’L L. 89, 93–96 (1994) (discussing the Albanian-U.S. agreement of 1993, in which both countries agreed that Albania would create an Albanian commission to resolve all U.S. property claims).

115. *Id.* at 95.

116. *Id.*

Similarly, the U.S. and Czechoslovakian governments signed an agreement in 1981 settling all claims held by U.S. citizens against the Czechoslovakian government.<sup>117</sup> The agreement also allowed those persons whose property was expropriated by the Czechoslovakian government between 1945 and 1948 and who became U.S. citizens by 1948 to receive a portion of the lump sum settlement.<sup>118</sup> The Department of State vigorously opposed this deviation from well-settled principles of international law and feared the provision would create a precedent that would involve the U.S. government in a whole range of marginal and new claims.<sup>119</sup> However, Congress prevailed, and the settlement provision allocated a portion of the settlement proceeds to U.S. citizens whose property was taken between 1945 and 1948, even if their claims previously had been rejected by the FCSC because they were not U.S. nationals at the time their property was expropriated.<sup>120</sup> Despite passing the legislation, Congress reaffirmed its support for the traditional rule of diplomatic espousal by inserting language into the claims act that this settlement award "does not establish any precedent for future claims payments."<sup>121</sup>

## 2. Claimant Eligibility Under Domestic Law

The experiences of former Eastern Bloc countries provide examples as to how claims based on expropriation have played out in the domestic context. The Estonian government, for example, has enacted property laws that permit former citizens, current citizens, and their heirs to bring claims against the current government for property that was expropriated by the Communist regime.<sup>122</sup> Similarly, the Latvian govern-

---

117. See Czechoslovakian Claims Settlement Act of 1981, Pub. L. No. 97-127, § 6(a)(2)(B), 95 Stat. 1675 (codified as amended at 22 U.S.C. § 1642 (1988)); see also Vrativlav Pechota, *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 AM. J. INT'L L. 639, 640 (1982). The U.S.-Czechoslovak agreement settled all claims held by U.S. citizens against Czechoslovakia for expropriations carried out between 1945 and 1981. *Id.*

118. Pechota, *supra* note 117, at 640, 649. The agreement required that the Czechoslovak government pay a lump sum of US\$81.5 million to be distributed to U.S. claimants on a *pro-rata* basis. The U.S. government agreed to return to Czechoslovakia 18.4 million metric tons of monetary gold (worth US\$250 million) and also agreed to release blocking control over certain properties. *Id.* Letter from Assistant Secretary of State for Congressional Affairs, *reprinted in* S. Rep. No. 97-211, 97th Cong., 1st Sess. 5 (1981).

119. *Cf.* Pechota, *supra* note 117, at 642-44.

120. Czechoslovakian Claims Settlement Act of 1981, 95 Stat. 1676-77 (codified as amended at 22 U.S.C. § 1642 (1988)).

121. *Id.*

122. Foster, *supra* note 85, at 93, 96.

ment permits such claims to be asserted by former owners and their heirs, regardless of present citizenship.<sup>123</sup> Latvia also permits domestic and foreign corporations, governmental entities, and religious institutions to assert claims.<sup>124</sup> Although Latvian law allows such claims, Estonia and Lithuania have far more restrictive rules on who may bring claims.<sup>125</sup> Estonia prohibits aliens, foreign states, and other foreign legal entities from bringing claims, for the reason that these foreign entities can seek redress through inter-state negotiations between their home state and Estonia.<sup>126</sup> Such inter-state negotiations often result in lump sum settlement agreements in which the expropriated foreign claimant receives a small fraction of the claim's original value.<sup>127</sup> Lithuania has adopted even narrower standards by allowing only current citizens and permanent residents to file claims.<sup>128</sup>

Some of the largest post-Communist countries have also restricted the kinds of claimants eligible for compensation. Although Poland has yet to approve a law to provide compensation for expropriated property, some proposed drafts preclude all foreign nationals or foreign business entities from asserting compensation claims.<sup>129</sup> These proposed laws would limit those eligible for compensation to Polish citizens and residents.<sup>130</sup>

The Hungarian compensation laws also restrict who can bring property claims.<sup>131</sup> The Hungarian First Compensation Law restricts the eligible group of claimants to: (1) persons who were Hungarian citizens at the time the First Compensation Law came into force; (2) persons

123. *Id.* at 97.

124. For example, Estonian law permits restitution to nonprofit community and religious organizations. Estonian Property Reform Principles, arts. 7(1), 7(4), 9(1), *supra* note 90, at 56–58. Latvia has also allowed claims from former religious groups. Foster, *supra* note 85, at 98 (citing Latvian Radio, Jan. 13, 1994, translated in BBC Summary of World Broadcasts, Jan. 21, 1994). The focus of restitution in the Baltic Republics, however, has been on land and residences. *Id.* (citing Frances Foster, Former Soviet Republics' Approaches to Restitution 7 (1994) (unpublished manuscript on file with *Law and Policy in International Business*)).

125. See Foster, *supra* note 85, at 97–98.

126. *Id.* at 97.

127. See generally LILlich & WESTON, *supra* note 31, at 230–38. Lillich and Weston calculated that by 1975 payments pursuant to lump sum settlements were signed on average twenty years after the expropriation occurred and provided compensation in a range from 4.5% to 60% of the adjudicated value of the claims excluding interest. See *id.* at 20–22, 179, 218 n.54–56.

128. Foster, *supra* note 85, at 98. The heirs of previous owners must provide documentary proof of permanent residence or Lithuanian citizenship. *Id.*

129. Gmurzynska, *supra* note 33, at 50, 51 n.2.

130. *Id.* at 51.

131. See Simonetti et al., *supra* note 33, at 65–69.

who were Hungarian citizens at the time of the actionable injury; (3) persons who were deprived of their Hungarian citizenship; or (4) non-Hungarian citizens who could claim primary residence in Hungary on December 31, 1990.<sup>132</sup> The law provides compensation *only* to natural persons and not to companies or any other organizations.<sup>133</sup> Moreover, individuals who have had their claims settled by treaty or by any other agreement with the government may not receive further compensation.<sup>134</sup>

The former Czechoslovakian government, after the "velvet revolution" in 1989, enacted three major restitution laws that provided claimants with the option of reacquiring their former properties or receiving compensation.<sup>135</sup> The law, however, restricted the eligibility of former citizens and emigres in obtaining compensation or restitution.<sup>136</sup> For instance, emigres could only file claims for "small" parcels of property, while resident citizens could file claims for both small and large parcels of property.<sup>137</sup> Resident citizens could seek restitution of agricultural or forestry land, whereas former citizens or emigres could not.<sup>138</sup>

The policies of these post-Communist governments to restrict the class of eligible claimants based on citizenship, nationality, and residency explicitly discriminates against foreigners who had property taken without compensation and denies those foreigners any redress in that country for their claims. International law prohibits a state from enacting expropriations that purposively apply only to foreign-owned property.<sup>139</sup> Such expropriations discriminate on the basis of nationality, violate customary international law, and entitle the expropriated owner to full value compensation.<sup>140</sup>

---

132. *Id.* at 65–66.

133. *Id.* at 66.

134. *Id.* When these claimants receive lump sum awards, they are deemed "satisfied" or compensated and thus are precluded from pursuing their claim any further. See LILICH & WESTON, *SUPRA* note 31, at 132.

135. Anna Gelpern, *The Law and Politics of Reprivatization in East-Central Europe*, 14 U. PA. J. INT'L BUS. L. 315, 338, 354–58 (1993).

136. *Id.* at 340–41.

137. *Id.*

138. *Id.* at 341 n.95.

139. See *supra* note 11 and accompanying text.

140. One scholar summarized the doctrine in this way:

... measures taken in violation of treaty commitments or in pursuit of no public purpose, or measures discriminatory against the alien, are unlawful under international law. A subsequent denial of justice also entails the state's responsibility for an international tort, so that measures which are followed by a denial of justice are similar in their effects to measures unlawful *ab initio*.

By refusing to permit specific groups to file compensation claims, these governments in effect ratify certain expropriations that occurred during the Communist period. Moreover, their refusals to recognize the claims of foreign parties logically can be viewed as discriminatory takings in violation of international law. In contrast, there is no international law violation when a government prohibits only the claims of those former alien owners who have had their claims settled by lump sum agreement or by any other agreement with the respondent government.<sup>141</sup>

To comply with international law, Cuba should broadly define the group of eligible claimants to include all former owners of Cuban property (individuals and business entities) at the time of expropriation. Understandably, such a broad definition of eligible claimants would result in many thousands of claims against the Cuban government—imposing a substantial financial burden on Cuba's limited budget. The Cuban government could reduce this amount by negotiating other settlement agreements with states where nationals hold substantial claims. Because past settlement agreements have produced compensation awards that are generally far less than the full value of the property, the Cuban government could conceivably follow the precedents of other nations and adopt a compensation program that, in conjunction with major economic reforms, would provide satisfactory compensation to former owners of Cuban property.<sup>142</sup>

## B. Abandonment

### 1. International Law of Abandonment

At present, the Cuban government maintains that Cubans and foreign-

A. A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* 307 (1962). See also IAN BROWN-LIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 539 (3d ed. 1978) (discriminatory takings are within the category of those "illegal apart from a failure to provide for compensation . . ."); BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 860 (2d ed. 1995) (quoting *Statement of President Ronald Reagan*, 19 WEEKLY COMP. OF PRES. DOC. 1216-18 (Sept. 9, 1983)); Lord McNair, *The Seizure of Property and Enterprises in Indonesia*, VI *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAL RECT* [NETH. INT'L LAW REV.] 218, 247-49 (1959).

