

COURTS OF SPECIAL JURISDICTION IN A POST-TRANSITION CUBA

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Not all courts in the judicial system of a modern state have the same rank. There are “lower courts,” before which legal disputes are originally presented, and “higher courts” that provide a means for reviewing the lower courts’ decisions. Another distinction among courts has to do with their jurisdiction, that is, the subjects that a court may hear and decide, or the parties who are subject to the court’s power. The first type of jurisdiction is called *subject matter* jurisdiction; the latter is referred to as *personal* jurisdiction. In terms of their subject matter jurisdiction, courts can be classified as having either *general* jurisdiction, that is, being able to hear all types of controversies, or *special* (or *limited*) jurisdiction, meaning that the court can only hear certain types of cases.¹

Institutions of a judicial nature may also exist within executive departments and other administrative agencies. Administrative tribunals and boards enforce

proposed actions by the agencies against private parties, and hear petitions by private parties seeking redress from actions by the agencies. In many legal systems, those seeking to appeal from actions by a governmental agency or department are required to pursue all available remedies within the agency before bringing an action in a court of general or special jurisdiction or an appellate court.

Courts of special jurisdiction exist in virtually all modern nations.² In the United States, for instance, the federal court system includes several important courts of special jurisdiction, such as the U.S. Tax Court, the U.S. Court of Federal Claims, the U.S. Court of International Trade, the U.S. Court of Appeals for Armed Forces and the U.S. Court of Appeals for Veterans Claims.³ Courts of special jurisdiction exist in Spain⁴ and in many Latin American

1. Sometimes the term “special courts” is used to refer to courts of special jurisdiction. However, “special courts” has unfortunate connotations, since the designation is often given by totalitarian governments to tribunals set up to persecute the governments’ opponents or otherwise help commit human rights abuses. See, e.g., <http://countrystudies.us/sudan/65.htm>. We will not use the “special courts” terminology in this paper.

2. See American Bar Association Central and East European Law Initiative (CEELI), Concept Paper on Specialized Courts (hereinafter “CEELI”), available *online at* <http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/spc.html>. The concept of special jurisdiction courts is hardly new. In his description of the legal system of 18th Century England, for example, William Blackstone devoted an entire chapter to the “courts of a special jurisdiction,” which included “forest courts,” “commissioners of sewers,” the “court of policies of assurance” (insurance), and half a dozen others. William Blackstone, *Commentaries on the Laws of England* (1765-69), Book 3, Chapter 6, available *online at* <http://www.lonang.com/exlibris/blackstone/bla-306.htm>.

3. See, e.g., Gretchen Feltes, *Update to A Guide to the U.S. Federal Legal System: Web-Based Publicly Accessible Sources*, available *online at* http://www.llrx.com/features/us_fed2.htm. There are also administrative tribunals within a number of Federal and State government agencies.

4. See, e.g., María Elisa Escolá, *New Bankruptcy Act in Spain*, available *online at* http://www.imninc.com/iln/new_bankruptcy_act_spain.pdf.

countries, such as Mexico,⁵ Chile,⁶ Venezuela,⁷ and Brazil.⁸

Cuba currently has a unified judicial system consisting of three levels of courts. At the highest level is the People's Supreme Court, which is divided into six different chambers: (1) criminal; (2) civil and administrative; (3) labor; (4) state security; (5) military; and (6) economic.⁹ The Supreme Court oversees the operation of the entire court system, but it lacks power to review the actions of the executive and legislative branches.¹⁰ The next level of courts is the People's Provincial Courts, one of which is located in each of the fourteen provinces. The Provincial Courts have initial jurisdiction over major crimes and serve as courts of appeal for the third and lowest layer of courts, the People's Municipal Courts. The 169 Municipal Courts are the principal trial courts in the Cuban judicial system, and have initial jurisdiction over civil and minor criminal matters.

Other than the chambers into which the Supreme Court is divided, Cuba has no permanent courts of special jurisdiction. The Cuban Government, however, has established at various times (particularly in the first decade of the Revolution) *ad-hoc* "people's courts" and "revolutionary tribunals," largely intended to replace regular courts and provide summary

handling of certain matters, particularly criminal proceedings against opponents of the regime.

Setting up courts of special jurisdiction will be a virtual necessity during the transition period in Cuba. Many lawsuits can be expected to be initiated during that period. Indeed, Cuba could experience a surge in litigation similar to those that occurred in other countries undergoing a transition from socialism.¹¹ Unless measures are taken to expedite judicial proceedings, there could be lengthy delays in the adjudication of cases.

The growing caseload will likely require that temporary courts and other judicial institutions having special jurisdiction be established during the early phase of the transition to handle some of the more frequently litigated matters (e.g., disputes involving property ownership issues). Courts of special jurisdiction of a more permanent nature will also need to be created to hear cases where the subject matter is of a specialized nature (e.g., tax cases).

This paper seeks to identify some of the most important courts and quasi-judicial tribunals that will need to be established during Cuba's transition to a free-market democracy. It is not intended to be comprehensive examination of the judicial administration needs in a post-transition era. Rather, the paper seeks to illustrate the challenges that a transition govern-

5. See, e.g., Mexican Legal System Overview, available online at <http://www.mexonline.com/lawreview.htm>.

6. See, e.g., <http://jurist.law.pitt.edu/world/chile.htm>.

7. See, e.g., http://www.photius.com/countries/venezuela/government/venezuela_government_the_judiciary.html.

8. See, e.g., <http://www.country-studies.com/brazil/the-judiciary.html>.

9. Ley de Organización del Poder Judicial, Law No. 1250, published June 23, 1973. This law was amended first by the Ley de Organización del Sistema Judicial, Law No. 4, published August 25, 1977, and subsequently by the Ley Sobre los Tribunales Populares, Law No. 70, published July 24, 1990. The economic chambers of the Supreme Court and the Provincial Courts were established by Legislative Decree 129, De Extinción del Sistema de Arbitraje Estatal, published August 19, 1991. Law 82 on the Popular Courts, promulgated in 1997, modified Law 70.

10. Luis P. Salas, *The Maintenance of Internal Order in Cuba: The Administration of Justice During the Special Period*, in TRANSITION IN CUBA—NEW CHALLENGES FOR U.S. POLICY (Lisandro Pérez ed., 1993) [hereinafter TRANSITION IN CUBA] at 251; Laura Patallo Sánchez, *The Role of the Judiciary In A Post-Castro Cuba: Recommendations For Change* (2003), available online at [http://ctp.iccas.miami.edu/Research Studies/LPatalloJudiciary.pdf](http://ctp.iccas.miami.edu/Research%20Studies/LPatalloJudiciary.pdf).

11. For example, in 1991 alone 700,000 new lawsuits were filed in Hungary and 121,000 in Czechoslovakia. CHERYL W. GRAY ET AL., EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE (World Bank Discussion Paper No. 209) (1993) [hereinafter GRAY ET AL.], at 58, 86.

ment will face in providing an adequate legal infrastructure.¹²

COURTS OF SPECIAL JURISDICTION AND LIMITED DURATION

The transition period in Cuba will witness profound changes to the country's political, social and economic structures.¹³ Some of those changes—for example, the privatization of state-owned enterprises—will be “one time only” initiatives that will be accomplished over a relatively short period of time, whereas others will be permanent modifications requiring the establishment of enduring structures for their implementation.

This section discusses those courts and quasi-judicial tribunals whose function will be to support the short-term needs of the transition. Such courts and tribunals will by necessity have limited jurisdiction and will be disbanded once the special need requiring their institution has been accomplished.

Property Rights Adjudication Courts

As is well known, during the early years (1959-63) of its Revolution, Cuba expropriated the assets of foreign nationals in the country.¹⁴ While Cuba has over time settled the expropriation claims of the nationals of several countries,¹⁵ the most significant claims—those of corporations and individuals that were U.S. nationals at the time of the property seizures—remain outstanding and represent a very large potential liability of the State. Applying a six percent simple interest rate to the \$1.8 billion principal in certified claims yields a present value of the expropriation claims by U.S. nationals of approximately \$6.7 billion as of July 2005.¹⁶

Resolution of the U.S. claims issue may not be practicable while the current Socialist regime is in power in Cuba. While Cuban officials have periodically expressed a willingness to discuss settlement of the claims issue with the United States,¹⁷ such willingness is usually expressed in the context of setting off those claims against Cuba's alleged right to recover from the United States hundreds of billions of dollars in damages due to the U.S. trade embargo and other

12. For a more detailed discussion of the changes that will need to be made to Cuba's legal infrastructure during a free-market transition, see Matias Travieso-Diaz, *The Laws and Legal System of a Free-Market Cuba* (hereinafter “Laws and Legal System”), Quorum Books, 1997, Chapter 3.

13. The political, social and economic changes that will need to take place in a transition period in Cuba have been thoroughly analyzed by a number of experts over the last fifteen years and are reflected in, for example, the papers presented at the annual meetings of the Association for the Study of the Cuban Economy (“ASCE”). See <http://lanic.utexas.edu/project/asce/publications/proceedings/>. A seminal assessment of the economic changes that must take place during the transition was provided by the late Felipe Pazos in 1990. Felipe Pazos, *Problemas Económicos de Cuba en el Periodo de Transición* (Dec. 1990), available online at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba1/pazos2.html>.

