

ALTERNATIVE REMEDIES IN A NEGOTIATED SETTLEMENT OF THE U.S. NATIONALS' EXPROPRIATION CLAIMS AGAINST CUBA

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1. INTRODUCTION

When the United States, a successor government in Cuba, and affected private parties eventually enter negotiations to resolve the U.S. nationals' outstanding claims for the expropriation of their assets in Cuba during the early years of the Cuban Revolution, they will have a variety of remedies from which to choose.¹ This Article, which complements an earlier article discussing the legal and practical issues involved in the resolution of similar expropriation claims by Cuban nationals,² examines these alternative remedies.

The expropriation claims by U.S. and Cuban nationals against Cuba share a number of common elements. The underlying facts surrounding the expropriations are similar, as is Cuba's failure to

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¹ In this Article, the term "U.S. nationals" refers to natural persons who were U.S. citizens at the time their properties in Cuba were seized by the Cuban government, as well as corporations or other entities organized under the laws of the United States and at least 50% 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) (1994). 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 Cuban government for the uncompensated taking of their properties after January 1, 1959. See 22 U.S.C. § 1643 (1994); *infra* note 14 and accompanying text.

² See Matias F. 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 (1995) [hereinafter *Cuban Claims Resolution*].

provide compensation to either group of claimants. Both categories of claimants will also compete for the Cuban government's limited resources.³ Additionally, for internal political reasons, Cuba may need to provide roughly equivalent remedies to both Cuban and U.S. nationals.⁴ Therefore, many of the issues raised in the earlier article are also applicable here.

This Article, as in the earlier article, assumes that as it transforms into a free-market society, Cuba would attempt to reach a settlement of U.S. nationals' outstanding claims and compensate them for expropriated property.⁵ As will be discussed in the next section, such an assumption is based on well-settled international law doctrines, principles of Cuban and U.S. law, and long-standing tenets of U.S. policy towards Cuba.

While this Article examines a variety of options for addressing the outstanding U.S. nationals' expropriation claims against Cuba, it does not present any specific proposals or formulas for handling

³ Citing U.S. government figures, Cuban Parliament President and former Foreign Minister Ricardo Alarcon asserted that the outstanding expropriation claims by U.S. and Cuban nationals could total approximately \$100 billion, a figure representing 50 times Cuba's average receipt from exports in the prior two years. See 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*]. In response to the size of claims against the Cuban government, Alarcon stated that "[either] we would have to return the properties to the former owners or that we would have to allocate the country's revenues for half a century to amortize the debt in order for the United States to lift its hostile policies on Cuba, regardless of the ideological orientation of its government." *Id.*

⁴ See, e.g., Matias F. Travieso-Diaz & 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 & George Plinio Montalván, *Economic Factors in Selecting an Approach to Expropriation Claims in Cuba*, in 3 CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 1 (1993).

⁵ See *Cuban Claims Resolution*, *supra* note 2, at 217 & n.1 for a discussion of various views on whether any remedy should be provided for Cuba's property expropriations. Although the issue may be subject to debate in the case of Cuban nationals, it is very likely (for the reasons discussed later in this paper) that the claims of U.S. nationals will have to be given an appropriate remedy. Cuba has repeatedly acknowledged its obligation to provide such a remedy and its willingness to enter into negotiations with the United States to achieve a settlement of the U.S. claims. See, e.g., Alarcon, *supra* note 3, at 1; Olga Miranda Bravo, *There Is No U.S. Property in Cuba that Could Affect Investors*, CUBA FOREIGN TRADE (Jan.-Mar. 1994), at 13. Cuba, however, has advanced no concrete proposals toward the resolution of the claims issue.

such claims. As with Cuban nationals' claims, it is likely that Cuba's then-current economic and political conditions will dictate which approaches are viable. Such conditions cannot be predicted at this time, because there is no evidence that Cuba and the United States are prepared to discuss the issue in the immediate future.

2. SYNOPSIS OF CUBA'S EXPROPRIATIONS AND RESULTING CLAIMS

2.1. *Introduction*

Cuba nationalized 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 1960.⁶ The process started in 1959 with the seizure of agricultural and cattle ranches under the Agrarian Reform Law⁷ and reached a critical stage in July 1960 with the promulgation of Law 851, which authorized the taking of U.S. nationals' property.⁸ The statute was carried out through several resolutions in the second half of 1960, primarily directed against properties owned by U.S. nationals, although other foreign nationals' properties were also taken.⁹ These actions continued through 1963, when the last U.S. companies that were still in private hands were expropriated.¹⁰ In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items, were

⁶ 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 FOREIGN PRIVATE PROPERTY* 69-108 (1976).

⁷ See Ley de Reforma Agraria [Agrarian Reform Law], *published in* *Gaceta Oficial*, June 3, 1959, at 2.

⁸ See Ley No. 851 [Law 851 of Nationalization of July 6, 1960], *published in* *Gaceta Oficial*, July 7, 1960, at 16,367.

⁹ See Resolution No. 1, Aug. 6, 1960, *noted in* FOREIGN CLAIMS SETTLEMENT COMM'N, FINAL REPORT OF THE CUBAN CLAIMS PROGRAM 78 (1972) [hereinafter 1972 FCSC REPORT]; Resolution No. 2, Sept. 17, 1960, *noted in* 1972 FCSC REPORT 78; Ley No. 890 [Law No. 890 of Oct. 13, 1960], *published in* *Gaceta Oficial*, Oct. 13, 1960, at 2; Resolución No. 3, Oct. 24, 1960, *published in* *Gaceta Oficial*, Oct. 24, 1960, at 1. For a listing of laws, decrees, and resolutions by means of which Cuba's expropriation of the assets of U.S. nationals were implemented, see 1972 FCSC REPORT 78-79.

¹⁰ See GORDON, *supra* note 6, at 105-06.

seized at various times between 1959 and 1968.¹¹

The laws issued to implement the expropriation of U.S. nationals' holdings authorized the state to provide compensation to the owners.¹² Nevertheless, in almost all cases, no compensation was paid.¹³

In 1964, the U.S. Congress amended the International Claims Settlement Act to establish a Cuban Claims Program, which gave the Foreign Claims Settlement Commission of the United States ("FCSC") authority to determine the validity and amount of claims by U.S. nationals against the Cuban government for the taking of their property retroactive to January 1, 1959.¹⁴ 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).¹⁵ It certified 5,911 of those claims, with an aggregate amount of \$1.8 billion;¹⁶

¹¹ 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 Annual Meeting on Aug. 9, 1994, in New Orleans, La. (1994), reprinted in 1 LATIN AM. BUS. L. ALERT 5 (1994).

¹² Law 851 of July 6, 1960 authorized the nationalization of the properties of U.S. nationals. The law also provided for the provision of compensation through thirty-year bonds yielding two percent interest, which would be financed by the profits Cuba realized from sales of sugar in the United States which exceeded three million tons, at no less than 5.75 cents per pound. The mechanism set up by this law was illusory because the United States had already virtually eliminated Cuba's sugar import quota. See Proclamation No. 3355, 25 Fed. Reg. 6414 (1960) (reducing Cuba's sugar quota in the U.S. market by ninety-five percent). Nonetheless, the inclusion of this compensation scheme in the law constituted an explicit acknowledgment by Cuba of its obligation to indemnify the U.S. property owners for their losses.

¹³ See *Cuban Claims Resolution*, *supra* note 2, at 220-21.

¹⁴ See 22 U.S.C. §§ 1643-1643(k) (1994).