141. The Cuban government has already signed six lump sum settlement agreements with developed countries. See *supra* note 31 and accompanying text.

142. The lump sum settlements agreed to by the Cuban government have provided expropriated property claimants with between 10% and 25% of the property's value. See *supra* notes 29-32 and accompanying text. For instance, the value of Spanish claims totaled nearly \$350 million but were ultimately settled for \$40 million. Diaz, *supra* note 13, at 221 n.14 (citing *Cuba to Compensate Spaniards for Property Seizures*, REUTERS TEXTLINE, Feb. 15, 1994, available in LEXIS, World Library, Txtline File).

ers who fled after the revolution and failed to return to Cuba abandoned their property to the Cuban government.<sup>143</sup> But, under international law, those who fled Cuba after the revolution did not abandon their claims for expropriated property.

Under international law, *force majeure* can be invoked to protect a party against the consequences of a wrongful act if the act was due to an irresistible force or to an unforeseen external event beyond the party's control.<sup>144</sup> Such an event must have made it impossible for the party to act in conformity with its obligation. As a case in point, the Iran-U.S. Claims Tribunal dealt with the issue of abandonment during the Iranian revolution. It held that, as a result of *force majeure* conditions during the 1979 revolution, U.S. individuals and businesses were justified in leaving Iran and thereby lost none of their claims for expropriated property.<sup>145</sup>

In 1961, the Cuban government enacted a law making it illegal for Cubans to leave Cuba and penalized those who fled after the revolution by authorizing state agencies to seize their property.<sup>146</sup> Moreover, when some foreign-owned companies began withdrawing their investments and employees after the revolution, the Cuban government responded by directing expropriations against foreign-owned property.<sup>147</sup> Cuban authorities defended their actions on the grounds that a company's withdrawal of its investment was tantamount to abandonment and thus justified the seizure of any related property.<sup>148</sup>

The Cuban government has argued that because no irresistible force or external event compelled the departure of any Cuban property owner, the doctrine of *force majeure* does not apply: those who decided to leave acted on their own volition and therefore abandoned their legal rights to any Cuban property.<sup>149</sup> Arguably to the contrary, however, the tumultuous events in Cuba after the 1959 revolution induced an immi-

143. The "abandoned property" law was passed December 5, 1961. Diaz, *supra* note 13, at 220 (citing Ley [Law] 989, published in *Gaceta Oficial*, Dec. 6, 1961, at 23,705). Law 989 provided that all Cubans who left Cuba for the United States and who failed to return within 29 days would have their property confiscated by the state. *Id.* at 235 n.64. Moreover, Cubans who had traveled to destinations other than the United States for periods of 60 days or more were deemed to have permanently abandoned any claim to their property. *Id.*

144. HENKIN ET AL., *supra* note 88, at 538.

145. See, e.g., *Motorola, Inc. v. Iran Nat'l Airlines Corp.*, 19 Iran-U.S. Cl. Trib. Rep. 73, 85 (1988). The Iranian government had passed laws similar to Cuba's, which resulted in foreigners losing their claims to expropriated property if they fled Iran during or after the 1979 revolution.

146. See Diaz, *supra* note 13, at 235.

147. GORDON, *supra* note 16, at 96-102; THOMAS, *supra* note 15, at 475.

148. Interview with Pedro Monreal, Research Associate, Center for American Studies, Havana, Cuba (Apr. 14, 1995).

149. *Id.*

nent fear of political and economic persecution among many Cubans and foreigners.<sup>150</sup> In this way, the revolutionary situation in Iran in 1979 was similar to both Castro's violent overthrow of the Cuban government and his subsequent pacification of the Cuban population. Although the rulings of the Iran-U.S. Claims Tribunal have no binding effect on Cuban property claims, they provide a useful analogy for arguing that, as a result of *force majeure*, the Cuban property owners who fled Cuba gave up none of their rights in expropriated property.<sup>151</sup>

In addition to the *force majeure* doctrine, Cuban and U.S. claimants could invoke the doctrine of necessity. Necessity serves to protect a party against the consequences of a wrongful act if the act was deliberately taken to safeguard "an essential interest" of the party against a "grave and imminent peril."<sup>152</sup> The essential interests of individuals include their right to avoid political persecution. Similarly, an essential interest of a business entity would be to avoid a state-imposed dissolution or expropriation of its assets.

Many Cubans fled Cuba after the revolution because Castro began to enact politically repressive legislation that outlawed most political opposition groups.<sup>153</sup> Similarly, many foreign business concerns were justified by necessity when they began withdrawing employees and assets from Cuba in anticipation of Castro's expropriation measures. These individuals were justified by necessity in leaving Cuba and should not be penalized for abandoning their property.<sup>154</sup>

Moreover, customary international law permits people to flee their country in times of emergency or when suffering political persecution.<sup>155</sup> Indeed, the International Covenant for Political and Civil Rights sets forth what has generally become accepted in state practice as a right to travel under customary international law.<sup>156</sup> The severe restrictions on foreign travel imposed by the Castro government against its citizens appear to have violated customary international law.<sup>157</sup> This further supports the proposition that those who fled Cuba after Castro came to

150. THOMAS, *supra* note 15, at 450-55.

151. *See, e.g., Motorola, Inc.*, 19 Iran-U.S. Cl. Trib. Rep. at 85.

152. HENKIN ET AL., *supra* note 88, at 540.

153. *See* THOMAS, *supra* note 15, at 449-73.

154. *Cf. id.*

155. *Universal Declaration of Human Rights*, arts. 13, 14, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, 74, U.N. Doc. A/810 (1948).

156. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 54, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368, 372.

157. *See id.*

power did not abandon their claims for expropriated property under international law.

## 2. The Cuban Law of Abandonment

Cuban domestic common and civil law recognize that an occupant of land acquires certain rights by virtue of continuous possession of that land.<sup>158</sup> This is sometimes known as the doctrine of adverse possession or of *usucapio*.<sup>159</sup> The 1889 Spanish civil code's definition of adverse possession distinguished between "ordinary" and "extra-ordinary" adverse possession.<sup>160</sup> In ordinary adverse possession, a possessor's legal right in land vested only if he or she had possession of the land for an uninterrupted period of twenty years and had no knowledge of other legal title to the land.<sup>161</sup> In extraordinary adverse possession, the possessor could have knowledge of other legal title to the land so long as he or she maintained uninterrupted possession for thirty years.<sup>162</sup>

In addition to the 1889 Spanish code, the 1988 Cuban Socialist Civil Code also defines the law of adverse possession.<sup>163</sup> The Socialist Code allows no bad faith or extraordinary possession and no adverse possession against state property.<sup>164</sup> Also, the period for ordinary adverse possession of urban real property is only five years, and the Code recognizes no distinction for property owners who currently reside in Cuba.<sup>165</sup> Furthermore, the Cuban abandonment statute authorized the government to expropriate property without compensation when the owner failed to return to Cuba within the period specified in the travel

---

158. Consuegra-Barquín, *supra* note 81, at 905.

159. Adverse possession applied when an individual possessed land for a certain period of time without having its possession challenged by the property's legal owner. *Usucapio* is a Roman Law term that closely corresponds to the common law term of prescription or adverse possession. Under the Roman Law, to obtain legal title, a possessor needed to prove undisturbed control for two years for real estate and for one year for movables. J. A. CROOK, *LAW AND LIFE OF ROME* 142 (1967). *Usucapio* differed, however, from the Anglo-common law version insofar as it denied legal title to the land if the possessor had *mala fide* or knowledge of any specific title to the land. Moreover, the possessor could never acquire good title to land that was stolen, even if the possessor acquired the land in good faith. *Id.*

160. Emilio Cueto, *Property Claims of Cuban Nationals* (unpublished paper submitted at Resolution of Property Claims in Cuba's Transition, Cuba in Transition Workshop (Jan. 26, 1995)).

161. *Id.*

162. *Id.*

163. *Id.* at 16.

164. *Id.*

165. *Id.*



visa.<sup>166</sup> Because many Cubans failed to return for fear of political persecution, the onerous travel restrictions of this law could be considered a restriction of the right to free speech under the 1940 Cuban Constitution.<sup>167</sup>

Under the current Cuban legal system, the twenty year period for adverse possession of most real property and the five year period for possession of urban property likely would have divested most exiled Cuban property owners of their property for failure to lay claim to it. Hence, to resist the government's claim to their property, exiled Cubans must show that they were suffering persecution and were compelled to leave.

### C. *The Standard and Amount of Compensation*

An appropriate compensation program for a post-Communist country must accomplish two goals. First, it must ensure equitable compensation for former property owners under domestic and international law. Second, a compensation program should not deter foreign investment and stifle economic growth by destabilizing expectations over the future disposition of expropriated property. Aside from these goals, U.S. taxpayers need to understand the tax consequences of receiving compensation for expropriated property.

#### 1. The International Law of Compensation

Under international law, Cuba had a sovereign right to enact the expropriation measures of the early 1960s, provided it paid the expropriated foreign owners "just" or "appropriate" compensation worth the

---

166. The abandonment statute stated:

Article 1. The Ministry of the Interior shall have the power to grant exit permits and reentry permits to persons leaving the country. If the return does not take place within the period for which the departure has been authorized, the person shall be considered as having permanently abandoned the country.

Article 2. In the case of the persons covered [in] . . . Article 1, all of their property (personal, real and other), their rights, securities, and valuables of any kind shall be considered nationalized through confiscation to the benefit of the Cuban State, and will be assigned to the appropriate government agency.