14. The history of the Cuban expropriation process is described in detail in Michael W. Gordon, *The Cuban Nationalizations: The Demise of Property Rights in Cuba* 69-108 (1975) (hereinafter “The Cuban Nationalizations”). For a more detailed discussion of the expropriation claims issue, see *Laws and Legal System*, Chapter 4. The expropriations of the assets of foreign nationals led to the submittal of claims by the affected parties before their respective governments. In the United States, a federal agency known as the Federal Claims Settlement Commission (“FCSC”) received evidence of, and assessed claims by, thousands of U.S. nationals whose properties in Cuba were confiscated. The FCSC certified 5,911 claims with a total value of \$1.8 billion in 1960 dollars. Investments by nationals of other countries amounted to \$350 million by Spanish nationals and approximately \$10 million each for nationals of France, Canada and Switzerland. 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) (hereinafter “Gordon”).

15. Cuba has entered into settlement agreements with five foreign countries for the expropriation of the assets of their respective nationals in Cuba: France, on March 16, 1967; Switzerland, March 2, 1967; United Kingdom, October 18, 1978; Canada, November 7, 1980; and Spain, January 26, 1988. See <http://www.cubavsbloqueo.cu/>; Gordon.

16. In its examination of the Cuban expropriation claims, the FCSC determined that simple interest at a 6% rate should be included as part of the value of the claims it certified.

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

acts of aggression against Cuba.¹⁸ To date, the Cuban government has given no indication that it is prepared to negotiate without preconditions a potential settlement of the U.S. expropriation claims with this country.

For that reason, the expropriation claims of those who were U.S. nationals at the time their properties in Cuba were seized are likely to require resolution after the country makes a transition to a free-market society. The expropriation claims of those individuals and corporations that were Cuban nationals at the time their properties were taken also remain outstanding, and are likely to greatly exceed in number and amount the claims of the U.S. nationals.

A number of solutions have been proposed to address the pending expropriation claims. It is outside the

scope of this paper to discuss potential approaches to the expropriation issue.¹⁹ All the proposed solutions, however, have in common the likely resort to the courts by, *inter alia*, (a) individuals or entities asserting conflicting ownership claims against the same asset; (b) claimants dissatisfied with the disposition given to their claims; and (c) former property owners suing foreign investors who have conducted business utilizing or otherwise involving the expropriated assets during the current regime.²⁰

For example, one of the claim resolution mechanisms whose use has been urged by some commentators is the restitution of the expropriated assets to their former owners.²¹ Restitution methods have been used in a number of countries making the transition from socialism to a free-market society.²² Implementation of a restitution program, however, would almost in-

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

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

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

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

19. For a discussion of the outstanding expropriation claims by U.S. and Cuban nationals and potential approaches to their resolution, see Laws and Legal System, Chapter 4; 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); Matias F. Travieso-Diaz, *Alternative Remedies In A Negotiated Settlement Of The U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L BUS. L. 659 (1996); Oscar M. Garibaldi and John D. Kirby, *Property Rights in the Post-Castro Cuban Constitution*, in EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA: TWO VIEWS, Institute for Cuban and Cuban-American Studies, University of Miami (2003) at 25 ("Garibaldi"); Matias F. Travieso-Diaz, *Alternative Recommendations for Dealing with Confiscated Property in Post-Castro Cuba* ("Alternative Recommendations"), *id.* at 77-81.

20. Starting in about 1990, the Cuban Government started to promote foreign investment in the island and encouraged the formation of joint ventures between foreign entrepreneurs and the State or government-owned entities. Over 500 enterprises involving foreign investors were established over the years, although the number of ventures in existence has been falling rapidly since 2002. See, e.g., *Cuba Adds Red Tape for Foreign Investors*, CUBANEWS, Feb. 2005 at 12. For a description of Cuba's foreign investment program, see Matias Travieso-Diaz and Charles P. Trumbull IV, *Foreign Investment In Cuba: Prospects And Perils*, 35 George Washington University International Law Review 903 (2003); *Alternative Recommendations* at 68.

21. See, e.g., Garibaldi at 25 (suggesting that the expropriations carried out by the Cuban government in the early days of the Revolution violated the 1940 Constitution and international law and therefore restitution of the assets to the former owners is the required remedy).

22. 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. 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).

evitably lead to controversies among potential claimants to the property,²³ the claimants and other users or occupiers of the property,²⁴ and the claimants and the State (to the extent that adjustments are made for the increase or diminution in the value of the property during its possession by the State).²⁵

Indeed, the experience of countries that have embraced restitution as the way to solve the property claims issue is that implementation of a restitution program has led to thousands of suits being filed.²⁶ If ordinary courts are tasked with the adjudication of disputes arising from the restitution program, paralysis of the court system may result.²⁷

A number of countries have sought to diminish the potential impact of litigation arising from expropriation claims by establishing administrative agencies or boards tasked with adjudicating such claims. This

has been done, for example, in Germany²⁸ and the Baltic republics of Latvia,²⁹ Lithuania,³⁰ and Estonia.³¹ Resorting to administrative bodies (particularly those of a local nature) has the potential drawbacks of referring the resolution of sometimes complex legal issues to untrained personnel, the competition for the time and attention of public officials if they retain other administrative duties, and vulnerability to political pressures.

Even if other remedies besides restitution are implemented, disputes could arise in the course of their implementation. For example, where compensation is offered, the amount of the compensation (whether in cash, government obligations, or other instruments) is typically tied to the assessed value of the expropriated assets.³² Disputes as to the appropriateness of the value assigned to the property are likely to arise

23. Since most of the expropriations took place 45 or more years ago, it is highly probable that the original owners of the property will be deceased (or, in the case of corporations, will be dissolved, merged or otherwise changed in identity). See Emilio Cueto, *Property Claims of Cuban Nationals*, presented at the Shaw, Pittman, Potts & Trowbridge Workshop on "Resolution of Property Claims in Cuba's Transition," Washington, D.C. 9-12 (Jan. 1995) (on file with author) (hereinafter "Cueto") at 4-5. For that reason, disputes as to who is the rightful successor in interest to the property are likely to arise as restitution of the confiscated properties is attempted.

24. Over the course of their occupation by the State, many properties have been subdivided, conveyed to third parties, or occupied illegally by individuals who may claim title to them by adverse possession. Cueto at 8-9; Juan C. Consuegra-Barquín, *The Present Status Quo of Property Rights in Cuba*, paper presented at the 5th Annual Meeting of the Association for the Study of the Cuban Economy, Miami, FL (Aug. 1995) 195, 200-205, available online at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba5/FILE15.pdf>; Alternative Recommendations at 68. In addition, many foreign investors have acquired rights to assets in the process of investing in Cuba, and are likely to assert these rights against those of the former owners. See Matias Travieso-Diaz and Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, paper presented at the 14th Annual Meeting of the Association for the Study of the Cuban Economy, Miami, FL (Aug. 2004) 139, 143, available online at <http://lanic.utexas.edu/project/asce/pdfs/volume14/travieso-musa.pdf>.

25. Laws and Legal System, Chapter 4; Cueto at 7; Alternative Recommendations at 69.

26. In Romania, for example, restitution of agricultural land led to more than 300,000 court cases. GRAY ET AL. at 4.

27. In the former Czechoslovakia, for example, restitution led to numerous disputes between original owners and current occupants, as well as disputes between competing claimants, resulting in clogged courts. GRAY ET AL. at 49; see also Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. Pa. J. Int'l. Bus. L. 315, 324 (1993) ("Gelpern").

28. Roland Czada, *The Treubhandanstalt and the Transition from Socialism to Capitalism* (2000), available online at <http://www.fernuni-hagen.de/POLAD/Treubhandanstalt.htm>.

29. Frances Foster, Restitution of Expropriated Property: Post-Soviet Lessons for Cuba, 34 Columbia J. Transnat'l L. 621, 627, 633 (1996).

30. William Valetta, *Completing the Transition: Lithuania Nears the End of its Land Restitution and Reform Program* (2000), available online at <http://www.fao.org/Legal/prs-ol/lpo11.pdf>.

31. Alari Pojaru, *The Political Economy of Privatisation in Estonia* (1996), available online at <http://www.som.hw.ac.uk/cert/wpa/1996/dp9602.htm>.

32. See, e.g., GRAY ET AL. at 70; Alternative Recommendations at 70-71.

and require adjudication by the courts.³³ And, if a negotiated settlement of the claim is reached between the claimant and the State, disputes can arise as to whether the State's (or the claimant's) obligations under the settlement agreement have been properly discharged.³⁴

Given the large number and contentious nature of the claims that can be expected to be asserted in Cuba, it would probably be necessary to establish either an independent agency of the Cuban Government with jurisdiction over the determination of the validity of claims to title over confiscated property and the dispensation of remedies, or a system of courts whose jurisdiction would be limited to the resolution of property expropriation claims and the adjudication of disputes relating to them.³⁵ To deal with potential shortages of judges to staff the courts, the tribunals could include lawyers as well as non-lawyers, as long as the head of the tribunal was a judge or a licensed legal practitioner.