¹⁵ See 1972 FCSC REPORT, *supra* note 9, Exhibit 15.

¹⁶ See *id.* The value of the certified claims against Cuba 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, and Vietnam. See FOREIGN CLAIMS SETTLEMENT COMM'N 1994 ANNUAL REPORT 146 (1994) [hereinafter 1994 FCSC REPORT].

The total amount certified by the FCSC is almost twice the \$956 million book value of all U.S. investments in Cuba as of the end of 1959, as reported by the U.S. Department of Commerce. See José F. Alonso & Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF

denied 1,195 claims, with an aggregate amount of \$1.5 billion;¹⁷ and dismissed without consideration (or saw withdrawn) 1,710 other claims.¹⁸

Of the \$1.8 billion in certified claims, over 85% were asserted by 898 corporate claimants, with the rest belonging to 5,013 individual claimants.¹⁹ There were only 131 claimants — 92 corporations and 39 individuals — with certified claims of more than \$1 million.²⁰ Only 48 of the claimants, 43 of them corporations, had certified claims in excess of \$5 million.²¹ These figures demonstrate that U.S. claimants fall into two general categories: a limited number, mostly corporations, with large claims, and a larger group, mainly individuals, with small claims. This breakdown suggests there may be ways to differentiate between both classes of claimants in terms of remedies provided to each.²²

Although the Cuban Claims Act did not expressly authorize the inclusion of interest in allowed claims, the FCSC determined that interest should be included as part of the value of the certified claims.²³ Applying a simple 6% interest rate to the outstanding \$1.8 billion principal yields a present value, as of December 1995, of over \$5.6 billion. This amount includes neither the value of claims disallowed for lack of adequate proof, nor those not submitted to the FCSC during the period specified in the statute.²⁴

THE CUBAN ECONOMY 168, 201 (1993). The valuation of the U.S. nationals' expropriation claims has never been established in an adversary proceeding. The FCSC certification process involves administrative hearings in which only the claimants introduce evidence on the extent and value of their losses. See 45 C.F.R. § 531 (1995).

¹⁷ See 1972 FCSC REPORT, *supra* note 9, Exhibit 15.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* at 413; see also App. A to this Article for a list of the 131 claimants with certified claims in excess of \$1 million.

²¹ See App. A.

²² See *infra* section 4.

²³ See 1972 FCSC REPORT, *supra* note 9, at 76. The applicable interest rate, if any, would most likely be determined through negotiations between the United States and Cuba.

²⁴ The aggregate amount of the expropriation claims by Cuban nationals has not been quantified precisely but is likely to be many times that of U.S. citizen claims given the comprehensive nature of the Cuban government's expropriations. One "crude estimate" of the Cuban national expropriation claims puts their aggregate value at \$7 billion, not counting interest. Alonso & Lago, *supra* note 16, at 202-04.

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, including Spain, France, Switzerland, and Canada.²⁵ Claims have been settled at a fraction of the assessed value of the expropriated assets.²⁶

2.2. *Legal Basis for U.S. Nationals' Expropriation Claims*

U.S. nationals' expropriation claims are based on well-established principles of international law recognizing the sovereign right of states to expropriate the assets of foreign nationals in the states' territory, but simultaneously requiring "adequate, effective and prompt" compensation to aliens whose property has been expropriated.²⁷ The "prompt, adequate and effective" compensation formulation was coined in 1938 by U.S. Secretary of State Cordell Hull.²⁸ Under current practice, the

²⁵ See generally 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) (describing the settlement agreements reached between Cuba and various foreign nations).

²⁶ Spanish claims, for example, were valued at \$350 million but were ultimately settled for approximately \$40 million. Even this limited amount was not paid until 1994, three decades after the claims accrued. See *Spain: Cuba to Compensate Spaniards for Property Seizures*, REUTER TEXTLINE, Feb. 15, 1994, available in LEXIS, World Library, Txtlne File.

²⁷ See *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 909 (1985); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-90 (1965). U.S. courts have held that Cuba's expropriations of U.S. nationals' assets violated international law because Cuba failed to provide adequate compensation and because it carried the expropriations out in a discriminatory and retaliatory manner. See *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 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). See generally THE CUBAN NATIONALIZATIONS, *supra* note 6, at 109-152 (discussing the doctrine of prompt compensation in the context of expropriation claims against Cuba).

²⁸ A shorthand phrase sometimes used for the Hull formula "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 AM. J. INT'L L. 474, 476 (1991) (citation omitted); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

"prompt" element of the Hull formula means payment without delay.²⁹ The "adequate" element means that the payment should reflect the "fair market value" or "value as a going concern" of the expropriated property.³⁰ The "effective" element is satisfied when payment is made in the currency of the alien's home country; in a convertible currency, as designated by the International Monetary Fund; or in any other currency acceptable to the party whose property has been expropriated.³¹ Cuba has clearly failed to satisfy its obligations under international law with respect to providing compensation for properties seized from U.S. nationals.³²

Domestic Cuban law in effect at the time of the takings also dictated that U.S. property owners should have received adequate compensation for the expropriations.³³ Cuban constitutions have

²⁹ See IBRAHIM F.I. SHIHATA, *LEGAL TREATMENT OF FOREIGN INVESTMENT: "THE WORLD BANK GUIDELINES"* 163 (1993).

³⁰ See ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 774-76 (1991). 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." SHIHATA, *supra* note 29, at 161. Shihata defines 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 161-62.

³¹ See SHIHATA, *supra* note 29, at 163.

³² U.S. courts and legal scholars have concluded that at least some of the expropriations of U.S. nationals' assets, such as those arising from Law 851 of July 6, 1960, were contrary to international law because they were ordered in response to U.S. actions to eliminate Cuba's sugar quota, and because they discriminated against U.S. nationals. See *supra* note 27 and accompanying text. Although the expropriations were contrary to international law, they were legally effective in transferring title to the assets to the Cuban state. The breach of Cuba's international law obligations, therefore, only gave rise to a duty to compensate the former owners of the loss of their properties. See *Cuban Claims Resolution*, *supra* note 2, at 227-44.

³³ See generally *Cuban Claims Resolution*, *supra* note 2 (discussing the Cuban domestic law basis for the rights of property owners in Cuba, including foreign nationals, to receive adequate compensation for the expropriation of their assets).

traditionally recognized the state's right to take possession of private property, provided that the taking is for a legitimate public purpose and compensation is paid to the owner. Cuba's 1901 Constitution, the first constitution of the newly independent nation, declared in Article 32:

No one shall be deprived of his property except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property.³⁴

The Cuban Constitution enacted in July 1940, and in effect at the time of the Revolution, gave broad recognition to private property rights.³⁵ In the 1940 Constitution, the state's right to expropriate private property is defined in Article 24:

Confiscation of property is prohibited. No one can be deprived of his property [except] by competent judicial authority and for a justified cause of public utility or social [interest], and always after payment of the corresponding indemnity in cash, judicially fixed. Non-compliance with these requisites shall determine the right of the person whose property has been expropriated, to be protected by the courts, and, if the case calls for it, to have his property restored to him. The reality of the cause of public utility or social interest, and the need for the expropriation, shall be decided by the courts in case of impugnation.³⁶

³⁴ CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1901), *published in* Gaceta Oficial, (Apr. 14, 1902), *reprinted in* 2 AMERICAN CONSTITUTIONS: A COMPILATION OF THE POLITICAL CONSTITUTIONS OF THE INDEPENDENT NATIONS OF THE NEW WORLD 112, 119 (José Ignacio Rodríguez trans., 1905).