Ribas v. Comm'r, 54 T.C. 1347, 1348-49 (1970) (quoting the Cuban Council of Ministers law No. 989, promulgated Dec. 5, 1961).

167. CONSTITUCION DE 1940 art. 52. This could affect adverse possession claims.

fair value of the property at the time of the taking.<sup>168</sup> The state's right to take property, however, is contingent on it having a public purpose, acting in a non-discriminatory manner, and paying adequate, prompt, and effective compensation.<sup>169</sup> Determining the appropriate amount of compensation can be quite complicated, but adequate compensation is usually defined as the fair market value of the property *at the time of taking*.<sup>170</sup> "Prompt" means payment at the time of taking or shortly thereafter, and "effective" means compensation shall be paid in an effectively realizable currency or its equivalent.<sup>171</sup>

Most Western states and some international arbitral tribunals have held that the fair market value of the property reflects its economic or

168. Fair market value usually means full value, which takes into account "going concern value," if any, and any other generally recognized valuation principles. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt.d (1987) [hereinafter RESTATEMENT THIRD]. In certain specific circumstances, however, a government may be excused from paying "full value" compensation. See *infra* notes 193–98 and accompanying text. Moreover, the *Restatement Third* defines "just" compensation to be an amount "equivalent to the value of the property taken." RESTATEMENT THIRD, *supra*.

169. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 538–50 (4th ed. 1990). The "prompt, adequate, and effective" formula was coined by U.S. Secretary of State Cordell Hull in a 1938 letter responding to the Mexican government's nationalization of U.S.-owned agricultural lands and oil fields. 3 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655–58 (1942). Today, the Department of State still espouses the Hull Doctrine as the standard of compensation required by international law. See *U.S. Informs Cuba of Views on Agrarian Reform Law*, 40 DEP'T ST. BULL. 958 (1959); *U.S. Protests Cuban Seizures of Property*, 43 DEP'T ST. BULL. 316 (1960). By contrast, some theorists and certain Latin American countries have asserted that when a state expropriates foreign-owned property, its only obligation under international law is to pay compensation in an amount equal to that which would have been paid to nationals of the expropriating state. See, e.g., Sir John Fischer Williams, *International Law and the Property of Aliens*, 9 BRIT. Y.B. INT'L L., B (1928) (Williams was the British representative on the Permanent Court of Arbitration.). Carlos Calvo, the eminent Argentinean jurist of the late nineteenth century, advocated the equal treatment principle as part of the Calvo Doctrine. CHARLES LIPSON, *STANDING GUARD* 80 (1985). Bolivia maintains this position today. *Id.* In contrast, Mexico abandoned the equal treatment principle when it entered into the North American Free Trade Agreement. Compare *id.* with LESLIE ALAN GLICK, *UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT* 24–26 (1994) (analyzing the provision of the NAFTA agreement that guarantees fair market value compensation for expropriated property).

170. RESTATEMENT THIRD, *supra* note 168, at § 712 cmt.d. See Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, in 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 31, 48–90 (Richard B. Lillich ed., 1987). But cf. BROWNLIE, *supra* note 169, at 543–44 (prompt compensation is often subordinated for other concerns, such as the economic realities of large payments.). Clagett writes that "adequate" means "just" and that both terms mean "compensation must make the expropriated owner whole for the value he has lost." Clagett, *supra*, at 31.

171. Clagett, *supra* note 170, at 31.

full value, which includes its profitability, net-book value, and goodwill.<sup>172</sup> In the case of an ongoing business where there was no active market, the property's value would be measured as a going concern.<sup>173</sup> The valuation of a going concern measures the discounted cash flow of the property's future profits.<sup>174</sup> Where the state has lawfully expropriated property that is not an ongoing business, other valuation methods may be more appropriate than the discounted cash flow method.<sup>175</sup>

Some tribunals and publicists have cited the lost future profits method as the proper valuation measure for determining the amount of compensation owed by a state when it expropriates a foreign-owned business.<sup>176</sup> Most capital-exporting states and their jurists contend that

172. William C. Lieblich, *Determining the Economic Value of Expropriated Income-Producing Property in International Arbitrations*, 8 J. INT'L ARB. 59, 61-63 (1991); see, e.g., *Lighthouses Arbitration* (Fr. v. Greece), 23 I.L.R. 299, 300-01 (Perm. Ct. Arb. 1956); *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.*, 35 I.L.R. 136, 186 (1963). *But cf.* Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176, 177 (1984) (discussing the failure of the *Restatement of the Foreign Relations Law of the United States* to deal adequately with the question of compensation for expropriation of private property).

173. An active market would measure fair market value by the amount a willing buyer would pay a willing seller. *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 201 (1987).

174. World Bank, *Guidelines on the Treatment of Foreign Direct Investment, compiled in 2 GENERAL COUNSEL OF THE WORLD BANK, INTERNATIONAL FINANCE CORP., MULTILATERAL INVESTMENT GUARANTEE AGENCY, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT* 35, 42 (1992) [hereinafter *World Bank Guidelines*]. Discounted cash flow means:

... the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value . . . .

*Id.* at 42.

175. For instance, some type of liquidation or break-down value should be used, such as net-book value or replacement costs in cases of movable or immovable property that is not an ongoing business. See generally John Westberg, *Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation; ICSID and Iran-United States Claims Tribunal Case Law Compared*, 8 ICSID REV 1, 19-28 (1993).

176. *Norwegian Shipowners' Claims* (Nor. v. U.S.), 1 R.I.A.A. 307, 338-39 (The Hague 1922); *Lighthouses Arbitration*, 23 Int'l L. Rep. at 300-01; *Sapphire Int'l*, 35 Int'l L. Rep. at 186. The lost future profits method uses the discounted cash flow of net future earnings to calculate the value of a property. The U.S. government asserts that the lost future profits method is a component of the adequate compensation standard under international law. Pamela B. Gann, *Compensation Standard for Expropriation*, 23 COLUM. J. TRANSNAT'L L. 615, 618 (1985).

the lost future profits method (*lucrum cessans*) is a component of the traditional international law rule of full value compensation.<sup>177</sup> Other arbitral tribunals and publicists (including two panels of the Iran-U.S. claims tribunal) have distinguished between unlawful and lawful takings by holding that full value compensation—that is, lost future profits—is only appropriate in cases of an unlawful government taking.<sup>178</sup> This view rejects the full value standard or lost future profits method as inappropriate in cases of lawful takings.<sup>179</sup> Instead, the tribunals have held that a lawful taking requires a state to pay an amount of compensation that reflects actual loss (*damnum emergens*), which would be the property's net-book value, replacement costs, goodwill, and commercial prospects (its capability to earn profits but not its estimated future profits).<sup>180</sup>

---

177. See *Sola Tiles, Inc. v. Islamic Republic of Iran*, 14 Iran-U.S. Cl. Trib. Rep. 223, 236–37 (1987) (Western jurists holding that “full compensation” standard of Iran-U.S. FCN Treaty was the same standard as required by international law). Cf. WHITE, *supra* note 13, at 15 (distinguishing lost profits between the time of expropriation and the time of compensation from lost future profits).

178. Most modern analysis of expropriation case law begins with the 1928 Chorzow Factory case, in which the Permanent Court of International Justice (P.C.I.J.) ruled that Poland's nationalization of a German nitrate factory in Upper Silesia violated the 1922 Geneva Protocols, which prohibited certain Polish expropriations of German-owned property. *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47, 63 (Sept. 13). The P.C.I.J. distinguished between the remedies required for unlawful and lawful expropriations. Unlawful expropriations required *restitutio integrum*, but if restitution was impracticable, the deprived owner was entitled to compensation that reflected the property's lost future profits. Lawful expropriations, though, required only compensation that reflected “the just price of what was expropriated” measured as the “value of the undertaking” at the time of the taking plus interest until date of payment. *Id.* at 47; in *obiter dictum* in *I.N.A. Corp. v. Islamic Republic of Iran*, 8 Iran-U.S. Cl. Trib. Rep. 373, 385, 391 (1985); *Amoco Int'l Fin. Corp. v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Rep. (1987), reprinted in 27 I.L.M. 1314, 1361 (1988). For a discussion of unlawful government takings, see *infra* notes 182–86 and accompanying text.

179. A lawful taking would occur when the government had a public purpose and violated no preemptory norms of international law. See Derek W. Bowett, *State Contracts with Aliens Under International Law*, 1988 BRIT. Y.B. INT'L L. 49, 59. Bowett cites the Chorzow Factory case for the proposition that a lawful expropriation requires compensation that reflects a fair value of the property but not its lost future profits. *Id.* at 59–60. Moreover, he cites the Chorzow Factory case for the rule that a lawful expropriation requires compensation providing for a valuation of the property at the time of the taking plus interest, whereas in an unlawful taking compensation must include interest until the date of judgment plus any increase in the value of the property from the date of expropriation until the date of judgment. *Id.* at 67–68; see also, Charles Chatterjee, *The Use of the Discounted Cash Flow Method in the Assessment of Compensation*, 10 J. INT'L ARB., No. 4, at 19, 21 (1993). Cf. Lieblich, *supra* note 172, at 68–72 (Lieblich criticizes Bowett's view by arguing that a property's contractual rights and goodwill do reflect its discounted cash flow of future profits, and therefore there is no distinction between the actual loss suffered by an expropriated owner and the loss of future profits.).