An example to consider, and in many respects to avoid, of the use of courts to adjudicate expropriation claims is the case of Nicaragua. After the transition from the socialist Sandinista government to the democratic government of Violeta Chamorro in 1990, owners of land expropriated during the Sandinista

rule began to demand restitution of their property or compensation for the takings.³⁶ Restitution presented a difficult problem in Nicaragua, where about one-fourth of all agricultural land and many urban properties had been seized and no clear records of ownership were maintained.³⁷

In 1990, Agrarian Commissions were set at the departmental and municipal levels to resolve disputes between individuals claiming rights to the same property.³⁸ Another agency, the National Review Commission, was established to deal with claims of governmental takings of land from original owners and provide for the restitution of illegally seized lands.³⁹ Appeals to the decisions by these agencies were to be heard by the courts.⁴⁰ The volume of claims was enormous: by 1992, about 40% of the households in Nicaragua were involved in an ownership dispute.⁴¹ Furthermore, Nicaraguans questioned the legality of the Agrarian Commissions and the National Review Commission.⁴² When claimants were not pleased with administrative decisions, they often took matters into their own hands, bringing the administrative process to a standstill and sparking violent confrontations between conflicting owners.⁴³

The judicial system was likewise ill equipped to deal with the number of disputes.⁴⁴ By 1995, there were

33. In Hungary, for example, where compensation in the form of state-issued vouchers was the main mechanism used to address expropriation claims, compensation was handled through local compensation offices, subject to appeal to a Hungarian National Compensation Office and review by the civil courts. Gelpert at 347.

34. See *Alternative Recommendations* at 64-67.

35. *Id.* at 83.

36. The Carter Center, *Nicaraguan Property Disputes* (April 1995), available online at www.cartercenter.org/documents/1199.pdf (hereinafter "Carter Center").

37. Brian Trackman, et al., *The Reform of Property Registration Systems in Nicaragua: A Status Report* (The Berkman Center for Internet and Society at Harvard Law School, 1999), available online at <http://cyber.law.harvard.edu/prs/Nicar.html>.

38. See J. David Stanfield and Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 *Cap. U. L. Rev.* 939, 949 (1993) (hereinafter "Stanfield").

39. *Id.*

40. See Carter Center.

41. See *id.*

42. A year after the establishment of the National Review Commission, the Nicaraguan Supreme Court decided that parts of the Decree authorizing the Commission were unconstitutional. Stanfield at 949.

43. *Id.*

44. *Id.* at 960.

an estimated 6,000 present and potential property dispute claims filed in the courts, threatening to create a crisis in the court system.⁴⁵

In 1997, the government of Arnaldo Alemán, successor to Chamorro, established four Property Tribunals (*salas de propiedad*) to handle expropriation cases.⁴⁶ The Property Tribunals conducted mediations, binding arbitrations and expedited trials of property cases.⁴⁷ Upon conclusion of the mediation, arbitration or trial the Tribunals forward their decisions to the regular courts, which issue orders containing the terms of the mediation, arbitration or trial results.⁴⁸

The caseload of the Property Tribunals has included a significant number of claims filed by U.S. citizens. By 2003, the Tribunals had received more than 4,600 claims from U.S. citizens, of which 3,700 claims had been settled and over 900 claims remained outstanding.⁴⁹ Currently, there are 18 U.S. citizens with pending claims before the Property Tribunal.⁵⁰ The Nicaraguan Property Tribunal has some

potentially attractive features that could be adopted in Cuba, such as court-supervised referral to alternative dispute resolution and the division of responsibilities between specialized courts that rule on the claims and the regular court system to administer the awards. On the other hand, the tribunals, like other branches of Nicaragua's judicial system, have been criticized for bias and lack of independence; they are seen as favoring current property holders and being subject to political manipulation. Such risks may be faced in a transition-period Cuba and should be taken into account in the selection of the members of the tribunals and in the establishment of guidelines to assure the tribunals' fairness and independence.

Privatization Program Courts

The term "privatization" can be defined as the transfer or sale of any asset, function or activity from the public to the private sector.⁵¹ In a narrower definition, privatization is taken to mean the conveyance of ownership of all or part of a state-owned enterprise

45. *Id.* See also Carter Center.

46. See Center on Housing Rights and Evictions (COHRE), *Housing Rights in Nicaragua: Historical Complexities and Current Challenges* (2003), at p.55, available online at www.cohre.org/downloads/MissionReport-Nicaragua-English.pdf. See also, *Ley sobre la propiedad reformada urbana y agraria*, Ley no. 278 (December 16, 1997), available online at http://www.legalfiscalfinanciero.com/es/propiedad_reformada_urbana_agraria.html. However, what was supposed to have been a 60-day period of adjustment during which no new actions could be brought became an almost three-year freeze until, under U.S. government pressure, the courts started accepting cases in July 2000. Personal Communication, Leónidas Henríquez Portillo, Senior Property Assistant, U.S. Embassy, Managua (hereinafter "Henríquez").

47. U.S. Department of State, *Nicaragua: Country Reports on Human Rights Practices—2002* (Bureau of Democracy, Human Rights, Labor, 2003), available online at <http://www.state.gov/g/drl/rls/hrrpt/2002/18339.htm>.

48. *Id.* In November 2002, the Supreme Court consolidated the four tribunals into a single one because of budgetary constraints. *Id.*

49. See Industry Canada, *Nicaragua Country Commercial Guide FY 2003: Investment Climate*, available online at <http://strategis.ic.gc.ca/epic/internet/inimr-ri.nsf/en/gr110522e.html> (hereinafter "Industry Canada"). Industry Canada reported that the Tribunals consistently rule against the original owners. *Id.*

50. Henríquez. New legislation, introduced in November 2004 and going into effect in January 2005, transferred responsibility for land titling, payment of compensation for confiscations, and administration of public lands, from the Finance Ministry to an Assembly-appointed Property Institute. See <http://www.asamblea.gob.ni>. The law contains a provision that halts for 180 days, while the Institute is established, all ongoing property civil and criminal judicial proceedings as well as the enforcement of judgments in property cases. The last time a similar provision was written in a property law resulted in property cases being deferred for almost three years. Henríquez.

51. ERNST & YOUNG, *PRIVATIZATION: INVESTING IN STATE-OWNED ENTERPRISES AROUND THE WORLD 4* (1994) [hereinafter "PRIVATIZATION AROUND THE WORLD"]. This definition encompasses "joint public-private ventures, concession leases, management contracts, as well as some specialized instruments, such as build-own-operate-transfer (BOOT) agreements." *Id.* Outsourcing of government functions and services (e.g., water supply) is also included in this definition.

(“SOE”) or its assets from the public sector to private parties.⁵²

There is little doubt that, in moving from the current socialist economic structure to an open, free-market economy, Cuba will need to privatize many, if not all, of its SOEs.⁵³ The emergence of private enterprise will stimulate economic growth and reduce chronic shortages, and the assumption of ownership by private parties over loss-generating enterprises will also ease the strain on the national treasury and generate revenues for the country. For those reasons, a privatization program is likely to be undertaken early in the transition process.⁵⁴

There are many ways in which the privatization of SOEs can be accomplished, and the decision as to the method to be used for a particular enterprise involves economic and policy factors, in addition to legal considerations. The choice among privatization methods may also be influenced by which techniques are judged to be most appropriate to attract investors.

The scope of the privatization process may also vary. At one end of the spectrum is the complete transfer of ownership of the SOE to one or more private parties. At the other, there are varying degrees of limited privatization in which the state retains an ownership interest in the enterprise, but private sector involvement is sought in the operation of all or portions of the company. Methods used in the outright sale of an SOE to private investors include: auction, negotiated sale, tender, stock floatation, stock distribution, voucher or coupon privatization, and management/employee buyout. Limited privatization methods include joint ventures, build-own-operate-and-transfer agreements, leases, and management contracts.⁵⁵

The wide choice of privatization alternatives dictates that a government entity, usually an independent agency, must be responsible for the administration of the privatization program. Almost all the countries making the transition from socialism to a free-market economy have established a privatization agency, and it is the actions of such an agency that are subject to judicial review.⁵⁶

For purposes of this paper, the issue of concern is what form such a review should take. In most countries, the acts of the privatization agency are reviewable—if at all—in the ordinary court system. That raises a justice administration concern, albeit of a different nature than that posed by the property expropriations. The problem is not the number of cases, but the potential complexity of the issues raised in connection with a privatization decision.

Some of the decisions that a privatization agency needs to make, and are potentially subject to judicial challenge, include:

- Whether the enterprise should be sold, turned over to the workers or managers, returned to former owners, merged with other enterprises, or liquidated.
- If the enterprise is to be sold, whether a negotiated sale, a competitive bidding process, or some other mechanism is to be used.
- The assessed value of the enterprise, taking into account both assets and current and potential liabilities.
- If the enterprise is sold by a negotiated agreement, the terms of the sale, the identity of the purchaser and its connections, if any, to any gov-

52. Richard M. Phillips & Marian G. Dent, *Privatizing Eastern Europe: A Challenge for the Nineties*, in JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE 448-449 (Practicing Law Institute Commercial Law and Practice Course Handbook Series No. 575 (1991)).

53. Few, if any, sectors of the Cuban economy appear to be so sensitive that they should be under the exclusive control of the state, or seem to be better run by the state than by the private sector. *See, generally*, Laws and Legal System, Chapter 6.

54. *Id.*

55. PRIVATIZATION AROUND THE WORLD at 17-18.

56. *See* Laws and Legal System, Chapter 6, for a discussion of the experiences in various countries with the creation of governmental agencies to oversee the privatization process.

ernment official or other party involved in the privatization process.

