

## RESTITUTION OF PROPERTY IN CUBA: LESSONS LEARNED FROM EAST EUROPE

G. Douglas Harper

This paper will discuss the various methods that the former communist countries of Eastern Europe have applied in their search for ways to undo the massive expropriations that took place in the 1940s, after the Second World War. The various models will then be applied to Cuba, in order to determine which model, given the similarities and differences between them, would be most likely to succeed on the island.

The sections discussing the different methods of restitution of expropriated property deal only with commercial and agricultural property. Restitution of residential property is discussed in its own section. In terms of expropriated personal property, such as farm equipment, automobiles, trucks, jewelry, and the like, compensation is the only available option, it being assumed that after nearly forty years most such property is either unrecoverable, unusable, or obsolete.

### BACKGROUND

At the time Fidel Castro took power in 1959, Cuba was either at or near the top in all economic catego-

ries indicative of a high standard of living when compared with the rest of Latin America.<sup>1</sup> In 1956, the United States Department of Commerce ranked Cuba seventh in population, but first in per capita income in relation to the rest of Latin America.<sup>2</sup> The Cuban people also had one of the highest standards of living in Latin America.<sup>3</sup> The middle class was classified as “unusually large,” with “considerable growth in the past decade.”<sup>4</sup> Foreign investment amounted to approximately \$750 million by 1955.<sup>5</sup> Cuba was not classified as underdeveloped; the sugar industry was highly efficient, and a “national network of railways and highways blanket[ed] the country. . . .”<sup>6</sup> The pre-revolutionary Cuban economy was continuing to expand despite the corruption, instability, and wealth disparity present on the island.<sup>7</sup>

Since the revolution, Cuba has dropped to almost last in terms of per capita income of all Latin American countries.<sup>8</sup> Between 1991 and 1996 alone, the Cuban economy shrunk by about one-half.

---

1. *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, Jose M. Sario and Nicholas J. Gutiérrez, Jr. April 2, 1989, p. 1.

2. *Investment in Cuba, Basic Information for the U.S. Businessmen*, U.S. Department of Commerce, July, 1956, p. 3.

3. *Id.* at 6.

4. *Id.* at 4.

5. *Id.*

6. *Id.* at 5–6.

7. Sario & Gutiérrez, *supra*, at 1.

8. Vicente Echerri, “Gains” of Cuban Revolution Built on Towers of Illusion, *Wall St. J.*, January 24, 1992, at A15.

By August 1960, the Cuban government had seized and nationalized all private property, including that of Cuban nationals and Americans.<sup>9</sup> The Cuban government has refused to compensate owners for property expropriated during the nationalization program.<sup>10</sup> As a result, these claims have never been settled. In 1972, the United States Foreign Claims Settlement Commission, created pursuant to 22 USC 1622, certified the value of the U.S.-owned property confiscated by the Cuban government at U.S. \$1.8 billion.<sup>11</sup> Over 8,300 claims submitted to the Commission before the expiration period were considered.<sup>12</sup> In determining the value of the claims, the Commission took into account

the basis of valuation most appropriate to the property . . . including but not limited to, (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement.<sup>13</sup>

The Cuban Claims Program led to the certification by the U.S. Foreign Claims Commission of 5,911 claims.<sup>14</sup> Simple interest accumulating at 6%, when added to the original amount of the confiscated claims, resulted in a total debt to former owners of \$5.364 billion as of August 1993<sup>15</sup> and some \$12 billion in June 1998. To pay off this debt in fifteen years, a successor Cuban government's annual payments will exceed \$465.6 million.<sup>16</sup> Given this number, it is unlikely that a post-Communist Cuba will

be able to afford to pay compensation for expropriated property. Other alternatives appear to carry a higher likelihood of successful implementation.

As of 1991, Cuban debt to foreign governments and commercial banks exceeded \$7.5 billion.<sup>17</sup> Cuba owes a large portion of its debt to the former Soviet Union in rubles.<sup>18</sup> Based on the rate of 160 rubles to the dollar as of 1991,<sup>19</sup> however, the Cuban debt to Russia had plummeted from \$26 billion to a still high, but more manageable, \$160 million.<sup>20</sup> By 1993, the ruble had dropped to 587 rubles to the dollar. Based on this rate, Cuba's debt to Russia has dropped to less than \$45 million.<sup>21</sup> Given the most recent drops in the value of the ruble against the dollar, Cuba's debt to Russia has no doubt been reduced even further.

### Post-Communist/Post-Castro Cuba

As stated in *La Sociedad Económica* Bulletin Number 15, at page 1:

A well defined system of property rights forms the cornerstone to any free-market economy. A post Communist-Cuba will be no exception.<sup>22</sup>

One of the first daunting tasks a post-Castro Cuban government will face is deciding whether to compensate those whose property had been confiscated, or to give full or partial restitution of the expropriated property. Both compensation and restitution have

---

9. José F. Alonso and Armando M. Lago, *The Foreign Assistance Requirements of a Democratic Cuba*, p. 33, La Sociedad Económica, London, 1994 (the bulletin of economic policy organization La Sociedad Económica de Amigos del País).

10. Matias F. Travieso-Díaz and Alejandro Ferraté, *Legal Foundations for a Successful Privatization Program in Cuba*, in *Cuba in Transition—Volume 7*, p. 322, Association for the Study of the Cuban Economy, 1997.

11. Alonso & Lago, *supra* at 33.

12. 22 USC 1643(b).