180. Bowett, *supra* note 179, at 70–72.

Lost future profits should not be compensated unless the state has committed an unlawful expropriation.<sup>181</sup>

An unlawful expropriation occurs when a state takes property in violation of a fundamental norm of international law, regardless of whether the state pays compensation.<sup>182</sup> For example, a state may not expropriate property in breach of an international agreement nor can a state undertake an expropriation that is directed against racial or religious groups or foreigners.<sup>183</sup> Where the state's expropriation is unlawful, the expropriated foreign investor has the right to restitution in kind (return of the property).<sup>184</sup> If returning the property in its full value is impracticable, international arbitral tribunals have held that the state must pay compensation in an amount that would make the former owner whole again.<sup>185</sup> Such compensation would include both any increase in the value of the property between the date of the taking and the date on which compensation is paid and any lost future profits.<sup>186</sup>

In the case of Cuba, there was no international or bilateral agreement prohibiting the Cuban government from taking private property. U.S. claimants, however, have asserted that the expropriations were unlawful because they were directed against foreigners (U.S. entities in particular).<sup>187</sup> Thus, they reason that they are entitled to have their

181. *Id.* at 67.

182. These types of unlawful government takings are known as *per se* unlawful takings because they are unlawful under any circumstance, regardless of whether compensation has been paid. See BROWNLIE, *supra* note 169, at 537–38.

183. *Id.* at 543. Unlawful *per se* takings also include the taking of assets of international organizations, takings that are part of crimes against humanity or genocide, and takings of diplomatic state property. *Id.* at 538.

184. See *Factory at Chorzow*, 1928 P.C.I.J. (ser.A) No. 17 at 47.

185. The P.C.I.J. wrote in *Factory at Chorzow*:

[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that [illegal] act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.

*Id.* at 47; see also Bowett, *supra* note 179, at 59–60.

186. *Factory at Chorzow*, 1928 P.C.I.J. (ser. A) No. 17 at 48. Note that compensation is based on the firm's value *not at the time of expropriation* but at the time of the award. See Bowett, *supra* note 179, at 69. Moreover, lost future profits would include the discounted cash flow of estimated future earnings. See *World Bank Guidelines*, *supra* note 174, at 42.

187. See, e.g., Roger D. Chesley, Comments and Observations of an Owner of Property in Cuba, Address Before the Cuba in Transition Conference in Washington D.C. (Jan. 26, 1995) at 9 (on file with *Law and Policy in International Business*).

property returned.<sup>188</sup> Yet, although the July 1960 nationalizations were directed against all U.S.-owned property, the government's policy was motivated not only by a political animosity against the United States; the government's desire to restructure and gain control of its economy through the adoption of socialist economic principles was also a major stimulus.<sup>189</sup> Moreover, the Cuban government has argued that the July 1960 nationalizations of U.S. property were not necessarily discriminatory against U.S. entities because they were part of a larger nationalization plan that included the nationalizations of September-October 1960 that applied to all foreign-owned property and to much Cuban-owned property as well.<sup>190</sup> Since the government's actions were motivated substantially by its alternative economic philosophy and not primarily by discrimination against foreigners, the expropriations could not be defined as discriminatory.

Even though the nationalizations violated no peremptory norms of international law, the Cuban government still was required by international law to pay adequate, effective, and prompt compensation to expropriated investors. Under this formula, the amount of compensation should reflect the property's fair market value at the time of expropriation. Moreover, the government should have paid compensation at a time not too long after the taking of property and in the form of convertible cash or bonds. The 1959 Agrarian Reform Law conditioned all government takings of property on the payment of compensation in the form of government bonds valued in pesos.<sup>191</sup> The statute's compensation provisions were never enforced and were later superseded by the nationalization laws enacted between 1960 and 1962.<sup>192</sup> Since Cuba failed to pay any compensation for its expropriations, it violated customary international law and thus must pay compensation that reflects the property's value at the time of expropriation, including interest.

Therefore, even though Cuba violated international law by failing to pay adequate compensation, the expropriations may not be *per se* unlawful because the property takings violated no peremptory norms of international law.<sup>193</sup> Thus, any future Cuban government only owes

---

188. *See id.*

189. The Cuban government also claims that the nationalizations of U.S. property were in retaliation against the U.S. government for its reduction of the Cuban sugar quota. *See supra* notes 20-24 and accompanying text.

190. Interview with Pedro Monreal (Jan. 27, 1995).

191. *See* GORDON, *supra* note 16, at 75-76.

192. *Id.* at 101-06.

193. The expropriations violated no treaties or bilateral agreements and were not directed specifically against racial groups or foreigners. *See generally* THOMAS, *supra* note 15, at 422-43.

compensation for the value of the property at the time of taking, including interest to the date of the award, but has no obligation to return the property to the original investor or to pay for any increased value of the property since the taking.

In addition, some developing states and publicists have recognized a "social reform" exception to the rule that a government must pay full value compensation.<sup>194</sup> The "social reform" exception applies to a developing country trying to gain control over a vital sector of its economy. In such a case, the objectives of the expropriation and the state's ability to pay would be important criteria in determining the amount of compensation owed.<sup>195</sup> The United States and other developed states reject this view by arguing that international state practice has never uniformly accepted the existence of a social reform exception to compensation in international law.<sup>196</sup> Moreover, developed states cite General Assembly Resolution 1803, reflecting existing customary international law, that requires in cases of nationalization or expropriation that "the owner shall be paid appropriate compensation, . . . in accordance with international law."<sup>197</sup>

The Cuban government has argued that its expropriations were part of a large-scale nationalization program that applied in a non-discriminatory manner to whole sectors of certain industries. After 1959, the Castro regime certainly had enacted programs to restructure

194. See Karl Meesen, *Domestic Law Concepts in International Expropriation Law*, in 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 191 (R. B. Lillich ed., 1987). Most developing states cite General Assembly Resolution 3281, the Charter of Economic Rights and Duties of States (CERDS), which was adopted in 1974 by a vote 120 to 6 with 10 abstentions (the U.S., U.K., and Federal Republic of Germany voted against). CERDS states *inter alia* that: "No State shall be compelled to grant preferential treatment to foreign investment" and that every state shall have the right to "nationalize, expropriate or transfer ownership of foreign property, . . . taking into account its relevant laws and regulations and all circumstances the State considers pertinent." Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974). The Cuban government has used the language in CERDS to justify its refusal to pay compensation to U.S. investors. Olga Miranda, *Cuba Has Met Its Nationalization Obligations Punctually*, Address Before the Cuba in Transition Conference in Washington, D.C. (Jan. 26, 1995).

195. M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* 189-95 (1986). For instance, a poor country with few hard currency reserves would be expected to pay only partial compensation with payments extended over a period of time. *Id.*

196. Meesen, *supra* note 194, at 157, 165-67.

197. Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1963), *reprinted* in 2 I.L.M. 223, 225 (1963). It was approved 87 to 2 (France and South Africa voting no). Of course, its language requiring "appropriate compensation . . . in accordance with international law" has been interpreted by some scholars as requiring less than full-value compensation.

and reform whole sectors of its economy.<sup>198</sup> If a social reform exception to the compensation rule exists, there would be no more fertile area of case law than the property claims arising from the Cuban revolution.

## 2. The Compensation Laws of Post-Socialist States

The Baltic states have made compensation available in a number of forms. The most prominent of these are restitution, substitutional restitution, and compensation. The preferred method for reprivatization in the Baltic States is restitution, which entitles the claimant to the return of the actual property expropriated.<sup>199</sup> Certain types of property, however, have been excluded from restitution, often according to size, use, and alienation.<sup>200</sup>

The Baltic states also provide substitutional restitution that furnishes former owners with replacement property of equivalent value to the expropriated property.<sup>201</sup> Substitutional restitution usually occurs where the original property has changed its form, no longer retains its original value, or its return has been forbidden by law.<sup>202</sup> Such replacement property is subject to the same restrictions on use, size, and transfer as the actual returned property.<sup>203</sup>

Generally, compensation falls into two main categories: monetary restitution and voucher restitution.<sup>204</sup> Baltic state statutes provide that monetary compensation be made in lump sum payments that reflect the actual value of the property at the time of nationalization.<sup>205</sup> The Estonian government provides compensation that reflects the value of the property at the time of the taking but does not include the present value of estimated future profits.<sup>206</sup> Where it is impossible to calculate an actual value, the Estonian parliament determines compensation by statute. To satisfy claimants, Estonia has created a compensation fund

---

198. See, e.g., *supra* notes 15–27 and accompanying text.

199. Foster, *supra* note 85, at 100.

200. *Id.* In Latvia, agricultural land that is in productive use or property with environmental, historical, or educational value is excluded. See *id.* (quoting WORLD BANK, LATVIA: THE TRANSITION TO A MARKET ECONOMY 93 (1993)). Lithuania limits restitution claims for agricultural plots to no more than 50 hectares, and it requires such plots be used solely for agricultural production. *Id.*

201. *Id.* at 100–01.

202. *Id.*

203. *Id.*

204. See generally Simonetti et al., *supra* note 33, at 67–72 (discussing Hungary's calculation of actual damages and system of voucher compensation).