- If competitive bidding is used, the format of the bidding process (i.e., whether bids are to be opened in public).
- The identities of the parties rejected (especially when the chosen party is a foreigner and the rejected party is national or employee group).
- The identity of the selected bidder and any links between it any government official or other party involved in the privatization process.
- The terms of the agreement (e.g., price, form, terms and conditions for payment of the purchase price, types of concessions, debts devolving on the government itself, conditions of the investment, and the operations the investor agrees to maintain).
- Any formal or substantive irregularities in the process of selecting the purchaser.⁵⁷

As this list of issues illustrates, a reviewing court faced with a challenge to the privatization of an SOE (by, for example, an unsuccessful bidder) must be capable of delving into highly technical issues and must also impartially rule on allegations of favoritism, lack of transparency and corruption.⁵⁸ These requirements

can best be met by establishing a court or courts of special jurisdiction having the sole responsibility of providing an independent review of the privatization decisions.⁵⁹

Courts of special jurisdiction have been set up in Russia and other successor countries to the former Soviet Union to review the actions of the privatization agencies. The Russian government has allocated authority over privatization disputes to the *arbitrazh* courts.⁶⁰ Arbitrazh courts are part of the judicial system and also hear disputes between commercial entities and between commercial entities and the state.⁶¹ The Arbitrazh Court system is comprised of district arbitrazh courts that operate at the county level or in important cities as the trial courts, regional arbitrazh courts, which function as appellate courts, and a Supreme Arbitrazh Court.⁶² During the Soviet rule, the arbitrazh courts served as quasi-judicial administrative tribunals, unconnected to the court system.⁶³ However, Russian judicial reform in 1992 reconstituted the arbitrazh courts as permanent legitimate courts and granted them jurisdiction to hear commercial disputes and challenges to privatization actions.⁶⁴

57. V.V. Ramanadham, *The Monitoring and Regulatory Aspects of Privatization*, in *PRIVATIZATION AND AFTER 11* (V.V. Ramanadham, ed., 1994).

58. There are many examples of lack of transparency in the privatization process. In Sri Lanka, Pakistan, and Guyana, for example, complaints were lodged over sales of state-owned enterprises under terms that were either unfavorable or tainted with allegations of corruption. *Id.* at 10.

59. The ability to expertly handle cases requiring specialized expertise is one of the reasons frequently cited in favor of the establishment of courts of special jurisdiction. Other advantages include greater overall court efficiency, uniformity of results, improved case management, elimination of conflicts and forum shopping, increased flexibility, and the ability to exercise continued oversight of the functions of administrative agencies. CEELI, Section I.C.

60. See Kathryn Hendley, *Symposium: Economic, Legal and Political Dilemmas of Privatization in Russia: The Spillover Effects of Privatization on Russian Legal Culture*, 5 *Transnat'l L. & Contemp. Probs.* 39, 58-63 (1995) (hereinafter "Hendley"). The arbitrazh are not arbitration courts, as the false cognate suggests. See Department of Commerce, Resolution of Commercial Disputes in Russia: Choosing the Best Alternative, available online at <http://www.bisnis.doc.gov/bisnis/country/001120rsdisres.htm>.

61. *Id.* See also Hendley at 58-63.

62. See Randy M. Wright, *Enforcing Contractual Obligations and Resolving Commercial Disputes in Russia*, available online at <http://www.berrymoorman.com/articles/speech.html>.

63. See Peter H. Solomon, Jr., *Courts in Russia: Independence, Power and Accountability* (9th Annual Conference on Individual v. State, Central European University, 2001), available online at <http://www.ceu.hu/legal/Solomon.htm>.

64. Russia placed administration of the privatization process in the hands of the Russian Federal Property Fund. See Official Website of the Russian Federal Property Fund, <http://www.fpf.ru>. The Fund is a specialized financial institution that, in accordance with Russian legislation, is responsible for selling privatized federal property. The Fund has authority to make decisions on property claims and the sale and purchase of confiscated property. *Id.*

Despite their grant of jurisdiction, arbitrazh courts have limited enforcement powers.⁶⁵ They do not have the power to force compliance with their orders by imposing sanctions or ordering sale of property.⁶⁶ In addition, they do not have injunctive powers.⁶⁷ For those reasons, claimants often avoid the arbitrazh courts, resorting to informal political channels for resolution of their complaints.⁶⁸

The negative experience in Russia with *arbitrazh* courts serves to illustrate the requirements of a successful system of special jurisdiction courts to review privatization agency decisions. The courts must be granted injunctive powers that allow them to block a prospective privatization, order the conveyance of enterprise property, and direct that a negotiated sale be overturned or that a bidding process be reopened. The courts must also be staffed with competent, impartial judges and adequate support staff.

Handling of Human Rights Claims

Transition to democracy, whether from a communist or another oppressive regime, has historically been accompanied by a surge of claims against the State and its former officials for violations of human rights.⁶⁹ After half a century of totalitarian rule in Cuba it should be anticipated that, if allowed, a myriad human rights violation claims would be leveled against the State and against officials of the current Socialist government.

This paper takes no position on whether legal claims arising from human rights violations should be permitted in a post-transition Cuba. However, should

such claims be allowed, there is ample international precedent for the setting up of special jurisdiction courts and agencies to handle the claims. Following are some examples of the available options.

Special Agency: The Ethiopian Special Prosecutor's Office: Ethiopia created a Special Prosecutor's Office ("SPO") with a mandate to investigate and prosecute atrocities committed by the Dergue, the Military Council that ruled Ethiopia during 1974-1991—a period known as the "Red Terror."⁷⁰ Ethiopia administered claims against the State and its former officials through its regular court system. The SPO, created in 1992, has more than 400 employees with 45 Ethiopian prosecutors and 8 foreign advisors.⁷¹ Since 1992, the SPO had interviewed 5,000 witnesses and collected more than 300,000 documents.⁷² In 1994, it brought charges of genocide and crimes against humanity against top officials of the Dergue pursuant to the Ethiopian Penal and Criminal Procedure Codes.⁷³ The SPO brought its claims to the Central High Court, an appellate level court established by the transitional government in 1991, and later renamed the Federal High Court by the 1995 Federal Constitution.⁷⁴

Special Agency Plus Special Jurisdiction Court: Sierra Leone: Sierra Leone endured a violent civil war between 1991 and 2000.⁷⁵ Fighting between the Revolutionary United Front and the Sierra Leone Army caused more than 75,000 people their lives, displaced two thirds of the country's population and terrorized thousands of others.⁷⁶ In 2002, the newly

65. See Hendley at 60-61.

66. *Id.*

67. *Id.*

68. *Id.*

69. See generally M. Cherif Bassiouni, POST CONFLICT JUSTICE (Transnational Pub. 2002) ("Post Conflict Justice").

70. See Wondwossen L. Kidane, *The Ethiopian "Red Terror" Trials*, in Post Conflict Justice at 676.

71. *Id.* at 671-2.

72. *Id.* at 671.

73. *Id.* at 672.

74. *Id.* at 675-6.

75. See Jennifer L. Poole, *Post Conflict Justice in Sierra Leone*, in Post Conflict Justice, at 563.

76. See *id.* at 563-4.

elected Sierra Leonean government, assisted by the United Nations, set up two bodies to administer justice to victims of war-time atrocities, the Truth and Reconciliation Commission and the Special Court for Sierra Leone.⁷⁷

The Commission has the mandate to investigate human rights violations committed during the war, hear the stories of victims of the violations, and create a historical record of the abuses committed.⁷⁸ Although not a court, the Commission has capabilities that make it a quasi-judicial body.⁷⁹ It can request or compel production of reports and records from any source, including domestic and foreign government entities and officials, as part of its information gathering.⁸⁰ It can also conduct confidential interviews of individuals and members of organizations.⁸¹ The Commission has the power to require that statements be made under oath and to administer such oaths.⁸² It can issue summons and subpoenas, and compel appearance.⁸³ It can also visit any location without prior notice to gather information, perform inspections, and obtain copies of documents.⁸⁴

The Commission also has contempt powers.⁸⁵ Failure to respond to a summons or subpoena issued by the Commission may lead to trial or punishment by a

court.⁸⁶ A citizen or member of the government who fails to assist the Commission or obstructs its functions faces a fine or imprisonment up to one year.⁸⁷

Sierra Leone also established a Special Court, as a temporary independent tribunal of limited jurisdiction.⁸⁸ The Special Court has the power to prosecute the perpetrators of serious violations of Sierra Leonean law and international humanitarian law.⁸⁹ The Court's chamber is composed of both Sierra Leonean and international judges.⁹⁰ The Special Court has concurrent jurisdiction with national courts, but enjoys supremacy over them and has power to issue binding orders to the government of Sierra Leone.⁹¹

The Special Court's jurisdiction is limited to punishing only the most notorious perpetrators for two reasons. First, the drafters of the Court's mandate wanted to ensure that child combatants, who were themselves victims of human rights violations, were not tried before the tribunal.⁹² Second, the Special Court, which is funded by voluntary contributions from the international community, is limited in its resources, while full-blown trials are expensive.⁹³ The work of the Commission is intended to make up for the Special Court's jurisdictional limitations by in-

77. See *id.* at 563, 577, 580. The Commission was established as part of the Lomé Peace Agreement of 1999, while the Court was established under the Agreement between the United States and the Government of Sierra Leone on the Establishment of a Special Court of Sierra Leone, Jan. 16, 2002. *Id.* at 577, 583-4, n.149. The agreement is available online at <http://sierra-leone.org/Laws/2002-9.pdf>.

