

# ALTERNATIVE RECOMMENDATIONS FOR DEALING WITH EXPROPRIATED U.S. PROPERTY IN POST-CASTRO CUBA

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## INTRODUCTION

This paper examines one of the most important bilateral issues that will need to be addressed by the United States and a future Cuban Government—the resolution of the outstanding claims of U.S. nationals<sup>1</sup> for the uncompensated expropriation of their assets in the early years of the Cuban Revolution.

The paper assumes that resolution of the U.S. claims issue will not be practicable while the current socialist regime is in power in Cuba. While Cuban officials have periodically expressed a willingness to discuss

settlement of the claims issue with the United States,<sup>2</sup> such willingness is usually expressed in the context of setting off those claims against Cuba's alleged right to recover hundreds of billions of dollars in damages from the United States due to the U.S. trade embargo and other acts of aggression against Cuba.<sup>3</sup> To date, the Cuban government has given no indication that it is prepared to negotiate in good faith and without preconditions a potential settlement of the U.S. expropriation claims with this country.

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

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

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

Art. 3.—The claims for compensation for the expropriation of U.S. properties in Cuba nationalized through that legitimate process, validated by Cuban law and international law referred to in the preceding article, may be part of a negotiation process between the Government of the United States and the Government of the Republic of Cuba, on the basis of equality and mutual respect.

The indemnification claims due to the nationalization of said properties shall be examined together with the indemnification to which the Cuban state and the Cuban people are entitled as a result of the damages caused by the economic blockade and the acts of aggression of all nature which are the responsibility of the Government of the United States of America.

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

The expropriation of U.S. assets in Cuba was one of the leading causes of the deterioration in relations between the two countries in the early 1960s and the imposition of the U.S. embargo on trade with Cuba, which remains in place to this date.<sup>4</sup> The expropriation claims issue is widely recognized as an obstacle to the re-establishment of normal relations between the United States and Cuba.

While this bilateral issue is being discussed by the governments of both countries, Cuba will also need to prepare itself to address the expropriation claims of Cuban nationals, whether the claimants are on the island or abroad. Resolving the claims by Cuban nationals is a separate issue from addressing the claims of U.S. nationals, but the two processes have so many political and economic interconnections that one cannot be easily addressed in isolation from the other.<sup>5</sup> The facts surrounding both sets of expropriations are similar, as is Cuba's failure to provide compensation to either group of claimants. Both categories of claimants will also compete for the very limited resources that the Cuban government will have at its disposal at the time it is called upon to provide remedies to the claimants. In addition, Cuba may need, for internal political reasons, to give roughly equivalent relief to Cuban nationals and U.S. claimants.<sup>6</sup> Indeed, one of the potential alternatives discussed in this paper is to have some U.S. na-

tionals opt out of the formal U.S.-Cuba settlement process and seek resolution of their claims under Cuba's domestic claim resolution program. Therefore, both groups of claimants must receive due consideration when seeking solutions to the claims issue.

There is also little doubt that once Cuba starts making a transition to a free-market economy, it will need to provide a remedy to those whose property was seized by the Revolutionary Government after 1959 and have not yet received compensation for the taking. Such an assumption is based on the requirements of international and Cuban law, fundamental notions of fairness, and the evident political necessity to settle property disputes before Cuba can achieve stability.

The resolution of outstanding U.S. expropriation claims is also a pre-condition to major foreign capital flow into Cuba. As long as property titles remain unsettled, foreigners are going to perceive investing in Cuba as a rather risky proposition and may be discouraged from stepping into the country.<sup>7</sup>

There are two additional reasons why resolution of the outstanding property claims of U.S. nationals must be one of the first orders of business of a transition government in Cuba. First, U.S. laws require resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted and

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

5. See Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995), for a discussion of the potential resolution of expropriation claims by Cuban nationals.

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

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

foreign aid can resume;<sup>8</sup> and second, apart from any legal requirements, resolution of U.S. nationals' expropriation claims have been since the days of President Kennedy's administration one of the stated U.S. conditions for the normalization of relations between the U.S. and Cuba.<sup>9</sup> These factors demand the speedy negotiation of an agreement between the U.S. and Cuba about resolving the expropriation claims of U.S. nationals.

The discussion that follows discusses and comments on several potential claim resolution alternatives that can be implemented to address the expropriation claims of U.S. nationals. This paper, however, does not offer a specific proposal on how the outstanding property claims of U.S. nationals should be handled. Several such proposals to do this have already been developed.<sup>10</sup> The viability of any proposed program will ultimately be determined by the circumstances

under which a settlement of outstanding claims is undertaken, including the economic and political conditions in which Cuba finds itself when the government decides to deal with the problem.