³⁵ See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1940) [Constitution] arts. 87-96, *reprinted in* 1 CONSTITUTIONS OF NATIONS 610, 626-27 (Amos J. Peaslee ed. & trans., 2d ed. n.d.) [hereinafter CONSTITUCIÓN DE 1940].

³⁶ *Id.* art. 24 at 614. The 1940 Constitution modified the corresponding provision (Art. 32) of the 1901 Constitution in four major respects: (1) only a *judicial* authority was empowered to authorize an expropriation; (2) property could be taken both for reasons of public utility and *social interest*; (3) compensation for the property had to be *in cash, and the amount was to be set*

When Cuba's Revolutionary Government issued a Fundamental Law replacing the 1940 Constitution, the text of Article 24 referring to the state's limited expropriation rights remained unchanged.³⁷ Subsequent amendments to Article 24 of the Fundamental Law, however, progressively removed the obstacles to the state's expropriation of private property. The last of these amendments, the Constitutional Reform Law of July 5, 1960 — issued on the eve of the promulgation of Law 851 establishing the right to nationalize U.S. citizen properties in Cuba — amended Article 24 to read in relevant part:

No other natural person or corporate entity shall be deprived of his property except by competent authority, for a justified cause of public utility or social or national interest. The procedure for the expropriations and the methods and forms of payment will be established by law, as well as the competent authority to declare the cause of public utility or social or national interest and the necessity for the expropriation.³⁸

This amendment severely weakened the protections against expropriation by removing the following requirements: that the action be taken by a competent judicial authority; that advance payment be made in cash in an amount set by the courts for the expropriation; and that the owner be able to challenge, before the courts, the utility or need for the expropriation.³⁹ Nonetheless, the amendment continued to recognize a private party's right to

by the courts; and (4) challenges to the *legitimacy of the purpose* for the taking could be raised, and would be decided by the courts. See *id.* Taken together, these changes suggest that the framers of the 1940 Constitution wanted to expand the State's ability to expropriate private property, but wished to ensure that such takings were subject to judicial control as to the legitimacy of the purpose of the taking. The framers also wanted to ensure that the international law principle requiring "prompt, adequate, and effective" compensation for property expropriations was satisfied. See *Cuban Claims Resolution*, *supra* note 2, at 232 n.50.

³⁷ See Ley Fundamental, published in *Gaceta Oficial*, at 1 (Feb. 7, 1959).

³⁸ Ley de Reforma Constitucional, published in *Gaceta Oficial*, at 1 (July 5, 1960) (translation by author).

³⁹ See Gutiérrez, *supra* note 11, at 7-9.

compensation for the expropriation of his property.

The state's limited right to expropriate private property was reaffirmed by the 1976 Constitution, which declared in Article 25:

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 is to be determined as well as the form of the compensation, taking into account the interest and the economic and the social needs of the [owner].⁴⁰

The amended Fundamental Law of 1959 and the 1976 and 1992 Constitutions have diminished, if not eliminated, the Cuban government's guarantees that private property owners would receive prompt, adequate, and effective compensation in the event of expropriation. Yet these constitutions still recognize two fundamental requirements of a valid expropriation: (1) private property can be taken only by the state for some legitimate public purpose, and (2) such taking must be accompanied or followed by the payment of compensation. Such principles remain part of Cuba's legal tradition and therefore provide a legitimate basis under Cuban law for providing remedies to U.S. nationals whose properties were taken by the Cuban government.⁴¹

⁴⁰ CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976) [Constitution], published in *Gaceta Oficial*, at 3, 6 (Feb. 24, 1976), reprinted in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CUBA* 8 (Albert P. Blaustein & Gisbert H. Flanz eds., 1976). Article 25 of the 1992 Constitution, currently in effect in Cuba, contains identical language. See *CONSTITUCIÓN DE LA REPÚBLICA DE CUBA* (1992), published in *Gaceta Oficial*, at 33, 36 (Aug. 1, 1992).

⁴¹ It is significant that in enacting a new Foreign Investment Law in September 1995, Cuba included express assurances against the uncompensated taking of assets of foreign investors:

Art. 3. Foreign investments in the national territory enjoy full protection and security, and cannot be expropriated, save for reasons of public utility or social interest, declared by the Government in accordance with the provisions of the Constitution, the laws in effect, and international agreements signed by Cuba on the reciprocal promotion and protection of investments, and subject to prior indemnification in freely convertible currency for their commercial value, established by mutual agreement.

In the event no such agreement is reached, the value will be set by a firm with internationally recognized credentials in business valuation,

3. WHY U.S. NATIONALS' CLAIMS SHOULD BE RESOLVED PROMPTLY

The resolution of outstanding property claims of U.S. nationals is an urgent matter that must be addressed in the early stages of Cuba's transition. There are several reasons for this urgency. First, U.S. laws arguably require resolution of U.S. nationals' expropriation claims before the embargo on trade with Cuba is lifted and foreign aid resumed.⁴² Second, the Cuban

authorized by the Ministry of Finance and Prices and hired to that effect by agreement of the parties, or of the foreign investor and the Ministry of Foreign Investment and Economic Cooperation, if the affected party is an enterprise with wholly foreign capital.

Ley Numero 77, *published in* Gaceta Oficial, at 5, 6 (Sept. 6, 1995) (translation by author). Except for the failure to provide recourse in Cuban courts, which foreign investors may not find desirable in any event, the guarantees against expropriation in the new Foreign Investment Law are essentially the same as those in Art. 24 of the 1940 Constitution. *See supra* note 36 and accompanying text.

⁴² *See* 22 U.S.C. § 2370 (a)(2) (1994) (prohibiting U.S. assistance to Cuba until Cuba 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"). A more recent statute, the Cuban Democracy Act of 1992, Pub. L. 102-484, 106 Stat. 2575, (codified as 22 U.S.C. § 6001-10 (1992)), sets very specific conditions for the lifting of the U.S. trade embargo against Cuba. It makes no reference, however, to payment of compensation to U.S. citizens for the Cuban Government's expropriations as a pre-condition to lifting the embargo and resuming economic assistance to Cuba. *See* Section 1708(b)(3) of the Cuban Democracy Act, 22 U.S.C. § 6007(b)(3); *see generally*, Matias F. Travieso-Diaz, *Requirements for Lifting the U.S. Trade Embargo Against Cuba*, in 3 CUBA IN TRANSITION — THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 222 (1993) (discussing the requirements that must be met before the U.S. trade embargo against Cuba is lifted and before U.S. aid is made available to Cuba).

Recently enacted legislation to provide aid to a democratically elected government in Cuba would make assistance to Cuba contingent upon its "making demonstrable progress" in returning the expropriated properties to U.S. citizens or providing full compensation to their owners. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, § 206(6), 109 Stat. 785 [hereinafter LIBERTAD Act]. The wording of this section is ambiguous, in that it refers to "U.S. citizens," a term not defined in the statute, leaving it open to the interpretation that the claims of all those who were U.S. citizens at the time of enactment — including naturalized Cubans — would have to be addressed before the embargo is lifted and aid to Cuba resumed. *See id.*

government will need to quickly resolve to the outstanding expropriation claims by both U.S. and Cuban nationals to assure domestic order, promote political and economic stability, expedite privatization, and foster foreign investment.⁴³ Third, resolution of U.S. nationals' claims will diminish the perceived political risks of investing in Cuba. These risks are a matter of concern to most prospective investors, traders, and financial institutions from the United States and other countries.⁴⁴ Finally, since President Kennedy's administration, resolution of U.S. nationals' expropriation claims has been an integral part of the stated political requirements for the normalization of relations between the United States and Cuba. Settlement of these claims is also a necessary precondition for lifting the U.S. trade embargo against Cuba.⁴⁵

The presence of these factors demands the speedy negotiation

⁴³ All countries in Central and Eastern Europe that have implemented schemes to settle expropriation claims have experienced a great deal of uncertainty over property rights. This uncertainty has discouraged potential investors and has delayed privatization efforts. See Cheryl W. Gray et al., *Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe 4* (World Bank Discussion Paper No. 209) (1993). 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.