13. *Id.*

14. Alonso & Lago, *supra* at 33.

15. *Id.*

16. *Id.*

17. Manuel Lasaga, Ph.D., *Options for Retiring Cuba's External Debt*, La Sociedad Económica, p. 2, 4th March, 1993.

18. *Id.*

19. The loans were made in rubles and are to be repaid in rubles, rather than U.S. dollars or some other hard currency.

20. *Id.*

21. *Id.*

22. *Private Property Rights in Cuba (1992): Housing*, La Sociedad Económica, Bulletin No. 15, p. 1.

advantages of which a post-communist Cuba can avail itself. The difficult task is choosing one model over the other, or some combination of the two. As discussed below in the section comparing restitution and compensation, most claimants have suggested that the return of confiscated property is their preferred choice to compensation or other remedies,<sup>23</sup> the main reason being that they have expressed a willingness to expend the energy and capital necessary to return to Cuba and help to rebuild the island.

A post-Communist Cuban government will most likely want to resolve all claims quickly, for three reasons: (a) to restore full relations with the United States; (b) to foster political stability; and (c) to encourage foreign investment.<sup>24</sup>

### **Restoration of Full Relations with the United States:**

The United States has consistently held that the first step towards normalizing relations with Cuba is settling all disputes relating to expropriated American property.<sup>25</sup> Once Cuba has established a process by which former owners can settle their property disputes, the United States can legally reestablish relations, thereby opening the gates for American investment in Cuba. The close proximity of a large economic superpower is an important factor for Cuba to consider in making decisions concerning entrepreneurial incentives to develop a healthy economy. The amount of investment potential and the interest already shown in investing in a post-communist Cuba by corporations and individuals, both Americans and Cuban-Americans, are significant factors to be considered. Investors will see a large, educated workforce close to American shores, while a post-Communist Cuba will see an opportunity to free itself of bloated state enterprises that constitute a drain on the economy.

**Fostering of Political Stability:** A look at the current situation in Russia is sufficient warning for countries unwilling to provide for the acquisition of private property (especially residential property) by its citizens. Because Russian citizens simply do not have anything to lose, they tend to elect leaders who promise them a bright future but who are unwilling or unable to make the difficult decisions necessary to provide for a stable economy.

To avoid similar instability, the Cuban government must provide its citizens with a stake in the future of a stable government. Settling property disputes and providing for the right to own private property would go a long way towards giving Cubans a stake in the continued success of a capitalist free-market society, and thus provide political stability as the economy expands.

**Encouragement of Foreign Investment:** Settling property disputes and providing for private property also will encourage much needed foreign investment. Once property issues are resolved, foreign investors will have clear mechanisms to pursue for purposes of purchasing, leasing, or developing property. Investors should be able to avoid having to defend their rights against several different claimants (the government, the current tenants, and the former owner or owners). Dealing with property issues in a timely and effective fashion will imbue investors with confidence that their real property investments are free and clear of competing claims.

### **SCHEMES FOR DEALING WITH CONFISCATED PROPERTY**

The governments of formerly communist countries have chosen one of two basic models in dealing with former owners of confiscated property.<sup>26</sup> The first is

---

23. *Legal Foundations for a Successful Privatization Program in Cuba*, Matías F. Travieso-Díaz and Alejandro Ferraté, Cuba in Transition—Volume 7, p. 323.

24. *Id.*

25. 22 USC 2370(a)(2).

26. Sariago & Gutiérrez, *supra*, at 25.

the “Restitution Model,”<sup>27</sup> while the second is the “Compensation Model.”<sup>28</sup>

### The Restitution Model

The Restitution Model is premised on the actual return of confiscated property to former owners.<sup>29</sup> Where physical restitution is not possible, the government substitutes some form of compensation,<sup>30</sup> including cash, bonds, or vouchers in privatized industries.<sup>31</sup>

The Czech and Slovak Republics have adopted the purest form of the Restitution Model.<sup>32</sup> Germany, in its reunification with the former East Germany, adopted a heavily modified version of the Restitution Model, combined with elements of the Compensation Model as described below.<sup>33</sup>

The three basic notions common to all forms of the Restitution Model are: (a) the laws deal primarily with commercial property rather than residential property; (b) various conditions are set forth which former owners must meet before qualifying for restitution; (c) the laws are based on a clear deadline for filing claims, combined with the difficult process of establishing clear title to property after many years.<sup>34</sup>

### The Compensation Model

The Compensation Model provides for physical restitution in a limited number of factual situations.<sup>35</sup> Different countries have developed various conditions for restitution, based on their perceptions of

state needs. The countries using the Compensation Model implement some form of program by which former owners are compensated for the loss of their properties. As with the Restitution Model, compensation to former owners can take the form of cash, bonds, stocks used for the purchase of state enterprises, or vouchers in privatized industries. The government uses money earned in the sale of state enterprises to pay compensation.

### Restitution or Compensation?

Both the Restitution and Compensation Models recognize the property rights of the former owners to some degree.<sup>36</sup> The differences between the two, however, are substantial from the point of view of the former owners, given the governments’ limited funds and a presumed willingness on the part of foreign investors to purchase assets from whomever holds clear title to them.<sup>37</sup>

Many former owners of expropriated Cuban property will prefer the Restitution Model.<sup>38</sup> Restitution will allow the former owners an opportunity to return to their homeland and rebuild their country. As well, a post-Castro government may find the Restitution Model preferable as a way to reduce the financial burden associated with the Compensation Model.<sup>39</sup> As discussed below, Cuba does not have the resources, in terms of both money and the numbers of state enterprises which would need to be sold, in order to

---

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Paper presented at the ABA Task Force on Cuba, Project Area #1, *Research Concerning the International Legal Standards Applicable to the Expropriation of Property*, p. 3, New Orleans, LA, August 9, 1994.

39. *Id.*

raise the capital necessary to adhere to the Compensation Model.