78. *Id.* at 577-8.

79. *Id.* at 578.

80. *Id.*

81. *Id.* at 578-9.

82. *Id.* at 579.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 580, 582.

89. *Id.*

90. *Id.* at 585.

91. *Id.* at 584-5.

92. *Id.* at 590.

93. *Id.*

vestigating less serious abuses of human rights.⁹⁴ The Commission is also better suited to reintegrate former combatants, including child soldiers, into society, restoring normalcy.⁹⁵ Thus, the Commission and the Special Court play complementary roles.⁹⁶ The Special Court fulfills the need for criminal prosecution in serious cases, while the Commission serves to facilitate reconciliation.⁹⁷

Truth and Reconciliation Commissions: South Africa: A number of countries (Argentina, Chile, El Salvador and Guatemala, among others) have established Truth and Reconciliation Commissions (“TRCs”) following the transition from a totalitarian to a democratic regime.⁹⁸ Although their charters vary, TRCs are usually set up to investigate and expose human rights abuses during a dictatorial regime that is no longer in power.

The South African TRC is the most cited, and probably most successful, example of such an investigative body. It was established by the Promotion of National Unity and Reconciliation Act of 1995 after the end of Apartheid, and was charged with compiling a historical record of the causes, nature and extent of human rights violations during the Apartheid regime.⁹⁹ The South African TRC was divided into three branches: an Amnesty Committee, which heard amnesty applications; a Human Rights Committee,

which provided a forum for the victims of human rights abuses to tell their stories; and a Rehabilitation and Reparations Committee, which put forward recommendations regarding the transformation of civil institutions and the grant of reparations to the victims.¹⁰⁰

The South African TRC differed from others in that it possessed quasi-judicial powers, such as the power to subpoena witnesses and the power to conduct searches and seizures.¹⁰¹ The TRC was to follow procedures established by the National Unity and Reconciliation Act. The TRC’s findings and other acts were subject to review by the courts, giving its activities the legitimacy enjoyed by judicial institutions.¹⁰² Most importantly, where there was sufficient evidence, the TRC attributed direct criminal responsibility to a number of individuals, something that was not done by other TRCs, like the one set up in Chile.¹⁰³

Lessons for Cuba: If some form of relief for human rights violations is allowed in a post-transition Cuba, it will be necessary to create an agency or court (or both, as was done in Sierra Leone) to adjudicate the claims and administer appropriate remedies. The personnel in such an agency or court will need relatively little expertise, but must function with fairness and independence, particularly if the agency and/or

94. *Id.* at 590-1.

95. *Id.*

96. *Id.* at 591.

97. *Id.*

98. Anurima Bhargava, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 Colum. L. Rev. 1304, 1307 (2002) (hereinafter “Bhargava”). See also <http://www.truthcommissions.org> (providing a table of mandate dimensions of various Truth Commissions).

99. See Promotion of National Unity and Reconciliation Act, No 34 of 1995, available online at <http://www.doj.gov.za/trc/>.

100. Bhargava at 1307.

101. See *id.* at 1309.

102. *Id.*

103. See Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa*, in *Post Conflict Justice* at 750.

court are set while elements friendly to the current government are still in positions of power in Cuba.¹⁰⁴

In addition, and perhaps independently of whether such agency or court is established, the merits of establishing a TRC should be carefully investigated. The South African TRC served as an effective means of providing catharsis and closure—if not always redress—to the many unacknowledged abuses during Apartheid. The same purpose could be served in Cuba, and for that reason the establishment of a TRC after the transition has been recommended by some analysts.¹⁰⁵

PERMANENT COURTS OF SPECIAL JURISDICTION

The discussion thus far has focused primarily on courts of special jurisdiction of a temporary nature. As noted above, those temporary specialized courts are designed to address particular problems expected to arise during the initial stages of the transition to a free-market economy, such as resolution of property expropriation claims and privatization of SOEs. But the shift to a free-market economy is likely to bring about enduring changes that will call for the application of areas of law and concepts that, even if they existed in some form during the pre-transition period,

have not been significantly developed primarily because of the nature of a centrally planned economy.

Some examples of those legal areas include: (1) tax laws—Cuba's current dearth of private economic activity and the levying of taxes to which such activity would otherwise be subject have not permitted this area of law to develop much during the past four decades; (2) bankruptcy laws—usually necessary in a free-market system in order to stimulate risk-taking economic activity and to cushion the blow of business failure; Cuba has not had much need for these laws given its general prohibition of the private enterprise these laws are indirectly designed to encourage; and (3) intellectual property laws—although Cuba does have trademark, copyright, and patent laws, since private ownership of intellectual property is generally not allowed in Cuba, this area of the law has not developed through the usual method of litigation over conflicting rights.

Tax Courts

Although Cuba currently has a tax law and taxes certain activities, until recently Cuba lacked a system of direct income taxation.¹⁰⁶ Some have also noted that Cuba does not have a tax-paying culture.¹⁰⁷ Nevertheless, in 1994, Cuba introduced a system of direct

104. An example of a special court established to adjudicate human rights abuses that failed its essential mission was that established in Cambodia to redress gross human rights violations committed during the Khmer Rouge regime between 1975 and 1979. See Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, in *Post Conflict Justice* at 6. In 2001, under pressure from the United Nations, the government passed a law allowing the creation of a hybrid tribunal (composed of U.N. appointed and Cambodian government appointed judges) that would oversee the prosecution of former Khmer Rouge leaders. *Id.* The law provided for a majority of Cambodian judges (three of five) but required that all decisions be based on a supermajority, reflecting the UN's concern about the lack of judicial independence. *Id.* In practice, since the government in power in Cambodia was still sympathetic to the Khmer Rouge, the three government-appointed Cambodian judges would vote at the orders of Cambodian prime minister, while the UN-appointed judges would vote to the contrary, causing gridlock on every vote. Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, in *Post Conflict Justice*, at 650. Ultimately, convinced that the hybrid tribunal would not be independent, impartial or objective, in February 2002 the UN withdrew from the program. *Id.*

105. See, Rolando Castañeda and George P. Montalván, *Nunca Más: Propuesta Para Establecer la Comisión Cubana de la Verdad y la Reconciliación Nacional*, paper presented at the 13th Annual Meeting of the Association for the Study of the Cuban Economy, Miami, FL (Aug. 2003), available online at <http://lanic.utexas.edu/project/asce/pdfs/volume13/castanedamontalvan.pdf>.

106. See United States International Trade Commission, *The Economic Impact of U.S. Sanctions With Respect To Cuba*, Investigation 332-413, Publication 3398 (February 2001), Ch. 3 at 3-16, available online at <ftp://ftp.usitc.gov/pub/reports/studies/pub3398.pdf> (noting, inter alia, that Cuba basically lacked a taxation regime from 1967 to 1994).

107. See generally, Archibald R. M. Ritter & J.A. Turvey, *The Tax Regime for Micro-Enterprise in Cuba*, Carleton University, Department of Economics, Carleton Paper Series number 99-04, February 2000, available online at <http://www.carleton.ca/economics/cep/cep99-04.pdf> (hereinafter "TAX REGIME").

income taxation.¹⁰⁸ The system was designed primarily to tap into the sources of revenue being generated at the time by newly legalized forms of self-employment.¹⁰⁹ The ability to raise revenues through the taxation of income is limited by Cuba's centrally planned economy and the insolvency of many state-owned enterprises.¹¹⁰ As a result, the lack of free enterprise has diminished the government's available tax base and has precluded the development of a sophisticated taxation system.

Once Cuba moves to a free-market economic system, however, the tax base is expected to broaden, and the Cuban government will be able to derive increased revenue from the wider range of revenue-generating activities likely to multiply within its borders. At the same time, and for the same reasons, tax laws are ex-

pected to evolve in order to capture the revenue that might otherwise be lost to tax avoidance schemes¹¹¹ likely to be devised in response to the advent of more prevalent taxation.

As the tax laws multiply in number and complexity,¹¹² it is inevitable that disputes will arise between the government in its quest to maximize tax revenue and those persons subject to taxation in their efforts to minimize their incidence of taxes.¹¹³ These disputes are likely to involve differing interpretations of the tax laws and their application to various activities. Given that taxes are a major source of financing for a government's activities, it is essential that these tax disputes be resolved and adjudicated in the most cost-effective and efficient manner.

One way for the government to maximize the efficiency and reduce the cost of adjudicating tax disputes is to create specialized tax courts.¹¹⁴ These tax courts should be staffed by judges who have received legal training in the interpretation and application of

108. *Id.* Cuba's basic taxation framework consists of Law 73—The Tax Systems Law, *Gaceta Oficial* (August 1994), and Decree-Law 169 (January 1997). Decree-Law 169 granted primary taxation authority to the Ministry of Finance, and created the National Office of Tax Administration (ONAT).

109. See TAX REGIME at 3. The legalized economic activities were primarily in the areas of transportation, housing services, and family and personal services. Decree-Law 141 limited self-employment to a subset of the population, namely retirees, housewives, and laid-off workers.

110. See Matias Travieso-Diaz, *Cuba's Perfeccionamiento Empresarial Law: A Step Towards Privatization?*, 23 U. PA. J. INT'L. BUS. L. 119 (2002).