### HISTORICAL SUMMARY

#### Synopsis of Cuba's Expropriations

Cuba seized the properties of U.S. and other foreign nationals on the island starting in 1959, with the bulk of the expropriations taking place in the second half of 1960.<sup>11</sup> The process started in 1959 with the takeover of agricultural and cattle ranches under the Agrarian Reform Law;<sup>12</sup> reached a critical stage in July 1960 with the promulgation of Law 851, which authorized the expropriation of the property of U.S. nationals;<sup>13</sup> was carried out through several resolutions in the second half of 1960, again directed mainly against properties owned by U.S. nationals, although those of other foreign nationals were also

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

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

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

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

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

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

taken;<sup>14</sup> and continued through 1963, when the last U.S. companies still in private hands were expropriated.<sup>15</sup> In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items were seized at various times between 1959 and 1968.<sup>16</sup>

The laws issued by the Cuban Government to expropriate the holdings of U.S. nationals contained undertakings by the state to provide compensation to the owners.<sup>17</sup> Nevertheless, in almost no case was compensation paid.

The expropriation claims by nationals of other countries were considerably smaller than those of U.S. and Cuban nationals, and for the most part have been settled through agreements between Cuba and the respective countries (e.g., Spain, France, Switzerland, United Kingdom and Canada).<sup>18</sup> Claims have been

settled at a fraction of the assessed value of the expropriated assets.<sup>19</sup>

### The U.S. Claims Certification Program

In 1964, the U.S. Congress amended the International Claims Settlement Act to establish a Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States (“FCSC”) was given authority to determine the validity and amount of claims by U.S. nationals against the Government of Cuba for the taking of their property since January 1, 1959.<sup>20</sup> The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims by U.S. corporations (1,146) and individual citizens (7,670).<sup>21</sup> It certified 5,911 of those claims, with an aggregate amount of \$1.8 billion;<sup>22</sup> denied 1,195 claims, with an aggregate amount of \$1.5 billion; and

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

15. THE CUBAN NATIONALIZATIONS, at 105-106.

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

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

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

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

20. 22 U.S.C. §1643 *et seq.* (1988) (amended in 1994).

21. 1972 FCSC REPORT, Exhibit 15.

22. *Id.* The value of the certified Cuban claims exceeds the combined certified amounts of all other claims validated by the FCSC for expropriations of U.S. nationals’ assets by other countries (including the Soviet Union, China, East Germany, Poland, Czechoslovakia, Hungary, Vietnam, and others). FOREIGN CLAIMS SETTLEMENT COMM’N 1994 ANNUAL REPORT 146 (1994) (hereinafter “1994 FCSC REPORT”). The total amount certified by the FCSC is almost double the \$956 million book value of all U.S. investments in Cuba through the end of 1959, as reported by the U.S. Department of Commerce. Jose F. Alonso and Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, in ASCE-3 at 168, 201. The valuation of the U.S. nationals’ expropriation claims has never been established in an adversary proceeding. The FCSC certification process involved administrative hearings in which only the claimants introduced evidence on the extent and value of their losses. *See* 45 C.F.R. Part 531.

dismissed without consideration (or saw withdrawn) 1, 710 other claims.<sup>23</sup>

Of the \$1.8 billion in certified claims, over 85% (about \$1.58 billion) corresponded to 898 corporate claimants, and the rest (about \$220 million) was spread among 5,013 individual claimants.<sup>24</sup> There were only 131 claimants—92 corporations and 39 individuals—with certified claims of \$1 million or more; only 48 claimants, all but five of them corporations, had certified claims in excess of \$5 million.<sup>25</sup> These figures show that the U.S. claimants fall into two general categories: a small number of claimants (mostly corporations) with large claims, and a large number of claimants (mainly individuals) with small claims.

Although the Cuban Claims Act did not expressly authorize the inclusion of interest in the amount allowed, the FCSC determined that simple interest at a 6% rate should be included as part of the value of the claims it certified. Applying such interest rate on the outstanding \$1.8 billion principal yields a present

value, as of April 2002, of approximately \$6.4 billion.<sup>26</sup> This amount does not include the value of the claims that were disallowed for lack of adequate proof, nor those that were not submitted to the FCSC during the period specified in the statute.