One important issue in any discussion of the Restitution Model is the relationship between former owners and foreign investors with the Cuban populace. Should the Cuban government, as this paper suggests, choose to return property to former owners, no doubt there will be a certain level of resentment on the part of Cubans as the programs are implemented. Expatriates who fled the country and who intend some day to return and make decisions on the future of Cuba will no doubt be viewed with suspicion and resentment by those Cubans who stayed behind and were forced to undergo the difficult “Special Period” following the collapse of the Soviet Union. Should Cuba, instead, choose to follow the Compensation Model, Cuban resentment may well focus on the foreign corporations which will be perceived as exploiting the island’s resources in order to make a quick profit, with no long term interest in the island. Thus another advantage of choosing the Restitution Model is that the former owners are more likely to be interested in rebuilding the long term economic infrastructure of the island, than they are simply in recouping short term profits.

### GERMANY

#### The Unification Treaty

The 1990 Unification Treaty between East and West Germany included specific programs aimed at prop-

erty confiscated by the Communists.<sup>40</sup> Under the Joint Declaration that was incorporated into the Unification Treaty, all confiscations based on laws passed by the Soviet occupiers between 1945 and 1949 were declared irreversible.<sup>41</sup> The constitutionality of this provision was challenged in the German Constitutional Court (the *Bundesverfassungsgericht*).<sup>42</sup> The German court upheld the recognition of these expropriations, stating that seizures took place outside the then existing territory of the Federal Republic of Germany, in what was the German Democratic Republic, and also before the German Basic Law became the Constitution of the Federal Republic. They were, therefore, nonrecoverable.<sup>43</sup>

In June 1990, just prior to reunification, East Germany created the “Trust Agency” (“*Treuhandanstalt*”).<sup>44</sup> All state-owned properties<sup>45</sup> were transferred to the Trust Agency, which was then charged with selling them as quickly as possible to either German or foreign investors.<sup>46</sup> Any properties in the form of companies that could not be sold were to be liquidated.<sup>47</sup>

#### The “Law Concerning Regulation of Unresolved Property Issues”

According to the “Law Concerning Regulation of Unresolved Property Issues” (the Property Law), any property confiscated by the East German government, as opposed to the Soviet occupiers covered by the Unification Treaty, and subsequently transferred

---

40. Sariago & Gutiérrez, *supra*, at 12.

41. Michael Gruson and Georg F. Thoma, *Investments in the Territory of the Former German Democratic Republic*, 14 *Fordham Int'l L. J.* 540, 554 (1991). I rely heavily on this material because of its concise explanation of the German restitution plans. I will refer to it as “Gruson & Thoma (I)” so as to distinguish it from a follow-up article.

42. *Id.*

43. Michael Gruson and Georg F. Thoma, *Investments in the Territory of the Former German Democratic Republic - A Change of Direction*, 14 *Fordham Int'l L. J.* 1139, 1156 - 1157 (1991). This is a follow-up to the authors’ original article. I will refer to this article as “Gruson & Thoma (II)” for the remainder of this paper.

44. Gruson & Thoma (I), *supra*, at 545.

45. Roughly 8,000 companies.

46. Gruson & Thoma (I), *supra*, at 548.

47. *Id.*

either to state ownership<sup>48</sup> or to a third party,<sup>49</sup> is to be returned to its former owners or their successors.<sup>50</sup> The Property Law allows the former owner to choose compensation over restitution.<sup>51</sup> Although the present owner is not directly liable for compensation to the former owner, it may have to contribute to a compensation fund.<sup>52</sup>

Expropriated enterprises placed under state administration are also to be reconveyed, if the current enterprise is comparable to the enterprise at the time of the taking.<sup>53</sup> If the current enterprise is different from the original enterprise, the former owner may only receive compensation.<sup>54</sup> However, the former owner has the option of choosing compensation rather than reconveyance of the property.<sup>55</sup>

Where the owner has chosen reconveyance, he must pay for any increase in the value of the land financed with public funds.<sup>56</sup> The former owner will also be compensated for any reduction in the value of the property while held by the state.<sup>57</sup>

Reconveyance is excluded in certain cases,<sup>58</sup> in which event the former owner may receive either compensation or substitution of a similar property.<sup>59</sup> The former owner will not be entitled to reconveyance, for example, when a church or recognized non-profit organization has acquired the property in good

faith.<sup>60</sup> Furthermore, a property cannot be reconveyed under this exemption if:

- (i) the use or dedication of the premises has been changed by material alterations and this use is in the public interest; (ii) the premises are dedicated to common use (e.g., streets); (iii) the premises are used for “complex housing;” or (iv) the premises are used commercially or as part of an enterprise, and a reconveyance would have severe adverse effects for that enterprise.<sup>61</sup>

### **The Law Relating to Special Investments in the German Democratic Republic**

The other plan used to deal with confiscated property in Germany is the “Law Relating to Special Investments in the German Democratic Republic” (the “Special Investments Law”). The Special Investments Law applies only to expropriated property, not property taken for public administration.<sup>62</sup> The Special Investments Law provides for the right of a present owner to sell property, even if the former owner has filed a claim, if the present owner can obtain a certification stating that the property has a “special investment purpose.”<sup>63</sup> A special investment purpose exists for:

- “the maintenance or creation of employment in particular through the setting up of an industry

---

48. Such as, for example, property nationalized under the East German communist government.

49. The Property law also deals with property confiscated by the Nazis. Therefore, property confiscated or sold in a “forced sale” is also dealt with under the law.

50. Gruson & Thoma (I), *supra*, at 554.

51. *Id.* at 556.

52. *Id.* at 560.

53. *Id.* at 558-559.

54. *Id.* at 559.

55. *Id.*

56. *Id.* at 556.

57. *Id.*

58. *Id.* at 558.

59. *Id.*

60. *Id.* at 557.

61. *Id.* at 558.

62. *Id.* at 561.

63. *Id.*

or commercial establishment, or a service enterprise[.]