⁴⁴ See Ibrahim F.I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 21 INT'L LAW. 671, 685-88 (1987). In recent years, a number of investors from other countries either have withdrawn from Cuba or have decided not to invest on account of the unsettled status of the property claims issue and the possibility that they may be subject to lawsuits by former property owners. See, e.g., *Head of Chamber of Commerce Assesses Foreign Investment*, BBC Summary of World Broadcasts, June 20, 1995, available in LEXIS, News Library, Curnws File; Ann Davis, *Helms to Cuba: See You in Court*, NAT'L L.J., July 10, 1995, at A1, A23.

⁴⁵ See 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 for Cuban Affairs, U.S. Department of State, explaining that before the United States lifts the trade embargo against Cuba, the Cuban expropriation of U.S. property 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, Deputy U.S. Representative to the United Nations, 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'").

of an agreement between the United States and Cuba regarding the resolution of expropriation claims. No international law principles or bilateral policy issues, however, require that Cuba provide a remedy to domestic claimants for the expropriation of their assets by the government.⁴⁶ Therefore, the resolution of Cuban nationals' expropriation claims can proceed on a separate but perhaps parallel track and can be handled as a domestic Cuban policy issue.⁴⁷

⁴⁶ See *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398, 84 S.Ct. 923 (1964); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir. 1967); *Banco Nacional de Cuba v. Farr*, 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 1966 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *Jafari v. Islamic Republic of Iran*, 539 F.Supp. 209, 215 (N.D. Ill. 1982); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. k (1986).

⁴⁷ Many Cuban nationals whose properties were seized by the Cuban Government subsequently moved to the United States and became U.S. citizens. Some of these Cuban-Americans advocate being added to the U.S. claimants class so they can be included in an eventual U.S.-Cuba settlement. Alternatively, they do not wish to be recognized as being bound by an agreement between the United States and Cuba, thereby permitting them to pursue their claims separately in U.S. courts. See Alberto Diaz-Masvidal, *Scope, Nature and Implications of Contract Assignments on Cuban Natural Resources (Mineral and Petroleum)*, Address at the Fourth Annual Meeting of the Association for the Study of the Cuban Economy, Miami, Florida, 54-62 (Aug. 1994).

The original version of the recently enacted Libertad Act would have provided the relief sought by the above-mentioned Cuban-Americans amending the Cuba Claims Act to allow U.S. citizens to file expropriation claims against Cuba with the FCSC, regardless of whether the claimants were U.S. nationals at the time of expropriation. See, e.g., H.R. 927, 104th Cong., 1st Sess., § 303(b). Such a provision, however, was dropped from the bill during Congressional deliberations.

Nonetheless, there is some precedent for including the claims of individuals who became U.S. citizens after the expropriations in the settlement of U.S. claims against another country. See *Cuban Claims Resolution*, *supra* note 2, at 223 n.22. Such an inclusion would require legislation amending the Cuban Claims Act along the lines of the early version of the LIBERTAD Act or the bill passed by Congress in 1955 to include individuals who were U.S. citizens as of August 1955 in the U.S. war claims against Italy. See 22 U.S.C. § 1641c (1994). Enactment of such legislation, however, will almost certainly be opposed by the existing certified U.S. claimants, whose share of a lump settlement would be decreased if the claimant class were enlarged and if the negotiated settlement amount will be less than one hundred percent of the certified value of the claims. In addition, such legislation would raise numerous legal questions, including its potential inconsistency with well-settled international law principles under which a state can only act to protect the interests of those who were nationals of that state at the time of the expropriations. See D.W. GREIG, *INTERNATIONAL LAW* 530-31 (2d. ed. 1976).

4. ALTERNATIVE REMEDIES FOR U.S. EXPROPRIATION CLAIMANTS

4.1. *Introduction*

Any proposal for the resolution of U.S. nationals' expropriation claims must recognize the objectives that such a claims resolution program must achieve, as well as the fundamental differences between the various types of property subject to claims. Further, such a proposal must recognize the practical limitations that the Cuban government will encounter 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 existing problem.

The objectives that a remedial program should strive to achieve include: (1) providing predictable and substantially fair treatment to all interested parties;⁴⁸ (2) creating, in the shortest possible time, a regime of clear, secure, and marketable rights to property;⁴⁹ (3) promoting the expeditious privatization of state-held assets;⁵⁰ (4) encouraging the early onset of substantial foreign investment;⁵¹ and (5) keeping the aggregate remedial cost within the nation's financial means.⁵² The pursuit of these objectives, which are in many ways inconsistent with each other, suggests that some remedies, such as making cash payments to claimants, must be used sparingly, while others, like direct restitution of confiscated properties, may be unsuitable in circumstances where protracted title disputes are likely to arise.

Fundamental differences among the property interests covered by the claims suggest 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 a legal and political standpoint.⁵³ Additionally, monetary

⁴⁸ See *Cuban Claims Resolution*, *supra* note 2, at 244-45.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873 (1994) (discussing the difficulties that a Cuban transition government will face in seeking to provide remedies for residential property expropriations).

compensation may be an inadequate remedy where the property is unique, such as beachfront real estate in a resort area.

Cuba will also be confronted with political as well as financial limitations in its ability to provide certain remedies. A settlement involving huge financial obligations over a long period of time may be resisted politically by, among others, the new generation that has come of age in the country after the expropriations were carried out.⁵⁴

The following section discusses how the aforementioned factors come into play with regard to possible remedies.

4.2. *The Standard "Lump Sum" Settlement Approach*

The President of the United States has wide, but not plenary, power to settle claims against foreign governments that take property belonging to U.S. citizens without compensation.⁵⁵ 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.⁵⁶ Under the "doctrine of espousal," the negotiations conducted by the Department of State are binding on the claimants. The settlement reached constitutes their sole remedy.⁵⁷

In most agreements negotiated in the past, the United States and the expropriating country have arrived at a settlement involving payment by the expropriating country to the United States of an amount that is a fraction — sometimes a small fraction — of the total estimated value of the confiscated assets.⁵⁸

⁵⁴ See Emilio Cueto, *Property Claims of Cuban Nationals*, Address at the Shaw, Pittman, Potts & Trowbridge Workshop on Resolution of Property Claims in Cuba's Transition, Washington, D.C. 9-12 (Jan. 1995).

⁵⁵ See *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 244-45 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 909 (1985). The President's authority is limited, however, by the rarely exercised power of Congress to enact legislation requiring renegotiation of a settlement it perceives as unfavorable. See *Dames & Moore*, 453 U.S. at 687-88 & n.13.

⁵⁶ See 453 U.S. at 680 n.9 (listing ten settlement agreements reached by the U.S. Department of State with foreign countries between 1952 and 1979).

⁵⁷ See *id.* at 679-80; *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); 1 RICHARD B. LILLICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 6 (1975).