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

The expropriation claims by U.S. nationals are based on well established principles of international law that recognize the sovereign right of states to expropriate the assets of foreign nationals in the states' territory, but require "prompt, adequate and effective" compensation to aliens whose property is expropriated.<sup>27</sup> The "prompt, adequate and effective" compensation formulation was coined in 1938 by U.S. Secretary of State Cordell Hull.<sup>28</sup> Under current practice, the "prompt" element of the Hull formula means payment without delay.<sup>29</sup> The "adequate" element means that the payment should reflect the "fair market value" or "value as a going concern" of the expropriated property.<sup>30</sup> The "effective" element is satisfied when the payment is made in the currency of

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23. 1972 FCSC REPORT, Exhibit 15.

24. *Id.*

25. *Id.* at 413.

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

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

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

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

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

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

LEGAL TREATMENT OF FOREIGN INVESTMENT at 61. Shihata goes on to define fair market value as the amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors. *Id.* at 161-162.

the alien's home country; in a convertible currency (as designated by the International Monetary Fund); or in any other currency acceptable to the party whose property is being expropriated.<sup>31</sup> Cuba has clearly failed to satisfy its obligations under international law with respect to providing compensation for the properties it seized from U.S. nationals.<sup>32</sup>

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

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

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

There are also fundamental differences among the property interests covered by the claims, which sug-

gest that certain remedies may be better suited for some types of property than for others. For example, restitution of residential property may be extremely difficult, both from the legal and political standpoints;<sup>33</sup> monetary compensation may be an inadequate remedy where the property is unique, such as in the case of beach-front real estate in a resort area.

Cuba will also be confronted with political, as well as financial, limitations to its ability to provide certain remedies. A settlement that involves huge financial obligations over a long period of time may be resisted politically by, among others, the generation that came of age after the expropriations were carried out.<sup>34</sup>

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

#### **Cuban Claims Settlement Precedents**

It is instructive to examine the precedent of the settlement agreements that Cuba has negotiated with other countries for the expropriation of the assets of their nationals. According to a Cuban summary, those agreements have five important facts in common: (1) they were negotiated over long periods of time; (2) none of the agreements adhered to the "Hull Formula", and in particular none implemented the "adequacy" standard, in that they were lump sum, country-to-country settlements that did not take into account either individually or collectively the amounts claimed by the nationals for the loss of their properties; (3) the payments were made in installments, rather than all at once; (4) the payment was in either the currency of the country advancing the claims or, as was the case with Spain and Switzer-

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31. *Id.* at 163.

32. It has been the conclusion of U.S. courts and legal scholars that at least some of the expropriations of the assets of U.S. nationals, such as those arising from Law 851 of July 6, 1960, were contrary to international law on the additional grounds that they were ordered in retaliation against actions taken by the U.S. to eliminate Cuba's sugar quota, and because they discriminated against U.S. nationals.

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

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

land, in trade goods as well as currency; and (5) all agreements were negotiated between Cuba and the state that representing the claimants, without claimant participation.<sup>35</sup>

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

### **Alternative 1: Government-to-Government Negotiations**

**Discussion of Alternative.** The President of the United States has wide, but not plenary, power to settle claims against foreign governments for the uncompensated taking of property belonging to U.S. citizens.<sup>36</sup> The U.S. Department of State, under authority delegated by the President, acts on behalf of U.S. claimants in the negotiation of their claims with an expropriating foreign country.<sup>37</sup> Under the “doctrine of espousal,” the negotiations conducted by the Department of State are binding on the claimants, and the settlement that is reached constitutes their sole remedy.<sup>38</sup>

In most agreements negotiated in the past, the United States and the expropriating country have arrived at a settlement involving payment by the expropriat-

ing country to the United States of an amount that is a fraction of the total estimated value of the confiscated assets.<sup>39</sup> The settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest, although a 1992 settlement with Germany over East Germany’s expropriations of the assets of U.S. nationals did include the payment of simple interest at the approximate annual rate of 3% from the time the U.S. properties were taken.<sup>40</sup>

Under standard practice, U.S. claimants may not “opt out” of the settlement reached by the U.S. Government. Dissatisfied claimants are barred from pursuing their claims before U.S. courts or in the settling country.<sup>41</sup>

**Comments on Government-to-Government Negotiations Alternative.** The above described traditional settlement agreement would not appear, in itself, to be adequate to satisfy the needs of the parties in the Cuban situation. The amount of the outstanding certified claims by U.S. nationals is so large that it would likely outstrip Cuba’s ability to pay a significant portion of the principal, let alone interest. In addition, Cuba’s transition government will be burdened already by a very large external debt: Cuba owes over \$11 billion to international private and public lenders in the West, and has defaulted on its

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

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

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

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

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

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

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

loan obligations.<sup>42</sup> Also, Cuba owes Russia, as successor to the Soviet Union, 15 to 20 billion U.S. dollars in loans that it has never repaid.<sup>43</sup> Any additional obligations to U.S. claimants would only exacerbate Cuba's debt situation.