- the provision of housing for local people, or
- the installation of infrastructure necessary for one of the above.”<sup>64</sup>

The cut-off date to file for the special investment certificate was December 31, 1992. To obtain a special investment certificate, the investor must have submitted both an investment plan and adequate assurance of performance of the plan.<sup>65</sup> A hearing is then to be held, so that both the municipality and the former owner can be heard for purposes of determining if the certificate should be granted.<sup>66</sup> If the certificate was granted, the former owner may receive the proceeds of the sale, or the fair market value if the proceeds are significantly below market value.<sup>67</sup>

Three examples help illustrate the plan under the Special Investment Law:

- A foreign corporation interested in acquiring confiscated property is willing to invest \$10 million and create 200 new jobs. The former owner is only willing to invest \$1 million, and will use the facilities mostly for storage space. Because the foreign corporation’s plan is most beneficial to the community, the Treuhandanstalt most probably would decide for the foreign corporation. The former owner will then be able to file a claim for the proceeds resulting from the sale of the land to the foreign corporation. If the sale

price is less than the fair market value, the former owner’s claim may be for the market value instead of the sales price of the property.<sup>68</sup>

- A former owner seeks restitution of a house that has new occupants. Either the government will pay compensation to the former owner, or the former owner will pay the current occupants, following price negotiations, to vacate the property.<sup>69</sup>
- Two companies bid for the same property. One company plans to build a supermarket, the other, a block of apartments. The local courts will decide which offer is best suited to the needs of the local community. The former owner is compensated.<sup>70</sup>

### **Law for the Removal of Obstacles to Privatization for Enterprises and for the Promotion of Investments**

The “Law for the Removal of Obstacles to Privatization of Enterprises and for the Promotion of Investments” (the “Obstacles Removal Law”), passed in March 1991, provides for amendments to the Property Law and the Special Investments Law.<sup>71</sup> The Obstacles Removal Law revised the Property Law by allowing the Treuhandanstalt or a Governmental Entity to sell and lease any of its real property or buildings, even if the former owner has filed a reconveyance claim, if the sale is to promote “investment purposes.”<sup>72</sup> Investment purposes are classified as the same as those for special investments.<sup>73</sup>

---

64. *Interim Report* 1, p. 4, Fundación Sociedad Económica de Amigos del País. (The first Fundación Sociedad Económica de Amigos del País was created in Bilbao, Spain in 1765. Subsequent Fundaciones were established in Havana and Santiago de Cuba. This Fundación was created with several objectives: (1) to encourage research and analysis of economic policies that will aid Cuba’s transition to a market economy; (2) to circulate work conducted by other groups relating to Cuba; (3) to publish and distribute clear and simply written studies relating to Cuba. I shall refer to it as “Fundación” throughout the remainder of this paper.)

65. Gruson & Thoma (I), *supra*, at 561.

66. *Id.*

67. *Id.* at 562.

68. Fundación, *supra*, at 4.

69. *Id.* at 5.

70. *Id.*

71. Gruson & Thoma (II), *supra*, at 1139 - 1140.

72. *Id.* at 1143.

73. *Id.*

The Revised Property Law differs from the Special Investment Law in two respects. First, unlike other present owners selling property under the Special Investment Law, the Treuhandanstalt or Governmental Entity does not need to file for certification of the investment purpose.<sup>74</sup> It need only notify local authorities and known former owners regarding the investment plan.<sup>75</sup>

Second, while present owners under the Special Investments Law may only dispose of property if it is necessary to achieve one of the three special investment purposes, the Treuhandanstalt or Governmental Entity needs only to establish a reasonable relationship between the property and the investment purpose.<sup>76</sup> Under the Special Investment Law, if a former owner challenged a sale, the sale was delayed until a final determination was made as to the certification of the property.<sup>77</sup> Under the Revised Property Law, if the former owner objects, the transaction may continue to go forward.<sup>78</sup>

If the property is sold, the former owner is still entitled to the proceeds of the sale, or the fair market value if the proceeds are substantially below the market value.<sup>79</sup> The Revised Special Investment Law allows a present owner to establish a long term lease to property.<sup>80</sup> If the property is leased, the former owner takes title to the property subject to the lease.<sup>81</sup>

The Obstacles Removal Law has moved Germany away from reconveyance and towards compensation, as the primary form of restitution in that country.<sup>82</sup>

### **Problems with Applying the German Programs to Cuba**

Many Cuban-Americans originally believed that East Germany represented the closest example to a post-communist Cuba. Both have sizable exile populations with an interest in and the means by which to revive their homelands. There are a number of significant differences, however, that appear to make the German plan inapplicable to Cuba.

First is the economic difference between the countries. At the time of reunification, Germany was an economic superpower. The programs dealing with expropriated property expressed the ability of Germany to absorb the tremendous losses which are associated with the Compensation Model. Cuba, on the other hand, is considerably poorer. There is little existing industry which a post-communist government can sell in order to pay compensation to former owners.

Second, by choosing compensation over restitution, the Cuban government may be denying an important avenue of economic growth by providing much needed work to local Cubans, who will almost inevitably be laid off from their jobs in state enterprises that are forced to cut back as government support disappears. By providing compensation rather than restitution, the Cuban government runs the risk of reducing the interest of expatriate Cubans in seeing their companies restored. Though this policy may create some tensions between former owners and the Cubans presently residing in Cuba, as discussed above, it appears sounder, economically, to return the land to those expatriates who are patriotism or nationalism to rebuild the island. There is more of a

---

74. *Id.* at 1144.

75. *Id.*

76. *Id.* at 1145.

77. *Id.* at 1146.

78. *Id.*

79. *Id.*

80. *Id.* at 1147.

81. *Id.* at 1146.