205. Foster, *supra* note 85, at 101.

206. *Id.*



financed by allocating fifty percent of all revenue derived from privatization sales of state-owned property.<sup>207</sup>

In Hungary, the government compensates former owners by issuing vouchers. The Compensation Law states that all claimants who have claims valued up to HUF 200,000 are entitled to full compensation.<sup>208</sup> If the claim is valued between HUF 200,000 and HUF 300,000, the government must pay an additional fifty percent of the amount exceeding HUF 200,000.<sup>209</sup> For claims ranging between HUF 300,000 and HUF 500,000, the government must pay at least HUF 250,000 plus an additional thirty percent of the damages exceeding HUF 300,000.<sup>210</sup> The maximum amount of compensation that can be received by each former owner for each piece of property is HUF 5,000,000 (approximately US\$50,000 in 1994).<sup>211</sup>

Moreover, the Compensation Law supplies different levels of compensation depending on whether the property is real, commercial, or agricultural. For instance, compensation for real property varies from HUF 200 to HUF 2000 per square meter, while compensation for commercial property varies from HUF 150,000 to HUF 5,000,000,<sup>212</sup> and compensation for agricultural property is based on its profitability.<sup>213</sup>

The Hungarian law stipulates that vouchers or “coupons” take the form of interest-bearing transferrable securities that can be traded on the Budapest Stock Exchange but cannot be exchanged for cash.<sup>214</sup> The vouchers earn interest at the rate of seventy-five percent of the central bank’s prime rate.<sup>215</sup> Compensation vouchers initially were used to purchase state-owned assets, agricultural land, government apartments, or to trade as securities.<sup>216</sup> The government has since expanded the private market for vouchers so that they can be used in a number of other transactions.<sup>217</sup>

207. *Id.* at 101–02.

208. Simonetti et al., *supra* note 33, at 68.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* Those who receive compensation vouchers (considered Primary Voucher Holders) may purchase agricultural property through a system of auctions, if they commit to cultivate the lands rather than sell them. *Id.* at 72.

214. *Id.* at 69.

215. *Id.*

216. *Id.*

217. *Id.* at 69–72.

Germany adopted a policy that made restitution the preferred remedy and compensation a less popular alternative. Claimants who wanted their property returned could delay any future disposition of the property until all pending claims were resolved.<sup>218</sup> Restitution claimants were given priority while compensation claimants had their claims deferred until all restitution claims had been settled. Moreover, a successful compensation claimant could only hope to receive payment from a yet-to-be-established government fund.<sup>219</sup> Most former owners of property in Eastern Germany therefore filed restitution claims, thereby preventing any disposition of claimed property.<sup>220</sup> The more than one million claims filed for East German property<sup>221</sup> served as a deterrent to investment and stifled economic growth in Eastern Germany.<sup>222</sup>

The Eastern German experience serves as an example to Cuba. Cuba should prohibit restitution claims for certain large-scale industrial and commercial property because such claims would deter foreign commercial investment by producing prolonged ambiguity over property ownership. Moreover, lacking sufficient hard currency and cash resources, Cuba should limit monetary compensation and instead offer coupon vouchers to former owners. This would facilitate commercial restructuring and privatization. Equally important, Cuba's limited resources would be preserved for investment in industrial modernization instead of being squandered in large compensation settlements for outstanding claims.

In other words, Cuba should make voucher compensation the rule and restitution the exception. In addition, Cuba would benefit by granting itself the kind of flexibility that Estonia did by "reserv[ing] the right with respect to all restitution claims for all types of property to grant compensation rather than restitution of property being claimed."<sup>223</sup> It appears that Cuba has no obligation to make restitution—only compensation—if the expropriations themselves are held not to be *per se*

---

218. Paul Dodds, Restitution Claims in Eastern Germany: An Experience to Avoid 125, 131, 132 (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section of Int'l Law & Practice, Aug. 9, 1994).

219. *Id.* at 131.

220. *Id.*

221. *Id.* at 127.

222. *Id.* at 132.

223. Foster, *supra* note 85, at 115 (quoting WORLD BANK, ESTONIA: THE TRANSFORMATION TO A MARKET ECONOMY 101 (1993)).

violations of international law. Some former owners of Cuban property will find compensation hard to accept, particularly if Cuba adopts other methods of compensation like paying expropriated investors with government bonds (Nicaragua has used this approach<sup>224</sup>) or issuing certificates that entitle the bearers to acquire shares in state-owned corporations (as was done in Poland<sup>225</sup>).

### 3. A Cuban Program of Compensation

Because the Cuban government is near bankruptcy and the country's economy is so poor, doubt naturally arises as to whether it would ever be able to generate the revenues necessary to compensate expropriated investors. Admittedly, the U.S. trade embargo, communist economic policies, and substantial reductions in Russian subsidies have resulted in much economic deprivation. However, Cuba possesses the necessary human infrastructure and natural resources to attract quality foreign investment. Most Cubans have access to basic education and health care,<sup>226</sup> and many thousands of Cubans are trained in foreign languages, the advanced sciences, and mathematics.<sup>227</sup> In addition, Cuba possesses great potential for tourism and vast energy resources.<sup>228</sup> If the United States lifts its trade embargo and Cuba enacts economic and legal reforms, Cuba would become eligible for loans and aid from the World Bank and International Monetary Fund.<sup>229</sup> This would attract private

224. John Otis, *Property Disputes Still Tear at Nicaragua*, WASH. TIMES, Apr. 30, 1994, at A7; *Nicaragua Guarantees Property Rights*, REUTERS LIMITED, Nov. 22, 1994, available in NEXIS, News Library, CURNWS File.

225. Gmurzynska, *supra* note 33, at 51.

226. See Jorge I. Dominguez, *Cuban Politics Before and After the 1991 Communist Party Congress*, in CUBA AT A CROSSROADS 1, 11–12 (Jorge F. Perez-Lopez ed., 1994) (reporting poll on Cubans' satisfaction with health and education services); see also Sergio Diaz-Briquets & Jorge F. Perez-Lopez, *Cuba's Labor Adjustment Policies During the Special Period*, in CUBA AT A CROSSROADS 118, 118–21 (Jorge F. Perez-Lopez ed., 1994) (discussing the government's commitment to educate and train its labor force); Julie Feinsilver, *Cuban Biotechnology*, in CUBA AT A CROSSROADS 167, 167–89 (Jorge F. Perez-Lopez ed., 1994) (describing Cuba's advances in biotechnology).

227. Feinsilver, *supra* note 226, at 172–82 (discussing competition among major pharmaceutical companies for vaccines developed by Cuban scientists).

228. See Archibald R.M. Ritter, *Cuba's Economic Strategy: Alternative Futures*, in CUBA AT A CROSSROADS 67, 72–73 (Jorge F. Perez-Lopez ed., 1994) (discussing tourism and nickel potential); see generally Maria Delores Espino, *Tourism in Cuba: A Development Strategy for the 1990s*, in CUBA AT A CROSSROADS 147 (Jorge F. Perez-Lopez ed., 1994); see also Suzanne McGee & Mark Heinzl, *Cuba's Rosier Export Prospects Could Hurt Sugar, Metal Prices*, WALL ST. J., Mar. 6, 1995, at C1, C14 (noting that Cuba could become a major exporter of cobalt and nickel if it could attract more foreign investment and economic assistance).

229. Carmelo Mesa-Lago, *Cuba's Economic Strategies for Confronting the Crisis*, in CUBA, AFTER THE

direct investment and stimulate the economy to such an extent that the government would be able to finance compensation payments by securitizing its debt on international markets.

In recent years, the Cuban government has abandoned its strict adherence to socialist economic philosophy by deregulating parts of the Cuban economy.<sup>230</sup> In 1982, foreign investors were allowed to take a forty-nine percent stake in certain joint ventures with the Cuban government, but bureaucratic obstacles and restrictions deterred most foreign investors until the early 1990s. At that time, the Fourth Party Congress implemented further economic reforms, eliminating many governmental obstacles and allowing foreigners to own majority shares in enterprises designated as a priority by the government.<sup>231</sup> In 1992, the government granted certain exemptions on profit taxes for designated industries, the freedom to hire foreign executives, and the free repatriation of profits and of the salaries of foreign workers who work in these industries.<sup>232</sup> More recently, in December 1994, the Cuban government privatized some consumer goods businesses in order to develop product markets and to alleviate severe shortages.<sup>233</sup> Among these, agricultural markets have been liberalized by allowing farmers to sell surplus produce at the market price once their pre-determined quotas have been delivered to the state.<sup>234</sup>

These reforms belie the plight of the Cuban economy.<sup>235</sup> Notwithstanding its efforts to diversify its economic base, Cuba relies on sugar exports to earn over ninety percent of its hard currency.<sup>236</sup> Moreover, because of

COLD WAR 201 (Carmelo Mesa-Lago ed., 1993) [hereinafter Mesa-Lago, *Cuba's Strategies*]. It must be noted, however, that Cuba's hard currency debt to developed countries other than the United States is substantial and is in default. *Id.* Between 1984 and 1990, Cuba's hard currency debt with developed countries more than doubled as it reached \$7.3 billion. *Id.* More significantly, Cuba ceased all debt payments in 1986, thus cutting itself off from any new loans or credits. *Id.* Before Cuba can qualify for assistance from the IMF or World Bank, it must resume payments on its current debt.

230. *See id.* at 201–03. *See also* CARMELO MESA-LAGO, ARE ECONOMIC REFORMS PROPELLING CUBA TO THE MARKET? 11, 13–16 (1994) [herein after MESA-LAGO, ECONOMIC REFORMS].

231. Perez-Lopez, *supra* note 4, at 195–98; *see also* Mesa-Lago, *Cuba's Strategies*, *supra* note 229, at 200–03. Priority industries include tourism, which accounts for half of all foreign investment, mining for nickel, and refining Russian oil for reexport. *Id.* *See supra* notes 61–63 and accompanying text for discussion of *empresas mixtras*.

232. Mesa-Lago, *Cuba's Strategies*, *supra* note 229, at 202.

233. *Cuba Implements Limited Economic Reforms*, FREE-MARKET CUBA BUSINESS JOURNAL, Spring 1995, at 2 (Shaw, Pittman, Potts & Trowbridge ed.).