⁵⁸ For example, the United States settled its nationals' claims against the People's Republic of China for \$80.5 million, which was about forty percent

Settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest.⁵⁹

Under standard practice, U.S. claimants may not "opt out" of a settlement reached by the U.S. government. Dissatisfied claimants are barred from pursuing their claims before U.S. courts or courts of the settling country.⁶⁰

The above-described traditional settlement agreement does not appear, in itself, to satisfy the needs of the parties in the Cuban situation. The sum of outstanding certified claims by U.S. nationals against the Cuban government is so large that it would likely exceed Cuba's ability to pay a significant portion of the principal, let alone the interest.⁶¹ In addition, Cuba's transition government already will be burdened by a very large external debt — Cuba has defaulted on \$9 billion worth of loans (excluding accrued interest) from international private and public lenders in the West.⁶² As a result, Cuba is not eligible for credit from Paris Club members or private lenders.⁶³ Also, Cuba owes Russia, as

of the \$197 million certified by the FCSC. See *Shanghai Power Co.*, 4 Cl. Ct. at 239; 18 I.L.M. 551, 551 (May 1979).

⁵⁹ A 1992 settlement with Germany over East Germany's expropriations of U.S. nationals' assets included the payment of simple interest at the approximate annual rate of 3% from the time the U.S. properties were taken. See 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 Concerning the Settlement of Certain Property Claims, May 13, 1992, U.S.-F.R.G., T.I.A.S. 11959 [hereinafter German Agreement].

⁶⁰ See *Shanghai Power Co.*, 4 Cl. Ct. 237.

⁶¹ Cuba's Gross Domestic Product ("GDP") in 1994 was 12.8 billion pesos. CONSULTORES ASOCIADOS, S.A., CUBA: INVERSIONES Y NEGOCIOS 38 (1995). At the current black market rate of 25 pesos to a dollar, Cuba's GDP is equivalent to about \$500 million, less than a third of the principal amount of the claims certified to U.S. nationals. See *Cuba Releases Details of its External Debt*, J. COM., Nov. 20, 1995, at 8A.

⁶² See *Cuba Releases Details of its External Debt*, *supra* note 61, at 8A; Carmelo Mesa-Lago, *The Economic Effects on Cuba of the Downfall of Socialism in the USSR and Eastern Europe*, in CUBA AFTER THE COLD WAR 133, 151 (Carmelo Mesa-Lago ed., 1993). See also ERNEST H. PREGG & JONATHAN D. LEVINE, CUBA AND THE NEW CARIBBEAN ECONOMIC ORDER 57 (Roberta L. Howard et. al. eds., 1993) (stating that Cuba owes non-U.S. western creditors \$8 billion).

⁶³ In 1986, Cuba unsuccessfully sought to renegotiate debt payments with its Paris Club creditors, and afterwards declared a moratorium on debt-services payments. See GILLIAN GUNN, CUBA IN TRANSITION — OPTIONS FOR U.S. POLICY 27 (1993). Because of Cuba's drop in creditworthiness, it was forced

successor to the Soviet Union, more than \$20 billion in loans that were never repaid.⁶⁴ Any additional obligations to U.S. claimants would only exacerbate Cuba's bleak debt situation.

For these reasons, a traditional settlement involving the payment of a large sum of money, even if payment is spread out over time, likely would place Cuba in very difficult financial straits. Such a settlement could also have adverse political repercussions.⁶⁵

It would be possible, however, for Cuba and the United States to arrive at a negotiated settlement as an alternative to a monetary payment. Under such a settlement, individual claimants would formally 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. Alternative methods of restitution can take the form of investment concessions, payments in commodities other than cash, or payments in the form of Cuban government obligations. The next sections explore these possibilities under the assumption that such a flexible settlement will ultimately be adopted, since it appears to be in the best interest of all parties.⁶⁶

The expansion of settlement alternatives to include other

to rely mostly on trade with socialist countries and to sharply curtail hard currency imports. See *id.*; see also Thomas T. Vogel, Jr., *Cuba Seeks to Revamp Its Defaulted Debt*, WALL ST. J., June 26, 1995, at C1.

⁶⁴ See CARMELO MESA-LAGO, ARE ECONOMIC REFORMS PROPELLING CUBA TO THE MARKET? 5 (1994).

⁶⁵ See Cueto, *supra* note 54, at 9-12, 34-36.

⁶⁶ There are indications that at least some major U.S. claimants would be interested in alternative methods to settle their claims. See *Amstar Says, Let's Make a Deal*, CUBA NEWS, Jan. 1996, at 6. There is also precedent for such flexibility. The recent 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. See German Agreement, *supra* note 59, Art. 3; 57 Fed. Reg. 53,175, 53,176 (Nov. 1992).

The intra-governmental negotiations between the United States and Cuba would have to include means for assuring that once claimants waive the right to be represented by the U.S. government in the negotiations with Cuba and enter into direct negotiations with that country for the resolution of their claims, Cuba would give them fair and reasonable treatment. One possibility could be for Cuba to agree to submit any claim it was unable to settle with a U.S. national. Such arbitration could be conducted, for example, by a tribunal analogous to the Iran-U.S. Claims Tribunal set up to resolve the expropriation claims of U.S. nationals against Iran. See Norton, *supra* note 28, at 482-86.

remedies would not eliminate the need for a lump sum payment by Cuba to U.S. nationals. Such a payment could be set aside to satisfy the claims of those for whom other alternative remedies would be undesirable or impracticable.⁶⁷ Lump sum settlement proceeds, for example, could provide limited monetary compensation to all claimants to the extent of their certified losses involving residential and small farm properties.⁶⁸ As another example, a lump sum payment of \$150 million would provide over 50% principal recovery to the 5,013 certified individual claimants.⁶⁹

4.3. *The Direct Restitution Alternative*

Many U.S. corporate claimants might prefer a solution providing for restitution of the actual confiscated property ("direct restitution").⁷⁰ Some types of expropriated property, such as

⁶⁷ There are approximately \$150 million in blocked Cuban assets held in the United States, although some portions may not belong to Cuba. See Stanley J. Glod, *Potential Approaches to the Resolution of U.S. Claims*, Address at the Shaw, Pittman, Potts & Trowbridge Workshop on Resolution of Property Claims in Cuba's Transition, Washington, D.C. 3 (Jan. 1995) (copy on file with the U. PA. J. INT'L ECON. L.). These assets could be used to fund the lump-sum payments.

⁶⁸ 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 already may have acquired legal rights to them and whose eviction might be politically untenable. See Consuegra-Barquín, *supra* note 53, at 909-12.

⁶⁹ A fifty percent level of recovery would exceed the recovery level in most "lump sum" settlements negotiated by the United States under the International Claims Settlement Act programs. See 1994 FCSC REPORT, *supra* note 16, at 146.

⁷⁰ 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. See Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L BUS. L. 315, 315 (1993). On the other hand, Hungary, Russia, and all other former republics of the USSR (with the exception of the Baltic states) have expressly refused to grant restitution of property expropriated during the communist era. See Frances H. Foster, *Post-Soviet Approaches to Restitution: Lessons for Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 93 (JoAnn Klein ed., 1994).

The former Czechoslovakia provides 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. See

large industrial installations, may lend themselves to direct restitution since the identity of the former owners is likely to be uncontested and the extent of the ownership rights may be relatively easy to establish.⁷¹

In some cases, the ability to grant restitution of the actual property seized by the Cuban government may be impossible. The property may have been destroyed or may have substantially deteriorated. The property may have been transformed, subdivided, improved, or otherwise changed. It may have been devoted to a use not easily reversed or providing substantial public utility. Finally, for policy reasons the State may decide not to return the property to its former owners. In these cases, some other form of compensation is necessary.