82. *Id.* at 1158.



risk that foreign corporations will be viewed by current Cuban residents as treating the island as though it were a colony—exploiting the island, to make a quick profit, but with little interest in reviving the island itself.

### THE CZECH AND SLOVAK REPUBLICS

Following the “Velvet Revolution” led by Vaclav Havel in 1989, the Czech and Slovak Republics instituted the most generous of the East European programs dealing with restitution of, and compensation for, confiscated property. The Czechoslovakian government recognized that restitution of expropriated lands is necessary not just for purposes of “justice,” but also to create a class of entrepreneurs that could strengthen the economy in the period of adjustment following Communism’s collapse.<sup>83</sup>

#### The First Restitution Act

The First Restitution Act of October 2, 1990, provided for the return of all land confiscated by the communist government between 1955 and 1959.<sup>84</sup> In actuality, this represented only a small portion of the property in question, and dealt mostly with small businesses in the service sector.<sup>85</sup> The original owners or their successors were given a six-month period in which to file a claim in order to have the expropriat-

ed properties restored to them.<sup>86</sup> The Act allowed both citizens and non-citizens to file claims.<sup>87</sup> Non-citizens could not file a claim, however, if the domiciliary country settled claims with Czechoslovakia through a bilateral treaty.<sup>88</sup> Where third parties<sup>89</sup> held bona fide title, the Czechoslovakian government offered compensation to the original owner.<sup>90</sup>

#### The Second Restitution Act

The Second Restitution Act of February 21, 1991, provided for restitution or compensation for all property confiscated between February 25, 1948, when the communists took over, and 1989, when they lost power.<sup>91</sup> The Second Restitution Act required current owners<sup>92</sup> to relinquish possession of property for immediate return to the former individual owners.<sup>93</sup> Seven hundred fifty million dollars was set aside for compensation purposes where restitution was not possible.<sup>94</sup> Any compensation in excess of the set-aside amount was paid to former owners by way of government-issued bonds.<sup>95</sup>

The Second Restitution Act covered over \$10 billion worth of property.<sup>96</sup> The benefits intended by the Act were limited, however, to individuals.<sup>97</sup> Companies and other legal entities were excluded from recovery under the Act.<sup>98</sup> Additionally, only Czech and

---

83. Vratislav Pechota, *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 Vanderbilt Journal of Transnational Law 305, 309 (1991).

84. *Id.*

85. *Id.* at 310.

86. *Id.* at 309.

87. *Id.*

88. *Id.*

89. Such as joint ventures, corporations, foreigners, or the state administration servicing the diplomatic corps).

90. Pechota, *supra*, at 309.

91. *Id.* at 310-311.

92. Usually a state enterprise and/or municipality.

93. Pechota, *supra*, at 311.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Slovak citizens were eligible to recover.<sup>99</sup> Citizens living abroad, or foreign nationals, could not qualify for restitution.<sup>100</sup>

Forcing the former owners to return to Czechoslovakia has had a destabilizing effect on the housing market, and has placed current occupants in an insecure position.<sup>101</sup> The residence requirement, along with the legal obligation to return all properties to their former owners, has resulted in a rise in the costs of housing and living, as current occupants are forced to look elsewhere for housing.<sup>102</sup>

An interesting aspect of the Czechoslovakian programs is that restitution claims took precedence over any privatization claims. Thus, before a state enterprise could be privatized, the Act required that the registry of deeds be consulted.<sup>103</sup> If an owner prior to 1948 was listed in a registry, the former owner had until the expiration of the period for submission of claims to file its claim.<sup>104</sup> If no claim were filed before the expiration date, no owner were found in the registry of deeds, or the claim was disallowed, the privatization of the state enterprise to investors could proceed.<sup>105</sup> Thus the Act ensures accurate title to the land, a basic condition necessary for investment purposes (as explained above). At the same time, the government raised funds which could be used for

compensation purposes, where necessary, as well as job training or social programs.

#### **Small-Scale Privatization Act**

Small-size privatization is covered by the “Act Concerning the Transfer of Some State Property to the Ownership of Individuals or Juridical Persons” of October 25, 1990 (“The Small-Scale Privatization Act”).<sup>106</sup> The Act applies to all “unclaimed small industrial businesses, or service establishments other than utilities or public services”—approximately 120,000 small businesses.<sup>107</sup> Under this Act, all unclaimed properties, as described above, were sold in auctions to present and former citizens<sup>108</sup> or to legal entities comprised of citizens.<sup>109</sup> The Act has been extremely successful.<sup>110</sup> In the first auctions, “most of the businesses sold for more than the asking price.”<sup>111</sup> Proceeds of the auctions are used by the government to suit various needs.<sup>112</sup>

#### **The Large-Scale Privatization Act**

The “Law on Conditions of Transferring State Property to Other Persons” (the “Large-Scale Privatization Act”) took effect on April 1, 1991.<sup>113</sup> The Act, hailed by Vaclav Havel as an historic “attempt to get rid of state ... ownership of industry,” provided for the privatization of most businesses except for certain industries such as railroads, nuclear power stations, and telecommunications.<sup>114</sup> Privatization was

---

99. *Id.*

100. *Id.*

101. “Social Policy in Chechoslovakia,” Mita Castle-Kanerova, *The New Eastern Europe*, p. 112, Sage Publications Ltd., 1992.

102. *Id.*

103. Pechota, *supra*, at 311.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Those naturalized after February 25, 1948.

109. Pechota, *supra*, at 312.

110. *Id.*

111. *Id.*

112. *Id.* at 313.