234. *Id.*

235. MESA-LAGO, ECONOMIC REFORMS, *supra* note 230, at 4–8.

236. *Id.* The Cuban sugar harvest, however, has plummeted in recent years. In 1993, the

the collapse of the Soviet Union and of the Council for Mutual Economic Assistance,<sup>237</sup> foreign investment and economic growth fell substantially between 1989 and 1993.<sup>238</sup> Although foreign investment increased dramatically in 1994, stagnation best describes the Cuban economy.<sup>239</sup> Moreover, Cuba still has one of the highest political risk ratings of any country.<sup>240</sup>

#### 4. The Tax Consequences of Compensating Expropriated Claimants

Claimants who are U.S. taxpayers deducted their losses suffered as a result of the Cuban expropriations.<sup>241</sup> Generally, expropriation losses are treated as net-operating losses under Section 165 of the Internal Revenue Code.<sup>242</sup> Individuals and corporations may deduct losses sustained during the taxable year for which there was no compensation by insurance or other reimbursement.<sup>243</sup> With respect to individuals,<sup>244</sup> these deductions are restricted to: (1) losses incurred in a trade or business, (2) losses incurred in any transaction entered into for profit, and (3) casualty or theft losses unconnected with a trade or business.<sup>245</sup>

harvest fell to a historic low of four million tons. Pascal Fletcher, *Cuba Impatient Over Russian Sugar-for-Oil Deal*, FIN. TIMES, April 6, 1995, at 39. The 1995 harvest is expected to be less. *Id.*

237. This Council was the group of Communist countries led by the former Soviet Union that had created a preferential trading bloc among its members. After the revolutions in Eastern Europe and the demise of the Soviet Union, this trading bloc collapsed. MESA-LAGO, *ECONOMIC REFORMS*, *supra* note 230, at 1–6.

238. *Id.*

239. *Id.* at 9.

240. See Mesa-Lago, *Cuba's Strategies*, *supra* note 229, at 202 n.12 (Cuba is a “problem locale” in terms of investment safety.).

241. For example, General Electric would have been eligible to take loss deductions in an amount of nearly \$2.9 million, which was the amount of their certified claims for expropriated property against the Cuban government. Documents reviewed by author, Feb., 1995 (on file with the Foreign Claims Settlement Commission, Washington D.C.). The Coca Cola Co. would have been eligible to take loss deductions in an amount of \$27,526,239.

242. Wolfe & White, *supra* note 2, at 594–96.

243. I.R.C. § 165(a) (1994). See Treas. Reg. 1.871-1(a) (1994) (allowing U.S. resident aliens who have not obtained U.S. citizenship to take deductions for losses incurred under § 165).

244. The restrictions of § 165(c) do not apply to corporations, presumably because all corporate transactions arise as part of a trade or business. In some instances, however, corporations will be denied deductions on the grounds that the property for which the expense or depreciation occurred was held for the personal convenience of the corporation's shareholders and not for business purposes. *Greenspon v. Commissioner*, 229 F.2d 947, 956 (8th Cir. 1956).

245. I.R.C. § 165(c) (1994). Casualty losses result from shipwreck, storm, or fire. The confiscation of the taxpayer's non-business property will not be considered a casualty loss for purposes of deducting an expropriation loss, unless it results from an accidental event or from theft. Moreover, the I.R.S. has ruled that an uncompensated expropriation of non-business property does

Moreover, to qualify for loss deductions associated with a trade or business or in pursuit of profits, the taxpayer must show that he or she had a good faith expectation of profit from the business or investment enterprise that produced the loss<sup>246</sup> and that there was a likelihood that profits would have been taxable by the U.S. government.<sup>247</sup>

The U.S. tax code treats U.S. citizens and resident aliens differently than it treats non-resident aliens. Non-resident aliens may only take deductions to the extent that such losses are connected with the production of income subject to U.S. income tax.<sup>248</sup> If the income is not connected with a U.S. trade or business, the taxpayer may deduct the loss of its property if the loss occurred while the taxpayer was a U.S. resident.<sup>249</sup> Therefore, Cuban citizens who fled Cuba after the revolution could not take this deduction if their Cuban property had no U.S.-connected trade or income and was expropriated before they left Cuba. On the other hand, a Cuban citizen who arrived in the United States before his or her property was expropriated could take the deduction because revenue earned from such property after arriving in the United States would have been subject to U.S. income tax.<sup>250</sup>

---

not qualify the taxpayer for a casualty or theft deduction under § 165(c). Therefore, if a taxpayer had non-business property expropriated, the loss would not qualify for a deduction against ordinary income. Wolfe & White, *supra* note 2, at 596-97.

246. Mercer v. Commissioner, 376 F.2d 708, 711 (9th Cir. 1967).

247. Rev. Rul. 80-17, 1980-1 C.B. 46.

248. I.R.C. § 873(a) (1994).

249. Gen. Couns. Mem. 33,922 (Aug. 30 1968), available in Westlaw, FTX-GCM Database. The U.S. Tax Court has held that the sole issue becomes at what point does the taxpayer incur loss of its property. *Ribas*, 54 T.C. at 1348-49. This is solely a factual issue that depends on the "practicality of ownership and control, rather than simply on the retention of legal title," and other factors, including the intent of the taxpayer, will be considered. *Id.* at 1349. In *Ribas*, a Cuban citizen fled Cuba for the United States on December 31, 1961, leaving all of his business property under the supervision of an employee. The Cuban abandonment statute provided that if he did not return to Cuba within the 29 day period of his exit visa, his property would be classified as abandoned and thereby nationalized by the government. *Id.* The Cuban citizen failed to return within 29 days and thereby became a U.S. resident alien retroactive to December 31, 1961. *Id.* The I.R.S. contended that he should not be allowed to deduct the property's loss for the years 1964-1967 for two reasons: (1) the Cuban abandonment statute provided that a Cuban citizen's failure to return within 29 days meant that his property was abandoned on the date of departure, which occurred before he arrived in the U.S.; and (2) on the date of departure his property was not subject to U.S. tax. Not agreeing with the I.R.S., the Court held that, notwithstanding the language of the Cuban statute, because the taxpayer still retained control of his Cuban property after he had become a U.S. resident, any income he would have earned on his Cuban property would have been subject to U.S. tax. *Id.* at 1350. Therefore, the expropriation of the property after the 29 day period was fully deductible. *Id.* at 1351.

250. Sabas v. Comm'r, 32 T.C.M. (CCH) 578, 579 (1973) (holding that loss of value of

The I.R.S. allows U.S. taxpayers to deduct losses caused by a foreign government's expropriation of their property.<sup>251</sup> The I.R.S. defines "foreign expropriation loss" as the "sum of the losses sustained by reason of the expropriation, intervention, seizure, or similar taking of property by the government of any foreign country, any political subdivision thereof, or any agency or instrumentality of the foregoing."<sup>252</sup> An act of expropriation or confiscation occurs when there is a deprivation of property ownership or of "the normal attributes of ownership" constituting a recognized or identifiable event.<sup>253</sup>

If U.S. claimants are eventually provided compensation under the domestic laws of a post-socialist Cuba or under an international agreement between the Cuban and U.S. governments, claimants who previously deducted the loss would owe income tax for the amount that qualified as a loss deduction in previous tax years. A basic principle of U.S. tax law holds that the return or recovery of property that was once the subject of an income tax deduction must be treated as income in the year of its recovery.<sup>254</sup> For instance, if a U.S. taxpayer owned a manufacturing plant in Cuba with a cost basis of \$200,000, and it was expropriated by the Cuban government, the taxpayer could deduct his or her \$200,000 loss against ordinary income and thereby obtain a tax savings. The value of such a deduction for a taxpayer in the thirty percent tax bracket would be \$60,000. If the taxpayer received \$200,000 in compensation in a future year, and assuming there were no alterations to the tax code, he or she would owe income tax on the compensation received in an amount of \$60,000.

Moreover, the I.R.S. will impose the tax rate on the compensation that is in effect during the year in which the recovered property or compensation is recognized as income.<sup>255</sup> During the 1960s, U.S. corpo-

securities in Cuban companies that were expropriated before taxpayer became U.S. resident did not entitle taxpayer to deductions under U.S. tax code, even though taxpayer still retained control of worthless securities after becoming U.S. resident). To establish a right to an expropriation loss deduction, petitioner must prove that the loss occurred after the time he or she became a U.S. resident alien. *Id.*

251. Rev. Rul. 62-197, 1962-2 I.R.B. 66, *clarified by* Rev. Rul. 64-149, 1964-1 I.R.B. 233. To qualify for the deduction, the taxpayer must show that he or she was deprived of the ownership of his or her property and that there was little or no chance of recovery. *Id.*

252. *See Whyte v. Comm'r*, 852 F.2d 306, 308 (7th Cir. 1988) (citing I.R.C. § 172(k)).

253. Rev. Rul. 62-197.

254. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 298 (1946). This rule is limited by the "tax benefit rule," which permits exclusion of the recovered property as income so long as its initial use as a deduction provided no tax savings. I.R.C. § 111 (1994); *see also* Treas. Reg. § 1.111-1 (1994).

255. *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 403 (Ct. Cl. 1967).

rate tax rates were generally in excess of fifty percent, and therefore a corporate claimant taking a deduction for an expropriation loss would have received a tax value in excess of fifty percent of the value of the property lost.<sup>256</sup> In the 1990s, because corporate tax rates have been dramatically reduced to not more than thirty-five percent, corporate claimants that receive compensation for expropriation losses will be taxed at a far lower rate than the rate at which they took their loss deductions in the 1960s.<sup>257</sup>

#### D. Privatization Agency's Practices and Procedures

Privatization agencies have the primary objective of facilitating a country's transition to a market economy. An important element of this transition is the resolution of conflicting property claims for expropriated property. Cuba should enact laws establishing procedures allowing property claimants to seek restitution or compensation. Some privatization agencies adjudicate claims, while others merely maintain records eventually used in a civil court proceeding.