111. In the United States, for example, it is estimated that the federal government loses an average of \$30 billion every year of identified taxes due to under- or non-payment of taxes as well as to various tax avoidance schemes. See Statement of Leonard E. Burman before the Committee on Ways and Means of the U.S. House of Representative, On Waste, Fraud, and Abuse, July 17, 2003, *available online at* <http://www.urban.org/UploadedPDF/900644.pdf>. Also, many professional service firms, both in the fields of law and accounting, have been known to peddle sophisticated tax shelters that allow individuals to avoid payment of taxes that would otherwise be due. See, e.g., David Cay Johnston, *Big Accounting Firm's Tax Plans Help the Wealthy Conceal Income*, *New York Times*, June 20, 2002, Section A, Page 1, Column 5; David Cay Johnston, *I.R.S. Closes Loophole That Let Rich Hide Income*, *New York Times*, September 26, 2002, Section C, Page 1, Column 3; David Cay Johnston, *U.S. Proposes Regulations to Restrict Some Tax Shelters for High-Income People*, *NEW YORK TIMES*, October 18, 2002, Section C, Page 2, Column 1; Tom Herman, *IRS Revises Rules For Advisers In Shelter Crackdown*, *THE WALL STREET JOURNAL*, May 25, 2005, Page D3.

112. The United States tax code is one example of just how complex tax laws can become. For instance, in an annual report to Congress, a senior tax policy official noted that Congress has made the tax code so complicated that even the Internal Revenue Service is having trouble coping. Furthermore, the report urges Congress to take up the simplification of the tax code, and notes that the current tax code is so complex and confusing that taxpayer compliance is on the wane. See, e.g., David Cay Johnston, *Report Calls for Simpler Taxes*, *New York Times*, January 12, 2005, Section C, Page 2, Column 5.

113. See *supra*, note 113.

114. See David Smith and Su Sun, *Introducing Competition Policy into Developing Economies: A Summary of Lessons Learned*, Perspectives, Vol. 2, No. 4, *available online at* http://www.oycf.org/Perspectives/10_022801/introducing_competition_policy_i.htm (noting how Argentina has a tax court staffed by specialized judges who deal exclusively with tax issues).

the tax laws.¹¹⁵ In the early stages of the transition, Cuba will probably have to outsource this specialized legal training,¹¹⁶ since at that stage Cuba will probably still lack the necessary know-how to conduct such training. With time, however, as those individuals trained abroad return to Cuba armed with such knowledge and begin to apply what they have learned, that specialized legal training could be carried out within the island.

Furthermore, each judge's decision should be published and should serve as precedent for other judges to follow when adjudicating factually and legally similar tax cases. This system of precedent-based adjudication will lead to the development of a more consistent body of tax law, and the level of certainty that such a well-developed body of law could engender could also have the salutary effect of stimulating further economic activity in the island.¹¹⁷

Bankruptcy Courts

Bankruptcy courts have a long history in free-market societies. The term "bankruptcy" is derived from the Italian for "broken bench", *i.e.*, "banca rotta." In Renaissance Italy, when a merchant failed to pay his debts, it was common practice for his creditors to get

together and break his bench, hence the term "banca rotta."¹¹⁸

In olden times, bankruptcy was considered a criminal offense, often subjecting the debtor to various punishments ranging from debtor's prison to the death penalty.¹¹⁹ With the passage of time, bankruptcy has lost much of its moral stigma, and has been decriminalized. But differences remain in how different countries and cultures view and deal with insolvent debtors.¹²⁰ Nevertheless, with the exception of bankruptcies involving fraud or other forms of serious criminal mischief, most countries generally agree that insolvency in and of itself is not an offense for which a person should be severely punished.

Bankruptcy could be divided into two general categories. The first involves individual/consumer debtors. The second involves corporate/business debtors. Although many of the legal principles are equally applicable to both categories, there are some differences that stem from a recognition that consumers and businesses have different concerns.

In the realm of consumer bankruptcy, traditionally, the main focus has been on allowing an individual

115. Some have argued, however, that such judicial specialization could give rise to a host of problems such as judicial tunnel vision, lack of cross-pollination of legal ideas, judicial capture by special interests, and excessive judicial policymaking. See Sarang Vijay Damle, *Specialize the Judge, not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. Rev. [] (2005). The authors believe, however, that the benefits of specialization will probably outweigh the costs.

116. For example, Cuba could send these jurists abroad to study tax law in the various tax L.L.M. programs available in the U.S. Although Cuban tax laws are not expected to mirror U.S. tax laws, the U.S. provides a well-developed body of tax law to which foreign jurists could apply a comparative law perspective, borrowing only those aspects of the U.S. system that they find appealing.

117. An analogy to this phenomenon exists in the realm of United States corporate law. The State of Delaware has dedicated significant resources to attracting corporations to the state. One of the reasons, if not the chief reason, why corporations choose to incorporate in Delaware is that Delaware has over the years managed to develop a large body of precedent-based corporate law. Whereas corporate law might not be as well developed in other states, Delaware provides corporations with a relatively certain set of legal rules within which corporations are able to operate. This core competency, in turn, has created a sort of cottage industry for corporate-related services in Delaware.

118. See A Brief History of Bankruptcy in the U.S., available online at <http://www.bankruptcydata.com/Ch11History.htm>; *Bankruptcy—What is Bankruptcy?*, available online at <http://www.cpafinder.com/bankruptcy-and-credit/bankruptcy--what-is-bankruptcy.html>

119. *Id.*

120. Generally, the European model of bankruptcy, at least in the context of threatened business insolvencies, concerns itself more with the social welfare of the various affected individuals (*e.g.*, workers, suppliers, etc.). Therefore, under the European model, the government is more likely to intervene when a business is threatened with insolvency in order to stave off an actual bankruptcy and its concomitant negative impact on various stakeholders. In contrast, the U.S. model of bankruptcy rarely results in governmental intervention to stave off a business bankruptcy filing. Rather, bankruptcy is viewed as a market-based disciplining measure designed to streamline inefficiencies and promote competition.

who finds himself in financial distress an opportunity to discharge his debts and obtain a “fresh start”. In the United States, this has usually taken the form of a liquidation bankruptcy¹²¹ where all of a debtor’s non-exempt assets are marshaled and sold, with the proceeds distributed pro rata to the debtor’s unsecured creditors, and with the amount by which the debt exceeds the sales proceeds being legally discharged.

In the realm of business bankruptcy, although liquidation is always an option, in the United States the focus has usually been on reorganizing and rehabilitating the debtor. In doing so, the goal is to provide some breathing space for the debtor to reorder its affairs and maximize its value to its creditors.¹²² In the business context, a liquidation is usually seen as “leaving money on the table,” where income-producing assets are sold at fire-sale prices rather than put to use to pay off creditors as in a reorganization.¹²³

In both cases, bankruptcy is a legal tool utilized to both protect a debtor from aggressive creditors, as well as to protect each creditor from the others.¹²⁴ Although the debtor-protection rationale is generally well understood, the creditor-protection rationale is less understood. The creditor-protection rationale stems from the view that bankruptcy is also a collective remedy for creditors.¹²⁵ In the absence of such a collective remedy, each creditor is pitted against the

others as each fights for the limited pool of assets held by the debtor.¹²⁶ In the absence of a bankruptcy law, the rule is that “the first creditor to the courthouse wins”. In other words, the first creditor to obtain a legal judgment against the debtor is then able to levy against the debtor’s assets to satisfy the debt owed to that particular creditor. Of course, this procedure leaves other creditors at a disadvantage and without any source of repayment. Furthermore, the harsh consequences of such a system serve only to intensify creditor aggressiveness as each creditor seeks simultaneously and individually to obtain repayment from the debtor’s assets. Such a system is not conducive to economic growth and prosperity.

On the other hand, the collective remedy of bankruptcy immediately stops all unilateral creditor attempts to collect on their debts, in favor of a court-supervised method whereby each unsecured¹²⁷ creditor is sought to be treated equally and fairly.¹²⁸

In the United States, Congress has set up a system of Bankruptcy Courts staffed by specialized judges equipped to handle the volume and complexity of bankruptcy cases. That Congress has chosen to set up such a separate system demonstrates the importance that the bankruptcy laws have in a free-market economy.¹²⁹

121. This is known in the U.S. as a Chapter 7 bankruptcy.

122. See Nicholas L. Georgakopoulos, *Bankruptcy Law For Productivity*, 37 Wake Forest L. Rev. 51 (Spring 2002) (noting the productivity-reviving function of bankruptcy).

123. *Id.*

124. See generally Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors*, 4th Edition, Aspen Publishers, Inc., 2001.

125. *Id.*

126. *Supra* note 124 at 69, noting that each creditor’s incentive to grab assets results in an overall destruction of value.

127. Secured creditors are those who have taken certain steps, prescribed by law, to secure their claims by designating specified assets of the debtor as collateral. Secured creditors are treated differently than unsecured creditors in bankruptcy. To the extent that a secured creditor has perfected its security interest in collateral consisting of some of a debtor’s assets, the secured creditor will be allowed to take the “first bite at the apple” with regard to those assets. In other words, unsecured creditors are entitled to distributions only if there remain any unencumbered assets after a properly perfected secured creditor has been paid up to the value of its collateral.

128. “Equality is equity” is one of the principles underlying the U.S. bankruptcy laws.