113. *Id.*

114. *Id.*

achieved through the creation of joint stock companies with subsequent offering of shares to investors and the sale of some enterprises directly to domestic and foreign investors.<sup>115</sup>

### Application of Czechoslovakian Plan to Cuba

The Czechoslovakian plan could be useful, to a limited extent, in Cuba. By providing for a time limit after the expiration of which the former owners cannot receive either restitution or compensation, the Cuban government can guarantee title of property to foreign investors, thus encouraging investment and the development of property without fear of claims from prior owners. As well, because the plan focuses more on returning property to former owners rather than compensation, the Czechoslovakian government saves money which can then be put to other uses necessary to encourage economic development.

The various Acts also do not discourage redevelopment by the former owners. Because all the Acts, except the Second Restitution Act, are not limited to citizens living in Czechoslovakia, any former owners (or their successors) living abroad can rebuild on the confiscated property. Money spent in the rebuilding process is put back into the economy, where a middle class, made up of entrepreneurial individuals helping in the rebuilding process, is encouraged to develop.

The main drawback to the Czechoslovakian plans appears to be the limitation of benefits to individuals. There is no reason to exclude legal entities such as corporations from receiving restitution. Although the Czechoslovakian government can make money from the sale of state enterprises, the government must continue to pay all expenses associated with the state enterprises, many of which are losing money. By continuing to pay those expenses, the government loses a large share of the profits earned from the eventual sale of the enterprise. It is better for the govern-

ment to rid itself quickly of the burden of these state-run enterprises so that investors can take them over and turn them into profit generating, and therefore more readily taxable, enterprises.

### POLAND

Polish compensation and restitution plans differ significantly from Germany's plans and those of the Czech and Slovak Republics. Poland's plan was to compensate owners whose land was taken without compensation between 1944 and 1960 in contravention of laws *then in force*.<sup>116</sup> The plan, therefore, does not cover any of the property expropriated under the various Polish nationalization programs. Landowners whose land was confiscated under any of the communist nationalization programs must file lawsuits, at their own expense and without any governmental policies to back up their claims.<sup>117</sup> This is costly in two respects. First, rather than spending resources which could be used for investment purposes, former owners are forced to pay to have their rights recognized by the courts. Second, the plan slows the economic recovery of the country by forcing foreign investors to wait until property ownership is settled before investing any money in a particular property. No investor would want to risk spending money on a property that may not have legally belonged to its seller.

For those former owners who were covered by the reprivatization laws, the Polish government chose compensation over restitution.<sup>118</sup> Compensation took the form of capital bonds that would enable the former owner to purchase shares in state enterprises undergoing privatization, and guaranteeing priority in purchasing shares of their former enterprises.<sup>119</sup> The former landowners could only reacquire their property by paying, in cash, the market value of the confiscated real estate or reproduction value<sup>120</sup> of

---

115. *Id.* at 314.

116. Sario & Gutiérrez, *supra*, at 19.

117. *Id.*

118. *Id.*

119. *Id.*

120. Defined as the replacement value of the property.

other “immovable property.”<sup>121</sup> The problem with this approach is that it requires former owners to expend money for land that is already theirs—money which could be better used to improve the land, thereby providing the necessary jobs following the inevitable closure of expensive and debt-ridden state-run enterprises.

Poles living abroad are eligible for restitution or compensation in the form of state bonds only if they adopt Polish citizenship, if given up, and return to Poland permanently to administer the enterprises and/or land they recover.<sup>122</sup> This aspect of the Polish plan is problematic when applied to Cuba, as the likely effect would be to discourage expatriate Cubans and Cuban-Americans from investing in Cuba. Many will probably not want to make a permanent return to Cuba immediately. Instead, many will probably elect to wait until the political situation stabilizes and the basics, such as electricity, water, and other facilities, are available and reliable for use, as opposed to the current situation and the likely situation in an immediate post-communist Cuba. Especially with so many Cubans living in close proximity to Cuba, limiting restitution and compensation to those willing to come back to Cuba is not useful to the long-term redevelopment of the island. Additionally, basing restitution and compensation on citizenship and residency in Cuba will put a strain on residential property should people be forced to return to a Cuba with little adequate housing. Former owners who are forced to move back to Cuba in order to recover their property will, rightfully, most likely want to recover their expropriated residential property, as well. Recovery of residential property would, in turn, necessitate the forced removal of thousands of Cu-

bans from existing housing. As a result, Cuba would be faced with two disruptive problems in an already unstable atmosphere: (1) instant homelessness on a nearly unprecedented scale and (2) economic meltdown. As discussed below, there appears to be a better solution.

The Polish Privatization Ministry reports that over 70,000 applications to reclaim property worth over \$1 billion have been filed.<sup>123</sup> The estimated cost for compensation could eventually cost Poland \$23 billion, an enormous amount considering Poland’s annual budget at the time was only \$2.2 billion.<sup>124</sup> As cited above, claims for confiscated property in Cuba exceed \$5 billion with annual payments exceeding \$465 million.<sup>125</sup> Cuba will not be able to pay such an amount. Poland is more industrialized than Cuba, and can therefore earn more from the sale of state enterprises than can Cuba. Additionally, money spent to pay compensation claims could be better spent on job training and/or welfare, as workers are laid off from formerly state-run enterprises.

## HUNGARY

In July 1991, the Hungarian Parliament passed the “Law to Provide Partial Compensation for Unjust Damage Caused by the State to the Property of Citizens.”<sup>126</sup> The law was designed to partially re-establish private property rights in Hungary.<sup>127</sup> The law did not provide for restitution; relying, instead, on compensation in the form of government issued interest-bearing certificates that could be used to buy state-owned property, businesses, or shares in businesses sold by the State Property Agency or local government.<sup>128</sup> There was no restriction on the selling of the certificates to foreigners.<sup>129</sup> Former owners were

---

121. Sario & Gutiérrez, *supra*, at 19.

122. Sario & Gutiérrez, *supra*, at 20.

123. *Bids to Reclaim Property Increasing: Total Bill Could Reach \$23 Billion*, BNA International Business Daily, December 4, 1991.