##### 1. Claims Procedures.

Most post-Communist countries have established a government agency with the authority to review compensation claims.<sup>258</sup> In Germany, the Treuhandanstalt has the primary responsibility for resolving claims for expropriated property in Eastern Germany and for deciding issues of restitution and compensation.<sup>259</sup> The Treuhandanstalt has authorized commissions or panels to adjudicate claims for East German property. German law permits claimants to appeal commission rulings to the

---

256. In 1961, the U.S. corporate income tax rate consisted of a normal tax rate of 30% on taxable income and a surtax of 22% on taxable income in excess of \$25,000. Revenue Act of 1964, Pub. L. No. 88-272, § 121, *reprinted in* INTERNAL REVENUE ACTS, BEGINNING 1961, at 201-02 (1966). In 1964, the corporate income tax rate was reduced to 22% on taxable income, but the surtax was increased to 26% on taxable income in excess of \$25,000. BORIS I. BITTKER & JAMES S. EUSTACE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 2.20, 47-48 (2d. ed. 1966).

257. In 1995, U.S. corporations generally pay 15% on the first \$50,000 of income; for all income in excess of \$50,000, but not exceeding \$75,000, a 25% marginal rate is imposed; for all income in excess of \$75,000, but not exceeding \$10 million, a 34% marginal rate is imposed; and for all income in excess of \$10 million, a 35% marginal rate is imposed. I.R.C. § 11 (1994).

258. *See, e.g.*, Judy Dempsey, *Contenders Lay Claim to the Title: The Problems of Deciding Ownership of Confiscated East German Property*, FIN. TIMES, Jan. 27, 1993, at 19 (discussing the Grundbucharchiv, the East German land registry, and its role in assessing over half a million claims for confiscated property).

259. *See* Dodds, *supra* note 218, at 127.



German courts.<sup>260</sup> In Poland, because no privatization agency exists, claimants seek redress directly through the court system.<sup>261</sup> The Hungarian government has established a National Compensation Office that supervises its local offices in various regions of the country.<sup>262</sup> Generally, property claims are filed with the local office of the jurisdiction that covers the property claimed.<sup>263</sup> Decisions made by local offices may be appealed to the National Office, the decisions of which in turn can be appealed to a civil court.<sup>264</sup>

Unlike most post-socialist states where a government agency receives restitution or compensation claims, claimants of the Czech and Slovak Republics must assert claims directly against the person or entity currently in possession of the property.<sup>265</sup> The Czech and Slovak Republics have no administrative agencies to review property claims.<sup>266</sup> Expropriated owners must serve written notice on the current holders of the property.<sup>267</sup> If the current holder of the property refuses to return it within a certain time period, the claimant then must file suit in a local court seeking either restitution or compensation.<sup>268</sup>

In the Baltic states, compensation commissions review claims and claimants may appeal an unsatisfactory ruling to the courts.<sup>269</sup> The compensation schemes in the Baltic states typically require that former owners submit claims before a deadline to local government authorities with jurisdiction over the expropriated property.<sup>270</sup> Depending on the type of property, the designated period for filing claims varies in length from four months to three years, although the governments have retained authority to alter these deadlines.<sup>271</sup> Amongst themselves, the

260. *See id.* at 127, 134.

261. Gmurzynska, *supra* note 33, at 44–47.

262. Gelpert, *supra* note 135, at 348. In fact, the Hungarian National Compensation Office is located in a building that was a brothel in the pre-Communist era, and the former owners have asserted a compensation claim for the building. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 342. In cases where the government still possesses the expropriated property, the claimant must file a restitution claim in a local court with jurisdiction. *Id.*

266. *Id.* Article 9 of the Federal Land Law requires a claimant seeking the return of land to file a claim with a regional Land Office and serve notice on the holder of the land simultaneously. *Id.*

267. *Id.*

268. *Id.*

269. *See Foster, supra* note 85, at 104–05 (discussing procedures in Latvia, Estonia, and Lithuania).

270. *Id.*

271. *Id.* at 103. The governments retain the discretion to extend the deadline for allowing claimants to obtain documents confirming their right to ownership. *Id.* at 103 n.71 (quoting

Baltic states have differing methods of reviewing compensation claims. Estonia authorized its State Property Department to create a special commission to examine and rule on claims, to devise suitable procedures, and to compile a register of previous owners and nationalized properties.<sup>272</sup> Latvia delegates the authority to review claims to local commissions appointed by municipal councils and grants final decision-making power to executive committees of local councils.<sup>273</sup> Lithuania has authorized agencies at different levels of government to review and decide property claims depending on the type of property involved.<sup>274</sup>

In nationalizing most of its economy, Cuban expropriation was more dramatic than those in Eastern Europe. Most Cuban claimants will have to seek either restitution or compensation because the current economic system does not in any way resemble private property ownership. A post-socialist Cuban government should establish a government agency to collect and to restore old records and to enact certain verification standards for property claimants.

## 2. Technical Records

Tracing the chain of title to expropriated property will be important for determining legitimate property claimants. In Germany, the Treuhandanstalt has traced some title claims back to the 1930s when the Nazi government instituted discriminatory expropriations without compensation against Jews and foreign groups.<sup>275</sup>

The availability of technical records documenting property ownership has presented a major obstacle for the Treuhandanstalt as it reviews compensation claims<sup>276</sup> because many property records in the former East Germany have been lost or improperly maintained.<sup>277</sup> By contrast,

---

Lithuanian Republic Law on Procedures for Restoration of Citizens' Right to Ownership of Extant Real Property, art. 1 (June 8, 1991)).

272. *Id.* at 104.

273. *Id.* Albania has also enacted recent reforms authorizing a state to review all expropriated property claims. Nash (Leich), *supra* note 114, at 97-98.

274. *Id.*

275. See Dodds, *supra* note 218, at 128, 130.

276. See *id.* at 127-28.

277. Some privatization agencies have broader responsibilities than merely adjudicating property claims and maintaining records. The German Treuhandanstalt facilitates relationships between former owners of business properties and other investors who want to renovate certain properties and promote their development. *Id.* The Treuhandanstalt's policy, however, of guaranteeing every claimant the option of choosing restitution instead of compensation for his or her expropriated property has created considerable confusion over who owns what property and has

Polish records have been maintained in good condition as have records in the Baltic states.<sup>278</sup>

The Baltic states require that claimants submit appropriate documentation that includes: legal evidence of ownership (will, deed, official "confirmation document"), description, dimensions, location, estimated value of property, name of claimant, and proof of relationship to original owner. Lithuania also requires that claimants produce proof of citizenship or permanent residence.<sup>279</sup> Hungarian compensation laws require each claimant to submit an application form containing a description of the property, the law under which it was expropriated, proof of citizenship or residency at the time of expropriation, and—where the original owner is deceased—proof of familial relationship to the original owner.<sup>280</sup>

In Cuba, tracing the chain of title may be difficult as well because old property records have not been preserved by the current government. The Cuban government has kept poor records and even lost many of the records that document property ownership prior to the 1959 revolution.<sup>281</sup> Cuban property claimants probably will have to produce evidence of ownership in order to validate their claims against any future Cuban government. The Cuban government should therefore establish a government agency that would serve as a depository of Cuban property records.<sup>282</sup> Moreover, such an agency should assist potential foreign investors by providing information on the status of expropriated properties.

## V. A CUBAN-U.S. CLAIMS TRIBUNAL

The Cuban and U.S. governments should sign an agreement vesting authority to resolve all Cuban property claims with a Cuban-U.S. claims tribunal. International law permits states to enter agreements granting

---

thereby deterred investment in those properties. *Id.* at 125–26. *See also supra* notes 218–22 and accompanying text.

278. *See* Jon L. Mills, Principal Issues in Confiscated Real Property in Post-Communist Cuba 27 (contrasting the availability of technical information in the former East Germany, Cuba, and Poland) (unpublished paper submitted at Cuba in Transition: Options for Addressing the Challenge of Expropriated Properties, Annual Meeting of the American Bar Ass'n Section of Int'l Law & Practice, Aug. 9, 1994) (on file with *Law and Policy in International Business*). *See also* Gmurzynska, *supra* note 33, at 59.

279. Foster, *supra* note 85, at 104.

280. Gelpern, *supra* note 135, at 348.

281. *Cf.* Consuegra-Barquín, *supra* note 81, at 894 n.95 (noting that groups in Miami have attempted to consolidate property claims).