In addition, Cuba is entering into a number of joint ventures with foreign (non-U.S.) investors.⁷² Many of these ventures involve property expropriated from U.S. and Cuban nationals.⁷³ In deciding whether to provide direct restitution for those

Gray et al., *supra* note 43, at 49. The restitution of "small" property was governed by the Small Federal Restitution Law, which provided for direct restitution to original owners. *See id.* 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. *See Gelpert, supra* 337-38 (1993). Likewise, for agricultural land and forests, the Federal Land Law provided presumptive restitution of lands to the original owners. *See id.* Where neither the land originally expropriated nor a substantially similar parcel in the locality was available, financial compensation was provided as an alternative remedy. *See id.*

⁷¹ The 20 largest U.S. claimants, in terms of amounts certified by the FCSC, are all corporations. *See* 1994 FCSC Report, *supra* note 16; *infra* App. A. Their combined certified claims total \$1.25 billion, or seventy percent of the total claims certified. *See id.* Most of the corporations owned large industrial installations that would be readily identifiable.

⁷² As of mid-1995, Cuba reported it had established 212 economic associations, including joint ventures, with foreign partners. *See Cuba Reports Foreign Investment Exceeding \$2 Bln*, REUTER TEXTLINE, July 10, 1995, available in LEXIS, Nexis Library, Txtlne File. Spain leads the way in terms of the number of joint ventures undertaken by its nationals in Cuba, but Mexico and Canada surpass Spain in the reported total amount of investment. *See* José A. Ferris & Pascal Fletcher, *Spain Exploits Old Ties in New Havana — the Former Colonial Power is Helping to Lead the Way in Investment in Cuba*, FIN. TIMES, July 20, 1995 at 4. For a listing of foreign investors engaged in joint ventures in Cuba, see *An Index of Foreign Investment in Cuba*, LA SOCIEDAD ECONOMICA, Bull. 43 (Sept. 1994).

⁷³ *See An Index of Foreign Investment in Cuba, supra* note 72, at 43.

properties to the U.S. claimants, a Cuban transition government will have to balance the rights and interests of the former owners against those of third-party investors in Cuba. Likewise, the rights of any other lessors, occupants, or other users of the property would have to be considered in the decision to grant direct restitution.

When direct restitution is the appropriate remedy, a number of matters will have to be negotiated between Cuba and the 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 be needed if the property has been improved since being expropriated. In some instances, an agreement will need to be made in advance on the recovering owners' responsibility for the environmental reclamation of the property, to the extent that long-term impacts from operation of the facility have occurred. Many other issues are likely to come up in individual cases.

Cuba may also choose to impose a "transfer tax" or equivalent fee on the restitution transaction. Such a tax would raise funds for other aspects of the program and ensure that the 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 limited recovery, such as partial compensation.

4.4. Substitutional Restitution

There may be instances where direct restitution will be impractical, but both Cuba and the U.S. claimants still will wish to apply a restitution type of remedy. Such circumstances may dictate restitution of substitute property through the transfer to the claimant of other property equivalent in value to the confiscated property. Where restitution of substitute property is proposed, it is necessary to establish rules regarding, among other things, how the equivalence of the properties is to be defined and determined.

This sort of substitutional restitution may be appropriate, for example, in cases where the confiscated property is farmland that has been conveyed to cooperatives 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 equivalent in value to the expropriated

properties.

Direct and substitutional restitution programs implemented in certain Eastern European countries have been criticized on economic grounds.⁷⁴ In addition, some analysts have concluded that the use of restitution in Cuba would do more harm than good.⁷⁵ There are those, however, who prefer that restitution of expropriated properties to the former owners has a positive economic impact.⁷⁶

⁷⁴ The restitution experience in Eastern Europe has been summarized 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 businesses 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., *supra* note 43, at 4. The same criticism is leveled against similar restitution programs instituted in the former Czechoslovakia. See *id.* at 49.

⁷⁵ 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:

[R]estitution . . . 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 further 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 emigres) and to introduce free market mechanisms, its present population would be at a competitive disadvantage.

Foster, *supra* note 70, at 113 (footnotes omitted).

⁷⁶ See Gutiérrez, *supra* note 11, at 17. Gutiérrez writes that:

[F]ull restitution of all non-materially altered industrial, commercial and agricultural properties to their legitimate owners will not only carry out the justice required for social peace, but it will also place the means of production in the hands of those entrepreneurs which had elevated Cuba to the top of nearly every socio-economic index in Latin America prior to the communist revolution. By creating constitu-

The restitution of properties in Cuba to U.S. claimants also has been specifically opposed because it would "lock the country back into a sugar-dominated structure of production" and "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."⁷⁷ Despite these concerns, it can be safely anticipated that U.S. nationals, at the conclusion of the claims settlement process, once again will be major participants in Cuba's economy.

Restitution — whether direct or by substitution — is likely to be a significant, but not necessarily a leading, ingredient in the mix of remedies granted to U.S. claimants. It will be inappropriate in many instances, and even where appropriate, its use should be tempered by the realization that restitution often is a slow and difficult process subject to contentious disputes among a variety of claimants, including former owners, their successors, current occupants, and many others.⁷⁸

tional and other legal incentives to encourage the unleashing of the creative energies of the Cuban people (both on the island and in exile), Cuba can rapidly earn foreign exchange through exports, produce abundantly for its own domestic consumption, employ workers at real jobs paying in a currency that has value (unlike today's Cuban peso), and restore labor rights. The economic multiplier effect of this combined economic activity will rapidly return prosperity to the island.

Id.

⁷⁷ Castañeda & Montalván, *supra* note 4, at 14. The concerns expressed by these authors 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, 33 & n.43 (1975). At that time, U.S.-owned enterprises dominated or played leading roles in the agricultural, mining, manufacturing, petroleum, and utility industries. See *id.* at 12-31.

⁷⁸ In the former Czechoslovakia, for example, restitution has led to numerous disputes between original owners and current occupants, as well as disputes between competing claimants, resulting in clogged courts. See Gray et al., *supra* note 43, at 49. In addition, "the legal precedence given restitution over privatization has created great uncertainty among potential investors and has complicated privatization, particularly in the case of small businesses and housing." *Id.*

4.5. *Payment by Means of State-Issued Instruments*

A number of Eastern European countries have used state-issued instruments, often referred to as “vouchers,” to provide full or partial compensation to expropriation claimants.⁷⁹ These vouchers may not be redeemed for cash, but they can be used as collateral for loans; as payment, 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; in exchange for annuities; or as investment instruments.⁸⁰

The voucher system provides another potential way of resolving many of the U.S. nationals’ expropriation claims in Cuba, particularly those of the former owners of small and medium enterprises who may not be interested in recovering the properties they once owned because of the obsolescence or physical deterioration of the facilities.⁸¹ This system recognizes the limits of Cuba’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 must be resolved at the outset is the level of compensation to be offered in proportion to the incurred loss.

⁷⁹ Hungary has used compensation vouchers as the sole means of indemnifying expropriation claimants. See Katherine Simonetti et al., *Compensation and Resolution of Property Claims in Hungary*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 61, 69 (JoAnn Klein ed., 1994). The means of compensation are interest-bearing transferable securities, called compensation “vouchers” or “coupons,” issued by a Compensation Office charged with the administration of the claims program. See *id.* The vouchers can be traded as securities, and pay interest at seventy-five percent of the prime rate set by the central bank. See *id.* at 69. Compensation is given on a sliding scale with regard to the assessed value of the lost property. See Gray et al., *supra* note 43, at 70.