124. *Id.*

125. Alonso & Lago, *supra* at 33.

126. *Property Compensation Law to Take Effect in Hungary*, BNA International Business Daily, August 9, 1991.

127. Sario & Gutiérrez, *supra*, at 16.

128. *Property Compensation Law to Take Effect in Hungary*, BNA International Business Daily, August 9, 1991.

129. *Id.*

given priority to acquire confiscated property, the major exception being apartments, in which case the current tenants were given priority rights for purchases.<sup>130</sup> Purchasers of agricultural lands through the use of certificates were limited to those who were currently farming and living in a community and who were prepared to continue the use of the land for farming purposes.<sup>131</sup> These restrictions have had an adverse effect on Hungarian nationals by stifling those “expatriate Hungarians who thought of returning to reclaim rural holdings or their Budapest villas for transformation into holiday homes or commercial ventures.”<sup>132</sup> Again, as with Poland, the restrictions on compensation and restitution are negatively affecting the economy by removing those parties most capable and willing to invest in the country’s resources—the expatriate Hungarians. The result is a high degree of foreign ownership, as the government sells unclaimed state-owned assets.<sup>133</sup>

### STATUS OF ECONOMIC RECOVERY IN EAST EUROPE

The Czech Republic, Hungary, Poland, and Slovakia have all recovered significantly since the collapse of communism. Considering that Slovakia has the smallest population of the four,<sup>134</sup> it has made the largest gains, from a negative growth rate in GDP of 16.7 percent in 1991, to a positive growth rate of 7.4 percent in 1995.<sup>135</sup> Next was Poland with a decline

in GDP of -11.5 percent in 1990, but an increase of 7 percent in 1995. The Czech Republic was third with a decline of -14.2 percent in 1991 and an increase of 4.8 percent in 1995. Last was Hungary with a decline of -12 percent in 1991 and an increase of only 2 percent in 1995.<sup>136</sup> The long range recovery for all four continues to be hopeful. The main drawback to both Poland’s and Hungary’s recovery is the large long-term debt they incurred. In 1995 Hungary’s public and publicly guaranteed debt amounted to over \$23.5 billion.<sup>137</sup> Similarly classified debt in Poland amounted to a staggering \$41 billion.<sup>138</sup> The Czech and Slovakian public debt, however, amounted to only \$9.6 billion and \$3.57 billion, respectively.<sup>139</sup> As payment on this debt comes due, those countries, such as Hungary and Poland, that are spending resources to pay the long-term debt and the continued operation of state-run enterprises will have to either take out more loans to finance the expenditures, or sell the state-run enterprises at a significant loss in order to get rid of them to pay their debts.

### APPLICABILITY OF SCHEMES TO CUBA

The market value of a product is subjective, in that it is created by the marginal utility of the product to the user.<sup>140</sup> Therefore, the value of a product is created by the market, not work plus capital as was believed in formerly communist countries.<sup>141</sup> When the Cuban economy opens, many enterprises may realize

---

130. *Id.*

131. Fundacion, *supra*, at 6.

132. *Id.*, as reported by the Financial Times newsletter “East European Markets” (8th Feb., 1991).

133. *Institutional Design in Post-Communist Societies*, p. 179–180, Jon Elster, Claus Offe, and Ulrich K. Preuss, Cambridge University Press, 1998.

134. As of 1995, the population of the Czech Republic was 10,302,215; the population of Hungary was 10,374,823; the population of Poland was 37,878,641; and the population of Slovakia was 5,274,335. See *Statistical Yearbook, Forty-Second Issue*, Department of Economic and Social Affairs, Statistics Division, United Nations, New York, 1997.

135. *Statistical Yearbook, Forty-Second Issue*, p. 163–173, Department of Economic and Social Affairs, Statistics Division, United Nations, New York, 1997.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Commentary*, p.1, La Sociedad Económica, Feb. 12, 1993.

141. *Id.*

that their products have a negative value on the market because few may be interested in purchasing them.<sup>142</sup> It is unlikely that workers will give up their jobs, salaries, homes, and whatever capital they have to save “their” company.<sup>143</sup> Instead, the government will be forced to print money in an effort to finance deficits resulting from these worthless enterprises.<sup>144</sup> The result is inflation,<sup>145</sup> or worse, hyperinflation. On the other hand, selling an enterprise with negative value to an investor willing to turn it into a positive value can be viewed not as selling a national property, but as selling a national problem.<sup>146</sup>

Cuba’s situation in relation to former property owners is more favorable than is the case in East Europe.<sup>147</sup> There is essentially only one class of confiscation victims, as opposed to the several mutually antagonistic ideological/ethnic groups in each of the Eastern European countries.<sup>148</sup> Therefore, it is unlikely that Cuba will destroy itself in civil war as is the case in Yugoslavia. Also, there are approximately 1.5 million relatively wealthy Cubans only 90 miles away who are ready and willing to support a post-communist nation.<sup>149</sup> The quick infusion of cash, as well as the long-term support by this large number of expatriate Cubans in such close proximity to their

former country, is an advantage not available to the former communist nations of Eastern Europe (with the possible exception of Germany).<sup>150</sup>

By giving Cubans clear title to property quickly, they will be able to sell or mortgage it for entrepreneurial pursuits.<sup>151</sup> This “bottom-up” approach to economic revitalization can proceed quickly and successfully, as shown by events in Eastern Europe.<sup>152</sup> Cuba will then have an expanding, or at least developing, middle class, as opposed to “millions of holders of shares in deficient enterprises.”<sup>153</sup>

On the other hand, Cuba is at a disadvantage to Eastern Europe in relation to its economy.<sup>154</sup> Cuba is much poorer than pre-reform Europe, primarily because Eastern Europe has a more diversified base of exports than Cuba and, as a result of large coal deposits, is less energy-dependent than Cuba.<sup>155</sup>

The importance of restitution and privatization can be seen in the Czech and Slovak Republics.<sup>156</sup> These Republics closely mirrored Cuba before their transition to economic liberalism.<sup>157</sup> Entrepreneurs in both countries utilized the newly privatized properties and assets to set up new businesses.<sup>158</sup> Additionally, “[t]he creation of new firms in the manufacturing, con-

---

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 2.