282. Since the early 1970s, to satisfy the demands for better records, the Cuban exile community has maintained a registry for Cuban property records in Miami. *Id.*

broad jurisdictional powers to international tribunals.<sup>283</sup> Tribunals can be authorized to determine which matters are subject to a state's domestic jurisdiction or are regulated by international law, in accordance with international law.<sup>284</sup>

A. *Presidential Authority to Settle Claims*

U.S. law requires the "advice and consent of the Senate" for ratification of a treaty.<sup>285</sup> Previous U.S. claims tribunals and conciliation commissions were approved as executive agreements,<sup>286</sup> which, like treaties, are binding agreements with foreign nations.<sup>287</sup> But, unlike treaties, executive agreements are concluded solely by the President and are not subject to approval by the Senate.<sup>288</sup> Such agreements reflect the President's broad authority to conduct foreign relations under Article II of the U.S. Constitution, but they have somewhat less authority under U.S. domestic law.<sup>289</sup>

It has long been the practice to allow the President to sign executive agreements settling the claims of U.S. nationals and entities against foreign governments.<sup>290</sup> The president's broad power to conclude such lump sum settlement agreements, however, is not plenary.<sup>291</sup> When Congress views a settlement agreement as unfavorable, it has the power, though rarely exercised, to enact legislation that modifies the agreement.<sup>292</sup> Con-

---

283. See CARTER & TRIMBLE, *supra* note 140, at 303.

284. *Id.*

285. U.S. CONST. art. II, § 2, cl. 2. Although the text of the Constitution provides no answer to the extent of presidential power in foreign affairs, the Supreme Court has recognized in a few famous cases a broad executive power to conduct foreign affairs. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

286. See HENKIN ET AL., *supra* note 88, at 221-27.

287. Executive agreements are constitutional acts of power that have as much legal validity as treaties and congressional legislation. Executive agreements are the law of the land under the Constitution's Supremacy Clause, Article VI, cl. 2. See *United States v. Pink*, 315 U.S. 203, 230 (1942). Executive agreements account for fewer than 10% of U.S. international agreements. CARTER & TRIMBLE, *supra* note 22, at 185.

288. The president's power to make executive agreements derives neither from the Constitution nor from a delegation of congressional power but from the necessary attributes of a sovereign state under international law. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-20 (1936).

289. *Id.* at 319-21.

290. *Dames & Moore*, 453 U.S. at 681.

291. *Id.* at 688.

292. See *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 245-47 (1983) (holding that the diminution in value of U.S. company's property claim against foreign government that resulted

gress exercised this power in 1981 to broaden the class of eligible claimants under the Czechoslovakian settlement agreement.<sup>293</sup>

### B. *Iran-United States Claims Tribunal*

On January 19, 1981, the United States and Iran reached agreement for the release of the fifty-two American hostages by Iran and the release of Iranian assets by the United States. The settlement agreement, known as the Algiers Declaration, established a tribunal to hear the claims of U.S. nationals against Iran and Iranian nationals against the United States for debts arising from contracts, expropriations, or other measures affecting property rights.<sup>294</sup> The agreement comprised two declarations of commitment: first, the release of all U.S. nationals held in Iran in return for a freeing of all Iranian assets held in the United States, and second, a statement of general principles that included the return of Iranian assets and the resolution of all U.S. claims against the Iranian government arising out of the revolutionary government's expropriation of most foreign-owned assets during the period between 1979 and 1981.<sup>295</sup>

The agreement provided that non-bank claims against the Iranian government and by Iran against the U.S. government be resolved through binding international arbitration.<sup>296</sup> The claims agreement specified *inter alia* the jurisdiction of the tribunal, the procedure by which arbitration panelists would be chosen, the applicable choice of law rules, and the rules of procedure and evidence.<sup>297</sup>

from president's negotiation of a lump sum agreement with foreign nation imposed no obligation on U.S. government to compensate for the reduced value of the claim).

293. See *supra* notes 117-21 and accompanying text.

294. The Tribunal was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 1 Iran-U.S. Cl. Trib. Rep. 3 (1981), and the 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 (Claims Settlement Declaration), 1 Iran-U.S. Cl. Trib. Rep. 9 (1981), collectively referred to as the Algiers Declaration. For the text of the Algiers Declaration, see Algiers Declaration, *supra* note 14.

295. Amin, *supra* note 14, at 750-52. The United States also pledged not to intervene in the internal affairs of Iran. *Id.*

296. *Id.* The rules used for arbitrating disputes were the rules formulated by the UN Commission on International Trade and Law (UNCITRAL). *Id.*

297. The settlement agreement between the United States and Iran (the Algiers Accords), which created the Iran-United States Claims Tribunal, provided that the substantive rules of law would be the rules contained in the 1954 Iran-United States Friendship, Commerce and Navigation Treaty; in situations not covered by the treaty, international law would apply. *Id.* at 756-60.

The Claims Tribunal started its work in 1981 at the Hague and had an original docket of 3816 claims.<sup>298</sup> It has held over 600 hearings and pre-hearing conferences and has finalized over 4000 cases by award, decision, or order.<sup>299</sup> To date, the Tribunal continues to hear cases involving complex issues of expropriation and valuation of property interests. Most observers agree that the tribunal has successfully resolved disputes over complex issues that may not have otherwise been resolved.<sup>300</sup>

C. *A Cuban-U.S. Claims Tribunal*

A Cuban-U.S. claims tribunal could adjudicate all claims and apply binding arbitration to all disputes arising from Castro's expropriation of private property in Cuba. Such a claims process would take several years but would provide stability and a realistic hope for expropriated investors to recover compensation for their lost property. To pay for such a compensation program, the Cuban government could receive financial assistance from international lending institutions and through adopting economic and legal reforms with the assistance of U.S. investment and trade.<sup>301</sup>

Because of the President's broad authority to conduct foreign relations, a Cuban-U.S. claims tribunal could be authorized to issue rulings that would have the effect of superseding the adjudications of the FCSC.<sup>302</sup> The rulings of the FCSC would not be rendered useless, however, because all the documentation it has maintained could still be introduced as evidence before a Cuban-U.S. claims tribunal.<sup>303</sup> Although many U.S. claimants will oppose this solution because their claims are now certified at the FCSC, a Cuban-U.S. claims tribunal in conjunction with a vast economic restructuring of Cuban society is more likely to provide compensation.

A Cuban-U.S. claims tribunal could be composed of a distinguished panel of jurists selected from neutral third party countries.<sup>304</sup> The Cuban and U.S. governments could propose a list of jurists, which could

---

298. Norbert Wuhler, *The Iran-United States Claims Tribunal*, 8 J. INT'L ARB. 5, 14 (1991).

299. *Id.* at 5.

300. *See id.* at 5-6.

301. *See supra* Part IV.C.3.

302. *See supra* Part V.A.

303. The documentation of property claims on file with the FCSC would serve as a valuable source of evidence for claimants who have been unable to find the necessary records and deeds that should have been maintained by the Cuban government in local property registries.

304. The panel could be composed of fifteen jurists, which is the number of jurists used by the Iran-United States Claims Tribunal.

be supplemented by proposals from the Permanent Court of Arbitration (PCA) and ICJ at the Hague. In the event that the Cuban and U.S. governments fail to agree on a sufficient number of jurists to serve on the tribunal, the PCA or ICJ could appoint the remaining jurists.

The scope of jurisdiction for a Cuban-U.S. tribunal could include all property claims and counterclaims of citizens or nationals of the United States, regardless of when they acquired their U.S. status. The tribunal's jurisdiction could also encompass the claims of Cubans who still live in Cuba but who lost property after the Castro regime came to power, so long as they have not already settled voluntarily their claims with the Cuban government. Moreover, similar to the Iran-U.S. agreement, a Cuban-U.S. tribunal could be authorized only to hear claims that have an estimated value exceeding a certain amount.<sup>305</sup> Those claimants who did not qualify could possibly have their claims heard by the FCSC or by a newly-established Cuban privatization agency.<sup>306</sup>

In addition to covering private property claims, some may suggest the tribunal's jurisdiction be broadened to include the claims of one government against the other government and the claims of nationals of one state against the government of the other state. This would allow Cuban citizens to file claims against the U.S. government. A tribunal with such broad jurisdiction would no doubt please the Cuban government and many of its supporters who could use their claims as an opportunity to attack U.S. foreign policy and to claim hundreds of millions of dollars in economic damages suffered as a result of the U.S. trade embargo. But granting the tribunal overly broad jurisdiction could make the adjudication process so politicized that objective resolution of the expropriation claims could not occur. The tribunal's jurisdiction should be limited to the claims of U.S. and Cuban nationals whose property was expropriated after the 1959 revolution.

## VI. CONCLUSION

The reprivatization of expropriated property in post-socialist countries is always complex and contentious, and Cuba will be no different. A post-socialist Cuban government must begin to resolve expropriated property claims before it receives international financial assistance and a lifting of the U.S. trade embargo. Cuba must be careful to implement

---

305. The Algiers' Declaration authorizes the Iran-United States Claims Tribunal to hear claims of \$250,000 or more, whereas claims worth less than \$250,000 are adjudicated before the FCSC. Ridgway, *supra* note 30.

306. Under the Albanian-U.S. agreement, all U.S. claimants must submit their claims before an Albanian compensation commission. See *supra* notes 114-16 and accompanying text.

a reprivatization program that resolves such claims in a manner that does not deter foreign investment. The experience of other post-Communist countries shows that reprivatization programs will fail if they deter foreign investment and hinder economic growth.

In addition, Cuba is faced with particular difficulties in complying with international law on expropriation. Although customary international law has strict claimant eligibility rules, states may enter agreements to broaden the scope of claimant eligibility. The international minimum standard of state responsibility requires a state to pay full value compensation to foreign owners of expropriated property, even though jurists are not in agreement over the exact valuation formula. Alien owners of property may abandon their property during a time of necessity or *force majeure* without losing their right to bring a claim for compensation because of a government expropriation.

Because of the irreversible changes that have occurred in Cuba over the last thirty-six years, a resolution must occur in a context of national and diplomatic reconciliation. Part of that reconciliation needs to be the creation of a Cuban-U.S. claims tribunal, which will provide the most equitable and practical way for Cuban and U.S. claimants to receive a fair hearing. An impartial tribunal, coupled with economic reforms and foreign assistance, may be the only way to entice the Cuban government to adopt the necessary political reforms. In view of the problems experienced by other post-socialist countries, a tribunal could serve the function of efficiently resolving most property claims and thus facilitate Cuba's transition to a market economy.