Thus, a traditional settlement involving the payment of money, even if payment is spread out over time, would be likely to place Cuba in difficult financial straits. Such a settlement could also have adverse political repercussions.<sup>44</sup>

This is not to say that, even if other settlement alternatives were considered (see *infra*), there would be no need for a lump sum payment by Cuba. Such a payment (in the order of, say, \$200 million) could be set aside to satisfy the claims of those for whom other alternative remedies would not be desirable or practicable. Lump sum settlement proceeds could, for example, provide limited monetary compensation to all

claimants to the extent of their certified losses involving residential and small farm properties.<sup>45</sup> Alternatively, a lump sum payment of \$200 million would provide over 50% principal recovery (but no interest) to the 5,013 certified claimants who are individuals.<sup>46</sup>

One potential source of funds for such lump payments could be blocked Cuban assets under the control of the U.S. Government. However, some if not all of these assets are likely to be unavailable because they have been made eligible, through legislation passed in 1996 and 2000, for recovery by those raising claims of personal injury or death as the result of actions by the Cuban Government.<sup>47</sup> Therefore, Cuba will need to identify some other source of funds to satisfy the lump sum payment portion of any settlement of U.S. national expropriation claims.

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

43. *Id.*

44. See CUETO at 9-12, 34-36.

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

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

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

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

### Alternative Methods not Involving Government-to-Government Negotiations

Whether as part of a government-to-government settlement, or independently of it, U.S. claimants could be authorized to obtain relief directly from Cuba for their expropriation claims. This relief could be the result of private, individual negotiations with the Cuban Government or through participation by the U.S. claimants in Cuba's formal claim resolution program. This section examines those alternatives.

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

**Discussion of Alternative.** It would be possible for the United States and Cuba to arrive at a negotiated settlement that allowed alternative remedies beyond the up-front payment of money, and which included the possibility that individual claimants would waive their right to receive a share of the lump sum settlement proceeds and instead negotiate directly with the Cuban Government for restitution of their expropriated assets, investment concessions, payments in commodities other than cash, or compensation by means of Cuban Government obligations.<sup>48</sup> While there is no direct precedent for such a procedure and the courts have ruled that individual claimants have no right to negotiate directly with the debtor government,<sup>49</sup> in the case of Cuba, such a flexible settlement may prove to be in the best interest of all parties.<sup>50</sup>

**Comments on Direct Claimant Negotiations with Cuba.** A direct settlement between a U.S. claimant and Cuba, if successful, should satisfy the claimant in

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

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

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48. In November 2000, a task force of former U.S. Government officials and other public figures established by the Council on Foreign Relations issued a report that recommended a number of initiatives to prepare for a transition in bilateral relations between the United States and Cuba. The task force, headed by former Assistant Secretaries of State for Inter-American Affairs Bernard W. Aronson and William D. Rogers, recommended among other steps resolving expropriation claims by licensing American claimants to negotiate settlements directly with Cuba, including equity participation in Cuban enterprises. See [http://www.cfr.org/Public/media/pressreleases2000\\_112900.html](http://www.cfr.org/Public/media/pressreleases2000_112900.html). The U.S. Government has not authorized such direct negotiations in the past.

49. See *Dames & Moore v. Regan*, *supra*.

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

the nationalization of Libyan oil in the early 1970s.<sup>51</sup> This lack of uniformity and predictability in the outcomes underscores the need to establish clearly and in advance the legal regime for the arbitration of disputes between U.S. citizens and the Cuban government.