⁸⁰ See Simonetti et al., *supra* note 79, at 69-72. In Hungary, vouchers can also be used to purchase farmland in auctions held by the state. Only the former owners of such land, however, may use their vouchers for this purpose. See *id.* at 69-70.

⁸¹ A Cuban economist has included the issuance of vouchers as an option for providing compensation to U.S. corporate claimants. See Pedro Monreal, “*Las Reclamaciones del Sector Privado de los Estados Unidos Contra Cuba: Una Perspectiva Académica*,” presented at the Shaw, Pittman, Potts & Trowbridge Workshop on Resolution of Property Claims in Cuba’s Transition, Washington, D.C. 5 (Jan. 1995). The alternative proposed by Monreal would require the claimant to invest in Cuba an amount equal to the value of the coupons he or she has received. See *id.*

This system potentially has great flexibility, for the vouchers could be used for a variety of purposes, some more attractive than others to individual claimants. In addition to vouchers, other state-issued instruments could be used to compensate U.S. claimants. These include annuities, bonds, promissory notes, stock certificates in privatized enterprises, or a combination of several of these forms.

There are, however, several potential drawbacks to a system of vouchers or other state-issued instruments.⁸² These instruments will fluctuate in value and are likely to depreciate in value if Cuba's economic recovery falters.⁸³ In addition, to the extent that the instruments are used as income-generating devices, such as for the collection of annuities, the rate of return is likely to be very low.⁸⁴ Also, the basic underpinning of a voucher system is confidence in the state's ability to make good on its obligations. Therefore, the security, transferability, and marketability of the compensation instruments are serious concerns that the Cuban transition government will need to address in order for this remedy to satisfy the U.S. claimants.

4.6. *Other Remedies*

Other remedies that might be utilized in Cuba — and have not yet been tried elsewhere — run the gamut from economic incentives to investment in the country itself. Alternative remedies could include: (1) credits on taxes and duties to the extent of all or part of the claim amount; (2) the ability to exchange the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, and preferences in government contracting; and (3) other benefits.⁸⁵ Each claimant may be interested in a different

⁸² For a brief discussion of some of the valuation and financing issues that will surface if Cuba seeks to implement a compensation scheme, see Cueto, *supra* note 54, at 26-28; Castañeda & Montalván, *supra* note 4, at 14-16.

⁸³ This depreciation occurred, for example, in the Slovak Republic. See Heather V. Weibel, Note, *Avenues for Investment in the Former Czechoslovakia: Privatization and the Historical Development of the New Commercial Code*, 18 DEL. J. CORP. L. 889, 921-22 (1993).

⁸⁴ In Hungary, the use of vouchers to collect annuities has yielded disappointing results. See Simonetti et al., *supra* note 79, at 78.

⁸⁵ See Matias F. Travieso-Díaz & Alejandro Ferraté, *Recommended Features*

“package,” so case-by-case negotiations should be conducted, at least to resolve the most significant claims.⁸⁶

5. CONCLUSION

A time will come when the United States and Cuba will set out to negotiate a settlement of the expropriation claims of U.S. nationals against the Cuban government. The date of such an event is uncertain, but it is very likely that the negotiations will be conducted 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 variety of remedies that Cuba will be able to offer the claimants. Certainly, the traditional way of settling expropriation claims — a lump sum of money paid to the U.S. government for pro rata distribution among all claimants — will not be adequate, given Cuba’s inability to pay a significant portion of the amounts it currently owes. Lump-sum compensation should be given to the extent that funds are available but should also be substituted with a variety of other remedies to be negotiated with Cuba by those claimants wishing to opt out of the lump-sum settlement. These other remedies can include restitution of the expropriated assets, compensation through state-issued instruments, and numerous other means. While the eventual solution reached in each case will likely 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.

Case-by-case negotiation is, however, likely to be a difficult and time-consuming process. Therefore, both the Cuban government and the claimants should be prepared to exhibit flexibility in working towards a fair and reasonable resolution of the claims, and they should approach any negotiations in good faith and with a cooperative attitude.

of a Foreign Investment Code for Cuba’s Free-Market Transition, 21 N.C. J INT’L L. & COMP. REG. (forthcoming 1996) (discussing incentives to foreign investment in Cuba that could also be offered to U.S. claimants in settlement of their claims).

⁸⁶ See A.R.M. Ritter, *Financial Aspects of Normalizing Cuba’s International Relations: The Debt and Compensation Issues*, in *TRANSITION IN CUBA — NEW CHALLENGES FOR U.S. POLICY* 501, 559 (Lisandro Perez ed., 1993).

APPENDIX A

U.S. EXPROPRIATION CLAIMS AGAINST CUBA WITH CERTIFIED AMOUNTS IN EXCESS OF \$1 MILLION

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
1	4122	2578	Cuban Electric Com- pany	\$267,568,414.00
2	3578	2622	North American Sugar Industries, Inc.	\$97,373,415.00
3	6049	2619	Moa Bay Mining Company	\$88,349,000.00
4	3824	2776	United Fruit Sugar Company	\$85,100,147.00
5	5969	665	West Indies Sugar Corporation	\$84,880,958.00
6	3969	2445	American Sugar Com- pany	\$81,011,240.00
7	5013	2615	ITT Corporation — Trustee	\$80,002,794.00
8	3838	938	Standard Oil Compa- ny	\$71,611,003.00
9	6066	2500	Francisco Sugar Com- pany	\$58,505,859.00
10	5013	2615	International Tele- phone and Telegraph	\$50,676,964.00
11	4546	1331	Texaco, Inc.	\$50,081,110.00
12	6020	2525	Manati Sugar Compa- ny	\$48,587,848.00
13	6034	2156	Bangor Punta Corp.	\$39,203,334.00
14	6247	2624	Nicar Nickel Com- pany	\$33,014,083.00
15	6818	1743	Coca-Cola Company	\$27,526,239.00

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
16	6217	2355	Lone Star Cement Corporation	\$24,881,287.00
17	6817	1850	New Tuinucu Sugar Company, Inc	\$23,336,080.00
18	4547	730	Colgate Palmolive Company	\$14,507,935.00
19	6057	2526	Braga Brothers, Inc.	\$12,612,873.00
20	3866	3548	Boise Cascade Corporation	\$11,745,960.00
21	4839	2354	American Brands, Inc.	\$11,679,901.00
22	3578	2622	West India Company	\$11,548,959.00
23	6031	2338	Atlantic Richfield Company	\$10,216,645.00
24	4234	548	Burrus Mills, Inc.	\$9,847,100.00
25	4212	3651	Pan-American Life Insurance Company	\$9,742,800.00
26	4071	3074	United States Rubber Company, Ltd.	\$9,523,892.00
27	4511	502	Powe, William A.	\$9,507,786.00
28	5928	2269	Pingree, Sumner Estate of	\$9,272,668.00
29	3713	1319	Woolworth, F.W. Company	\$9,188,256.00
30	6165	2492	Havana Docks Corporation	\$9,179,700.00
31	4545	2521	InterContinental Hotels Corporation	\$8,934,371.00
32	3792	778	Continental Can Company, Inc.	\$8,906,810.00
33	5627	7659	Loeb, John L.	\$8,573,096.00
34	3701	2644	Owens Illinois, Inc.	\$8,039,240.00
35	6812	3503	Brothers of Order of Hermits St. Augustin	\$7,885,099.00
36	3338	1330	Firestone Tire & Rubber Company	\$7,649,180.00