147. Sario & Gutiérrez, *supra*, at 28.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Commentary*, p. 3, *La Sociedad Economica*, Feb. 12, 1993.

152. *Id.*

153. *Id.*

154. *Cuba: The Transition to a Market Economy*, Jorge Sanguinety, in *Sociedad Económica*, “Summary of Meeting of the Association for the Study of the Cuban Economy,” Bulletin No. 9 (September 1991) p. 2.

155. *Id.*

156. *Prospects for Cuba’s Entrepreneurs After Transition: A Comparative Analysis*, Cuba in Transition—Volume 7, p. 47, Association for the Study of the Cuban Economy, August 7-9, 1997.

157. *Id.* at 48.

158. *Id.* at 47.

struction, and retail sectors has been most dynamic in the countries where privatization has made the greatest progress.”<sup>159</sup> The private sector in the Czech Republic has grown remarkably fast, a success attributable to policies adopted early in the transition process.<sup>160</sup> A post-communist Cuba should look to these broad policies early in its process of transition to economic liberalization.<sup>161</sup>

There should also be an emphasis on the creation of small- and medium-sized businesses.<sup>162</sup> In this way a strong middle-class, essential to a stable government and economy, can develop. As stated in the journal of the *Fundación Sociedad Económica de Amigos del País*:

“The swift privatization of state-owned assets in the newly found democracies of East Europe are now universally seen as the key to their effecting successful transition from command to market economies.”<sup>163</sup>

### ESTABLISHMENT OF A CLAIM PERIOD

For the orderly restitution of expropriated property, a post-communist Cuba will first have to establish a claim period, following the expiration of which all unclaimed property can be auctioned off to the highest bidder.<sup>164</sup> Property that was created by the communist regime (such as the national fishing fleet and energy production facilities) and property developed with foreign governments (specifically, hotels and tourist resorts) in which the Cuban state has a share, may likewise be auctioned off.<sup>165</sup> The funds from these auctions can be used in several ways: job training, loan repayment, entrepreneurial incentives, and other such beneficial social endeavors.

### RESIDENTIAL PROPERTY

Since taking power, Castro has warned Cubans that if Communism collapses, the exiled Cubans will return and take the present owners’ houses away from them. Such an act would no doubt lead to violence between the present and former owners. A change from a command economy to a market economy, however, does not require such harsh measures as to displace and make homeless a large number of Cubans. Instead, a post-Communist Cuban government should learn from the German experience. In developing a plan for resolution of residential property claims in the former East Germany, the German government has had to balance three competing interests:

the moral right of former owners to the restitution of property that they lost to the former regime; the rights of present occupants to continue living in their houses; and finally, but most importantly, the need to encourage new investments in East Germany.<sup>166</sup>

Title in residential property could be settled peacefully in one of four ways. First, current occupants of residential property can receive clear title to the property, so long as they have, or are in the process of acquiring, title to the land.<sup>167</sup> Second, occupants of government property that have not acquired title to the land may be given the option of acquiring title at advantageous terms.<sup>168</sup> Third, property occupied by the government for official use can be returned to the former owners.<sup>169</sup> Fourth, property may be reconveyed to the former owners if it is either not in use, abandoned, or the present occupants under option two decline to acquire title to the property. Those

---

159. *Id.* at 48.

160. *Id.* at 47-48.

161. *Id.*

162. Fundación, *supra*, at 3.

163. *Id.* at 1.

164. Sario & Gutiérrez, *supra*, at 28.

165. *Id.*

166. Fundación, *supra*, at 4.

167. *Commentary*, p. 1, La Sociedad Económica, Feb. 12, 1993.

168. *Id.*

169. *Id.*

former owners whose property has been acquired by the current occupants under the first two options may receive compensation in the form of cash or bonds.

The first two options allow for present occupants to gain title to land. They will therefore have gained an incentive by which they can pursue entrepreneurial activities by mortgaging their property. The government will no longer be saddled with the expense of the upkeep of houses that have slowly fallen into disrepair in the last forty years. Former owners will be compensated for their expropriated property.

Under the third and fourth options, Cuba will reconvey property to the former owners or their heirs. These former owners, in an effort to repair or modernize their properties, will require both labor and materials. The optimum outcome will be that local Cubans will benefit, as they will be paid for their work. Salaries can be saved for investment purposes or spent on tangible goods. The economy will expand, as a middle class begins to develop and flourish in an environment ripe for small- and medium-sized businesses. It will, in turn, provide stability to the economy and to the government, which relies on a strong middle class for support.

## **CONCLUSION**

A post-Communist Cuban government will have to make many important decisions. One of the weightiest will be whether to reconvey or to compensate former owners for property expropriated by the Communist regime. As this paper suggests, reconveyance of commercial property is a better option for Cuba, as it provides a short-term quick infusion of much needed cash as well as the long-term development of a stable economy and government.

Residential property should only be reconveyed where there are no present occupants, the present occupants are unwilling to obtain title to the property, or the government uses the property for official purposes. In all other cases, former owners should be compensated. In this way, present owners and those occupants who choose to obtain title are not negatively affected by a new government. If title to residential property is conveyed to the current occupants, hundreds of thousands of Cubans will be secure in their housing and therefore less likely to take out their frustrations on the new government before it can stabilize.