Predictability of applicable rules could be achieved if the United States and Cuba agreed in advance to a procedure analogous to that used by the Iran-U.S. Claims Tribunal (“Tribunal”) set up to resolve the expropriation claims of U.S. nationals against Iran.<sup>52</sup> The Tribunal has three jurisdictional grants of power: (1) it may hear the “claims of nationals of the United States against Iran and claims of nationals of Iran against the United States;”<sup>53</sup> (2) it may hear “official claims of the United States and Iran against each other arising out of contractual arrangements between them;”<sup>54</sup> and (3) it may hear disputes between the United States and Iran regarding the interpretation or performance of any provision of the General Declaration<sup>55</sup> or the claims of their nationals.<sup>56</sup> One important aspect of the Tribunal’s framework is the adoption of The United Nations Commission on International Trade Law’s (“UNCITRAL”)

Arbitration Rules, which are designed to address international commercial arbitration.<sup>57</sup> This choice of rules allowed supervisory jurisdiction to the courts of the Netherlands where the Tribunal sits.<sup>58</sup>

The Tribunal has taken the view that the claims of nationals are the claims of a private party on one side and a Government or Government-controlled entity on the other.<sup>59</sup> In accord with this view, the procedures set up by the Tribunal require exhaustion of local remedies and provide that the private claimants themselves will present their claims to the Tribunal.<sup>60</sup> The nationals themselves file the claims and present them, and also decide whether to withdraw or accept any settlement offer.

One of the most innovative structural elements of the Tribunal is that a Security Account held in trust by the Algerian Government—consisting of a portion of frozen Iranian assets—has been established for the purpose of guaranteeing that the awards of the Tribunal are capable of being satisfied. This Account is only available to satisfy the claims of U.S. nationals, and cannot be used for awards in favor of

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

52. See NORTON at 482-486.

53. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning The Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981 (“Claims Settlement Declaration”), Art. II(1).

54. *Id.*, Art. II(2)

55. Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 (“General Declaration”). See, Claims Settlement Declaration, Art. II(3).

56. *Id.*, Art. VI(4).

57. See United Nations United Nations Commission on International Trade Law Arbitration Rules (1976), (“UNCITRAL rules”), available online at <http://www.jus.uio.no/lm/un.arbitration.rules.1976>

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

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

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

Iranian nationals or Iranian governmental counter-claims.<sup>61</sup>

The structure of the Tribunal is thus largely self-contained in both its procedural operation and its ability to satisfy successful claims.<sup>62</sup> However, there are areas in which the Tribunal's relationship to the external world may need to be considered. For example, should the Security Account become depleted, enforcement of Tribunal decisions would become a significant issue.

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

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

Assuming that it was not feasible to have direct negotiations between U.S. claimants and Cuba, another alternative could be to allow U.S. nationals to participate in Cuba's domestic claims resolution program. Under such a program, there would be several alternative forms of compensation that could be made available to the claimant (as well as to Cuban claimants). These alternative remedies are discussed next.

**Restitution Methods: Direct Restitution.** Restitution of the actual property that was confiscated ("direct restitution") would be the solution that many U.S. corporate claimants might prefer, assuming such a choice was available under Cuba's claims resolution program.<sup>63</sup> Some types of expropriated property, e.g. large industrial installations, may lend themselves readily to direct restitution since the identity of the former owners is likely to be uncontested and the extent of the ownership rights may be easy to establish.<sup>64</sup>

Restitution, however, may in many instances prove difficult to implement even for readily identifiable property because the ability to grant restitution of the actual property seized by the Cuban Government

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

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

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

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

64. The top twenty U.S. claimants, in terms of amounts certified by the FCSC, are all corporations. Their combined claims add up to \$1.25 billion, or 70% of the total certified. Most of the corporations owned sugar mills and other industrial installations that would be readily identifiable.

may be negated by a variety of circumstances. The property may have been destroyed or substantially deteriorated; it may have been subject to transformation, merger, subdivision, improvement, or other substantial changes; it may have been devoted to a use that may not be easily reversed or which may have substantial public utility; or its character or use may be such that the state decides not to return to its former owners. In such cases, some form of compensation would need to be granted.

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

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

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

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

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

**Comment on Restitution Methods.** Direct and substitutional restitution programs implemented in certain Eastern European countries have been criticized on economic grounds.<sup>65</sup> Some analysts have concluded that the use of restitution in Cuba would be fraught with perils.<sup>66</sup> The restitution of properties to U.S. claimants has also been opposed because it "would be tantamount to insisting that nationalistic feelings in Cuba due to foreign ownership of the country's principal assets never had a basis in fact."<sup>67</sup> Despite these concerns and criticisms, restitution—

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65. Gray et al. summarize the restitution experience in Eastern Europe as follows:

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

whether direct or substitutional— is likely to be an important ingredient in the mix of remedies granted to U.S. claimants under Cuba's claims settlement program. It will be inappropriate in many instances, and even where appropriate, its use should be tempered by the realization that restitution will often be a slow and difficult process, and one subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others.<sup>68</sup> In addition, if a variety of remedies are offered, care must be taken to assure that those availing themselves of the restitution alternative are neither better nor worse off than those receiving other types of remedy.