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
37	3836	1393	Clafin, Helen A.	\$7,508,690.00
38	6294	2685	Chase Manhattan Bank	\$7,461,468.00
39	6820	2545	Marks, Carl & Com- pany, Inc.	\$7,333,001.00
40	3231	2155	IBM World Trade Corporation	\$6,449,434.00
41	6034	2156	Baragua Industrial Corp. of N.Y.	\$6,280,722.00
42	3976	2577	Swift & Company	\$5,953,393.00
43	3071	2268	First National Bank of Boston	\$5,904,941.00
44	6143	2038	General Electric Com- pany	\$5,870,437.00
45	5930	2275	Pingree, Sumner Estate of	\$5,814,526.00
46	4783	1821	Libby, McNeill & Libby	\$5,713,618.00
47	4546	1332	Texas Petroleum Company	\$5,143,433.00
48	887	887	Goodyear Tire & Rubber Company	\$5,118,762.00
49	3393	569	Proctor & Gamble Company	\$4,996,256.00
50	6827	3669	Lengyel, Olga	\$4,865,767.00
51	3835	2628	First National City Bank	\$4,863,731.00
52	1943	2458	International Harvest- er Company	\$4,589,423.00
53	5970	2620	Davis, Arthur V. Estate of	\$4,267,083.00
54	6034	2156	Macareno Industrial Corp. of N.Y.	\$4,145,316.00
55	3875	3089	General Motors Cor- poration	\$3,877,702.00

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
56	5844	3088	General Motors Corporation	\$3,806,648.00
57	6034	2156	Florida Industrial Corporation of N.Y.	\$3,749,751.00
58	1145	385	Sears Roebuck and Company	\$3,704,957.00
59	1943	2459	International Harvester Company	\$3,673,387.00
60	3790	2279	Reynolds Metals Company	\$3,438,844.00
61	31	133	Sherwin-Williams Company	\$3,408,121.00
62	5743	662	Lykes Brothers, Inc.	\$3,383,226.00
63	3968	2326	Gillette Japan, Inc.	\$3,272,215.00
64	6001	8292	International Standard Electric Corp.	\$3,263,440.00
65	4558	3335	American Securities Corporation	\$3,252,740.00
66	3716	244	Air Reduction Company, Inc.	\$3,251,766.00
67	5751	1507	King Ranch, Inc.	\$3,216,085.00
68	6261	1471	Leeder, Marsden Robert	\$3,202,086.00
69	6141	240	Calixto Lopez & Company	\$3,156,328.00
70	3655	2372	Du Pont Inter-American Chemical Co.	\$2,995,683.00
71	5511	7649	Loeb, Frances L.	\$2,929,578.00
72	3836	1395	Rentschler, Mary C.	\$2,927,190.00
73	4129	3598	de Arango, Mercedes	\$2,892,136.00
74	6201	375	Goodrich, B.F.	\$2,768,801.00
75	5879	632	Pagliuca, Angel	\$2,655,759.00
76	3908	50	Gache, Mac	\$2,628,150.00
77	3660	3489	Grace, W.R. & Company	\$2,541,560.00

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
78	4129	3599	Giroux, Carmen de Arango	\$2,515,221.00
79	5921	2590	University of Chicago	\$2,500,000.00
80	5906	2510	Siboney Corporation	\$2,454,068.00
81	6254	515	Roberts, Alexander M. Sr.	\$2,258,674.00
82	332	202	Leone, Joseph Estate of	\$2,121,946.00
83	5754	1478	US Life Insurance Company	\$2,065,266.00
84	3748	2567	Armour & Company	\$2,055,004.00
85	3967	1477	Duys H & Company, Inc.	\$2,046,298.00
86	3453	407	Shepard, Julius J.	\$2,033,959.00
87	3745	277	Rutz, Anthony M.	\$1,992,423.00
88	30	538	Berwind Corporation	\$1,937,210.00
89	6194	653	Burford, Richard D.	\$1,865,868.00
90	15	772	Avon Products, Inc.	\$1,865,232.00
91	3837	2965	Hilton International Company	\$1,854,575.00
92	6021	1092	Garcia, Elsa	\$1,810,129.00
93	3680	2470	Mathieson Pan-American Chemical	\$1,794,710.00
94	3602	2035	Frederick Snare Corporation	\$1,762,231.00
95	1043	273	General Milk Company	\$1,732,612.00
96	3669	611	Rainbow Development Corporation	\$1,707,945.00
97	5842	3597	Pepsi-Cola Metro Bottling Company	\$1,646,766.00
98	6084	8773	Trexler, Harry C. Trust of	\$1,638,362.00
99	3789	2351	Canada Dry Corporation	\$1,633,114.00

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
100	3681	2126	Warner-Lambert SA	\$1,591,138.00
101	3724	233	Cuba Grapefruit Company, Inc.	\$1,567,470.00
102	6806	1420	Shapiro, Wilma	\$1,555,646.00
103	6806	1421	Shapiro, Charles	\$1,551,434.00
104	3672	2469	Squibb, E.R. & Sons Inter-America	\$1,523,329.00
105	3832	3717	Everhart, Jack Fall	\$1,481,052.00
106	6031	3017	Atlantic Refining Company of Cuba	\$1,382,314.00
107	3061	455	Tecon Corporation	\$1,375,392.00
108	6241	1617	Fryer, Matthew A.	\$1,368,930.00
109	3747	3566	Standard Brands, Inc.	\$1,355,312.00
110	3715	2646	Sterling Drug, Inc.	\$1,326,475.00
111	6191	2626	First National City Bank	\$1,305,874.00
112	665	2987	McKenzie, Fred	\$1,303,523.00
113	3830	3100	Doughertys, J.A. Sons, Inc.	\$1,298,363.00
114	4429	2775	United Fruit Compa- ny	\$1,270,728.00
115	5622	7647	Loeb, Frances L. (U/W Lehman)	\$1,255,619.00
116	380	1900	Dana, Agnes L. Estate of	\$1,250,000.00
117	4966	373	Schultz, Alfred H.	\$1,202,600.00
118	6224	2317	Western Union Tele- graph Company	\$1,155,654.00
119	6200	2692	McMasters, Helen Hunt Jackson	\$1,131,733.00
120	4791	2164	Kewanee Oil Compa- ny	\$1,125,917.00
121	3932	2495	Phillips, Edna A. Paul Valentine	\$1,121,581.00
122	5217	1530	PPG Industries, Inc.	\$1,090,068.00

<i>RANK</i>	<i>DECISION #</i>	<i>CLAIM #</i>	<i>CLAIMANT NAME</i>	<i>CERTIFIED AMOUNT</i>
123	5512	7657	Loeb, John L., Jr.	\$1,088,014.00
124	5752	2864	Griswold, Loomis D. Estate of	\$1,085,982.00
125	6259	1817	Namarib Company	\$1,082,667.00
126	6234	695	Harper, George K.	\$1,081,579.00
127	1862	2592	International Paper Company	\$1,071,518.00
128	3842	2932	USM Pan-American, Ltd.	\$1,054,846.00
129	3787	2476	General Dynamics Corporation	\$1,035,891.00
130	5907	3067	Swetland, Frederick L. Jr.	\$1,024,019.00
131	5626	7658	Davies, Deborah F.	\$1,012,180.00
<i>TOTAL</i>				<hr/> \$1,659,966,661.00