129. In fact, the Framers of the United States Constitution considered the establishment of a uniform bankruptcy law to be of such vital importance to the national interest that they specifically mentioned bankruptcy as one of the enumerated powers to be given to the federal government of limited powers. Article 1, Section 8, Clause 4 of the U.S. Constitution gives the Congress power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”

As Cuba starts to develop a free-market economy, it should enact a bankruptcy law¹³⁰ that will encourage individuals and emerging companies to take potentially rewarding business risks without the fear that business failure will result in them being saddled with an insurmountable amount of debt. For example, it is well known that the bankruptcy laws in the United States have been credited to some degree with the nation's robust economic growth and prosperity.

In connection with the passage of a uniform bankruptcy law, Cuba should create specialized bankruptcy courts in order to ensure the most efficient and cost-effective administration of bankruptcy cases. Staffed with a group of capable, independent bankruptcy judges, a system of bankruptcy courts will be conducive to a well-functioning bankruptcy system that is so important for the establishment and maintenance of a vibrant economy.

Intellectual Property Courts

The term "intellectual property law" is an umbrella term that refers to the laws of copyrights, patents, and trademarks.¹³¹ Although Cuba currently has intellectual property laws on its books,¹³² the laws are not administered by one body but rather by an amal-

gam of different government agencies and judicial bodies.¹³³ Cuba's intellectual property laws currently do not impact the Cuban people much, given that Cuba outlaws most forms of private property. However, the transition to a free-market economy is likely to liberalize private property rights. In turn, intellectual property rights are likely to play an increasingly important role as Cuba progresses on its transition.

If the situation in the United States is any indication, a successor Cuban government would be well advised to set up a system of specialized intellectual property courts to adjudicate intellectual property disputes. In recent years, the United States has witnessed an explosive growth in complex technological and intellectual property cases.¹³⁴ These cases have often presented novel issues that have taxed the adjudicatory ability of generalist judges with limited knowledge of these specialized areas.¹³⁵

As mentioned earlier, the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") is a specialized court that deals primarily with intellectual property cases.¹³⁶ The Federal Circuit has been credited by some with significantly advancing the development of patent law doctrine, and with building the

130. As pointed out in *Laws and Legal System*, Cuba's bankruptcy law should probably incorporate features of both the "liquidation model" and the "reorganization model" of bankruptcy, as both serve useful purposes in different contexts. Cuba could also look to Hungary's experience for further ideas. For example, in 1986, Hungary became the first communist country to enact a bankruptcy law that sought, in part, to induce enterprises to become more profitable and less reliant on government subsidies. See <http://reference.allrefer.com/country-guide-study/hungary/hungary110.htm>.

131. As with bankruptcy law, intellectual property law was deemed important enough to the national interests of the United States that the Framers of the Constitution specifically granted Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Article 1, Section 8, Clause 8 of the U.S. Constitution. Although this Constitutional provision deals only with patents and copyrights, Congress has taken steps to federalize trademark law with passage of the Lanham Act.

132. Cuba's patent law is codified in Decree-Law 68 of May 14, 1983; its trademark law is codified in Decree-Law 293 of May 2, 2000; and its copyright law is codified in Law No. 14 of December 28, 1977.

133. See Jesus (Jay) Sanchelima, *Selected Aspects of Cuban Intellectual Property Laws*, paper presented at the 12th Annual Meeting of the Association for the Study of the Cuban Economy, Miami, FL (Aug. 2002).

134. See LeRoy L. Kondo, *Untangling The Tangled Web: Federal Court Reform Through Specialization For Internet Law And Other High Technology Cases*, 2002 UCLA J.L. & Tech. 1.

135. *Id.* Noting that "the 'tangled web' of legal and scientific complexity experienced in the aftermath of explosive technological growth in this new millennium may be 'untangled', at least in part, through court reform by implementing policies of increased specialization within the judiciary."

136. *Id.* The Federal Circuit also hears cases involving the U.S. International Trade Commission, the Federal Tort Claims Act, and the Merit System Protection Board. However, since the Federal Circuit is an appellate court, the intellectual property cases it reviews have first been decided by lower courts (*i.e.*, U.S. District Courts) staffed by generalist judges.

“major pillars of novel computer software technologies, biotechnology developments, and business methods.”¹³⁷ Also, commentators, including the U.S. Supreme Court, have noted the Federal Circuit’s success in achieving the desirable policy goals of providing “uniformity, order and predictability to a complex body of law.”¹³⁸ In fact, it has been noted that the Federal Circuit has in essence become the de facto “court of last resort” for intellectual property (and in particular, patent) cases, as evidenced by the high rate of Supreme Court denials of certiorari to intellectual property cases resolved by the Federal Circuit.¹³⁹

In addition to the United States, several other countries have established some form of specialized intellectual property courts.¹⁴⁰ For example, approximately eleven countries have developed specialized courts or tribunals that hear only intellectual property cases.¹⁴¹ And approximately twenty-five countries have courts of general jurisdiction that have specialized divisions that hear exclusively intellectual property cases.¹⁴² Cuba, however, has indicated that it does “not have specialised IP courts, and [is] not currently contemplating the creation of specialised IP courts.”¹⁴³ For the reasons stated above, a successor Cuban government would do well in considering the creation of courts of special jurisdiction to deal with the complex intellectual property issues likely to arise post-transition.

STAFFING OF COURTS OF SPECIAL JURISDICTION

One of the greatest challenges that a transition government in Cuba will face will be that of deploying a sufficient number of qualified judges and other personnel to oversee the reform of the legal system and staff both the courts of general jurisdiction and the specialized courts that will need to be established.¹⁴⁴ This challenge will be aggravated if, as some propose, some members of the current judiciary are dismissed or excluded from participation in the post-transition court system due to their association with the current regime.¹⁴⁵ The judges that will preside over the courts of special jurisdiction whose creation is advocated in this paper will need to come from either the existing court system (subject to the necessary retraining), or be newly appointed jurists. Most likely, both methods will have to be utilized over time.

Training of Existing Judges

Those among Cuba’s current judges who are appointed to specialized courts will have to be trained on the fundamental legal and technical principles applicable to their new specialty. Some form of institutionalized legal education will be most effective in helping judges make this transition. Cuba will probably need a short-term and long-term plan for retraining its judges. A short-term plan would involve the assistance of foreign aid for training in specialized areas, while over the long term Cuba may want to es-

137. *Id.*

138. *Id.*

139. *Id.*

140. See International Bar Association Intellectual Property and Entertainment Committee’s *International Survey of Specialised Intellectual Property Courts and Tribunals*, available online at http://www.comml-iba.org/attachment/articles/88/Final_International_IP_Survey_edited-clean_28-02-05.pdf (hereinafter referred to as the “Specialized IP Court Survey”).

141. *Id.* Examples are: Korea, Thailand, Turkey, United Kingdom, Australia, China, Jamaica, Kenya, New Zealand, Singapore, and Zimbabwe.

142. *Id.* Examples are: Brazil, Belgium, Canada, Denmark, Finland, France, Germany, Hong Kong, Hungary, India, Iran, Israel, Italy, Japan, Norway, Pakistan, Panama, Romania, Sierra Leone, Slovakia, South Africa, Spain, Sweden, Taiwan, and the Netherlands.

143. *Id.*

144. See generally, *Laws and Legal System*, Chapter 3; Patallo.

145. See, e.g., Mario Diaz-Cruz, III, *Challenges for a Transitional Judiciary in a Post-Castro Cuba*, in *Cuba in Transition—Papers and Proceedings of the Twelfth Annual Meeting of the Association for the Study of the Cuban Economy* 304 (Aug. 2002). The exclusion of former communists from participation in post-communist governments (“lustration”) has taken place in some former Eastern Bloc countries, such as the former Czechoslovakia and Poland. *Id.*

establish a program of continuing legal education for its judges. Models and resources are available to assist the transition government in the implementation of both plans.

Short-Term Retraining: Countries making the transition from Socialism to a free-market economy have instituted crash programs to make their judiciaries better able to address the new issues presented by the changed economic order.¹⁴⁶ Judicial Training Centers (“JTCs”) have been established in twenty countries in Central and Eastern Europe to educate judges about changes in the law in light of a transition to democracy.¹⁴⁷ The JTCs provide short-term training in the form of seminars, workshops, and other structured and unstructured instruction tailored to the needs of the specific judges being trained.¹⁴⁸ This type of training is consistent with current trends in judicial education.¹⁴⁹ It is outside the scope of this paper to discuss in detail the training programs that existing members of the Cuban judiciary should receive in order to be able to serve in courts of special jurisdiction. Suffice it to say that there is a wealth of information available on the appropriate methodology for such training and general guidelines have been developed for the organization of judicial training programs.¹⁵⁰

There appear to be a number of international organizations that could lend technical and financial support to a JTC program in Cuba. It has also been recommended that the United States include judicial

training as one of the elements of an aid package to be made available by the United States to a transition government in Cuba.¹⁵¹

Continuing Legal Education: Judges in courts of special jurisdiction will need continuing training to keep abreast of changes in the law in their areas of specialization (*e.g.*, changes in the tax regime). In establishing some form of continuing legal education, the following considerations must be made: (1) whether the program will be run by the government or a non-government entity, (2) who will teach the judges, and (3) whether the program will be voluntary or mandatory.