### Issuance of State Obligations

**Discussion of Alternative.** A number of Eastern European countries have used state-issued instruments, which will be generally referred to here as “vouchers,” to provide full or partial compensation to expropriation claimants.<sup>69</sup> The vouchers may not be redeemed for cash, but can be used, among other things, as collateral for loans; to pay (fully or in part) for property sold by the state, including shares in privatized enterprises; to purchase real estate put up for sale by the state; to be exchanged for annuities; or as investment instruments.<sup>70</sup>

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

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

Finally, Estonia, Latvia, and Lithuania indicate that restitution could have a severe socioeconomic impact on current Cuban citizens. As in these three states, the Cuban government has heavily subsidized the living expenses of its population. It has prevented its citizens from significant acquisition of assets and, until recently, legally prohibited them from accumulating hard currency. Thus, if Cuba should elect to return property to former owners (many of whom are foreign corporations or émigrés) and to introduce free market mechanisms, its present population would be at a competitive disadvantage. *See* FOSTER at 113 (footnotes omitted).

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

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

69. Hungary has used compensation vouchers as the sole means of indemnifying expropriation claimants. Katherine Simonetti et al., *Compensation and Resolution of Property Claims in Hungary*, in OPTIONS at 61, 69 (hereinafter “SIMONETTI”). The means of compensation are interest-bearing transferable securities or “vouchers” known as Compensation Coupons, issued by a Compensation Office charged with the administration of the claims program.

interest rate set by the central bank.

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

The voucher system provides a potential way of resolving many of the U.S. nationals' expropriation claims in Cuba, particularly those of former owners of small and medium enterprises who may not be interested in recovering the properties they once owned because of the obsolescence or physical deterioration of the facilities.<sup>71</sup> The system recognizes the limits of the country's ability to pay compensation claims, and avoids the dislocation costs and disputes associated with direct restitution systems. As with restitution remedies, an issue that would need to be resolved at the outset would be the compensation to be offered in proportion to loss.

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

#### Comments on Issuance of State Obligations

There are several potential drawbacks to a system of vouchers or other state-issued instruments.<sup>72</sup> The instruments will fluctuate in value, and are likely to depreciate if Cuba's economic recovery falters.<sup>73</sup> In addition, to the extent the instruments are used as income-generating devices (e.g., for the collection of annuities), the rate of return is likely to be very low.<sup>74</sup> Also, the basic underpinning of a voucher system is confidence in the state's ability to make good on its

commitments. Therefore, the security, transferability, and marketability of the compensation instruments is a serious concern that the Cuban Government will need to overcome in order for the remedy to have acceptability with the claimants.

#### Other Compensation Mechanisms

**Discussion of Alternative.** Other remedies that might be utilized in Cuba, and have not yet been tried elsewhere, could consist of economic incentives to invest in the country. These remedies could include, for example, giving credits on taxes and duties to the extent of all or part of the claim amount; granting the ability to exchange the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, or preferences in government contracting; and conferring other benefits. Each claimant might be interested in a different "package," so *ad-hoc*, case-by-case negotiations would need to be conducted, at least to resolve the most significant claims.<sup>75</sup>

#### Comments on Other Compensation Mechanisms

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

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

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

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

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

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

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusions

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

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

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

Cuban government and the claimants should be prepared to exhibit flexibility in working towards as fair and reasonable a resolution of the claims as can be achieved under the circumstances.

#### Recommendations

As the discussion in this paper suggests, the U.S. government needs to make a number of important policy decisions to prepare itself to discuss with Cuba the potential resolution of the claims issue. For example, the U.S. Government will need to decide whether to organize its settlement approach around the traditional "espousal" principle and preclude claimants from engaging in separate negotiations with Cuba, or whether it will adopt a more flexible approach that allows claimants to be represented by the U.S. Government or pursue other avenues to obtain redress.

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

All countries in Eastern Europe that have implemented schemes to settle expropriation claims have experienced a great deal of uncertainty over property rights. This uncertainty has discouraged potential investors and has delayed privatization efforts. While it appears inevitable that the claims resolution process will have some impact on Cuba's economic transition, the rapid development of a claims resolution plan would help minimize this impact.