Government v. Non-Government Sponsorship: Continuing legal education (“CLE”) programs in transitioning countries have varied in institutional structure. Some countries have established a single institution in charge of overseeing all CLE, while other countries allow various organizations to run CLE programs.¹⁵² Some countries have both types of CLE programs.

Single institution CLE programs can be conducted by either government or non-government entities. Mongolia’s CLE program is run by a government-owned non-profit organization that operates under the Ministry of Justice.¹⁵³ On the other hand, Bulgaria’s CLE program, the Bulgarian Magistrate Training Center, was established as a non-governmental, non-profit organization, although the Center is expected to eventually become a State institution.¹⁵⁴ Mace-

146. The World Bank has sponsored a number of these programs. See <http://www4.worldbank.org/legal/legtr/introduction.html>.

147. See http://www.abanet.org/ceeli/special_projects/jtc/home.html.

148. See http://www.abanet.org/ceeli/special_projects/jtc/armenia_04schedule.html for an example of the training curriculum for a JTC.

149. See Livingston Armytage, *Judges as Learners: Reflections on Principle and Practice*, Centre for Judicial Studies (Nov. 4, 2004), at <http://www.nji.ca/internationalForum/Armytage%201.pdf>. (hereinafter “Armytage”).

150. See, *e.g.*, Armytage at 15.

151. See, Commission for Assistance to a Free Cuba, *Report to the President* (May 2004), available online at <http://www.state.gov/documents/organization/32334.pdf>, Chapter 3.

152. Mary Francis Edwards, *Getting Continuing Legal Education Started in a Developing Country*, National Center for State Courts, available online at http://www.nji.ca/internationalForum/02_Getting%20CJE%20_mary%20frances%20edwards.pdf.

153. See *id.*

154. See *Bulgaria Magistrate Training Center*, ABA/CEELI, available online at http://www.abanet.org/ceeli/special_projects/jtc/bulgaria.html. Bulgaria also allows for non-profit legal organizations to carry out CLE programs.

donia carries out its CLE through the Macedonian Center for Continuing Education, which operates under the auspices of the Macedonian Judges Association.¹⁵⁵ Regardless of whether CLE functions as part of the government or as a non-government entity, the program should be organized so as to prevent governmental interference with judicial education.

Where a government-controlled institution oversees the CLE program for judges, the composition of the oversight institution may vary. The most popular governing structure seems to mix government officials, judges, and other legal professionals. For example, the Bulgarian Center's Board of Directors is composed of top ranking officials from the executive, legislative, and judicial branches.¹⁵⁶ A Board of Directors composed of officials from the Ministry of Education and Culture, the Supreme Court, and the National University Law School oversee the CLE program (part of the Centro de Estudios Jurídicos de Uruguay) in Uruguay.¹⁵⁷ The Mongolian CLE program's Governing Board is chaired by the State Secretary of the Ministry of Justice and Home Affairs, while the chair of the Judicial Education subcommittee is a Supreme Court Justice.¹⁵⁸

Teachers: While many judicial training programs in transitioning countries have been taught by foreigners, judicial reform strategists recommend that a sustainable CLE program should be taught by local professionals, preferably judges.¹⁵⁹ Successful CLE programs have also utilized lawyers with specialized

areas of expertise, as well as non-legal professionals who specialize in other disciplines. Judges, however, prefer to learn from other local judges because of their practical experience and because they have a better understanding of their country's legal context than foreigners. A second reason to have local judges teach is that local judges will remain in the country after foreign assistance has left.

CLE teachers need not dedicate their full efforts to such teaching. Mongolia, for example, hires CLE faculty to work only part-time. Under such an arrangement, faculty members can maintain their careers, but still provide teaching services. Cuba may need to provide flexible programs that maximize the availability of competent CLE teachers.

Mandatory vs. Non-Mandatory CLE: Not all countries in transition require judges to participate in CLE. Countries will, however, provide incentives for judges to participate in CLE.¹⁶⁰ For example, in Chile, for judges to be considered for promotion, they must have taken at least one CLE course.

It should be anticipated that countries with a more structured CLE program (including compulsory CLE training) will be more successful in sustaining judicial reforms.

Training of New Judges

The two major models of judicial education and training are the civil system and the common law system. In a civil model, law school graduates are ap-

155. See USAID's *Rule of Law Project*, USAID, available online at http://www.usaid.org/mk/English/DG/Rule_of_Law_eng.htm

156. See *Bulgaria Magistrate Training Center*, ABA/CEELI, available online at http://www.abanet.org/ceeli/special_projects/jtc/bulgaria.html.

157. See Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 Wis. L. Rev. 691, 709 (2000).

158. Mary Francis Edwards, *Getting Continuing Legal Education Started in a Developing Country*, National Center for State Courts, available online at http://www.nji.ca/internationalForum/02_Getting%20CJE%20_mary%20frances%20edwards.pdf

159. See, e.g., Principles & Standards of Continuing Judicial Education, National Association of States Judicial Educators (NASJE), 1991, 12. NASJE, Commentary on Preamble, 3 and 6; Kara L. Flanery de Tichoc, *Judicial Reform in the Development Agenda: The Case of Guatemala*, Center for Latin American Studies (2003), available online at <http://www.georgetown.edu/sfs/programs/clas/Pubs/entre2003/judicial.htm>.

160. In some countries CLE is compulsory. In Armenia, for example, judges are obligated to attend mandatory trainings for 36 hours per year. See, e.g., *Judicial Reform Index for Armenia*, ABA/CEELI, (Apr. 2002) available online at <http://www.abanet.org/ceeli> (hereinafter "Armenia").

pointed as judges for the term of their careers.¹⁶¹ Students achieve the required level of competence before a judicial appointment.¹⁶²

In the common law model, judges are selected from a pool of experienced lawyers. Legal education is meant to facilitate a transition to the judicial role and the application of the competencies already developed from practicing as a lawyer.¹⁶³

Use of a civil model would serve well the needs of specialized courts because it provides a structured, institutionalized and predictable framework for the training and appointment of judges. It would be an easy step to include specialized training in the areas of interest to the specialized courts as part of the judicial education curriculum. On the other hand, the common law model has the advantage that the lawyers appointed to the special courts would have from the outset practical experience and knowledge in the areas of interest.

Many Central and Eastern European countries use a combination of the two approaches to obtain new judges.¹⁶⁴ Judicial qualification and preparation in these countries offer judicial careers for both recent law school graduates and practitioners. In some countries, only the completion of a higher education

course of studies, and not necessarily any legal training education is required to become a judge.¹⁶⁵ Such an approach makes sense in countries transitioning to democracy, where there is a need for a large pool of applicants to draw from to fill newly created (or newly available) positions. This dual approach should also be employed in Cuba.

Use of Non-Judicial Personnel in Courts of Special Jurisdiction

Non-judicial personnel (lawyers and non-lawyers) can serve in a judicial capacity in a variety of ways. In specialized courts, non-judges serve as lay judges, conciliators, arbitrators, and justices of the peace.¹⁶⁶ Judicial systems that employ lay judges usually place them on panels alongside professional judges.¹⁶⁷ Staffing courts entirely with non-judges is unlikely to result in adequate administration of justice.¹⁶⁸ Hiring requirements for lay judges range from minimal education to higher education combined with requisite number of years of legal experience. Not all countries require that lay judges have legal training. For example, to serve in the Constitutional Court in Armenia, you only have to have completed some type of higher education and ten years work experience in the legal field, government, or scientific field.¹⁶⁹

161. See Armytage at 16.

162. Alternatively, judges could enter the judicial school after law school, as is the practice in Spain. Spanish judicial candidates are trained specifically to serve as judges in particular courts including commercial, civil, or criminal courts. The qualifications to serve on each differ and the candidates receive in depth training and education in both procedural and substantive laws that are regularly addressed in those courts. Patallo at 29.

163. Armytage at 16.

164. See, e.g., Armenia; *Judicial Reform Index for Bulgaria*, ABA/CEELI, (Jul. 2002), available online at <http://www.abanet.org/ceeli>.

165. *Id.*

166. Kent Anderson & Mark Nolan, Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-In Seido) From Domestic Historical and International Psychological Perspectives, 37 Vand. J. Transnat'l L. 935, 966-970 (2004) (noting that Japan uses non-lawyer judges to guide the lowest and highest courts in Japan). Lay judges in Japan hear civil cases in courts of limited jurisdiction. *Id.* These judges are only required to pass a general civil servant's exam and be employed by the court system or justice ministry for three years. *Id.* Japan also employs lay judges as Supreme Court justices with the intent of maintaining one third of the bench as non-lawyers. *Id.* Lay judges also act as conciliators. *Id.*

167. France and Germany are examples of such countries.

168. In an extreme case, the Government of Rwanda staffed a brand new judiciary with almost entirely non-lawyers to handle the tremendous caseload resulting from the genocide killings. See, Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. Disp. Resol. 387 (2005). The newly elected judges were inadequately trained, spending only six days in judicial training seminars. *Id.* As would be expected, the work of these judges was considered inadequate. *Id.*

169. See Armenia.

Non-lawyer judges are generally chosen, either by the community or the judiciary, based on their high moral standing in the community and special knowledge or experience. Some countries only require non-lawyer judges to be a certain minimum age and without a criminal record. Other countries require non-lawyer judges to have completed higher education and a certain number of years of professional experience. Lay judges in specialized courts are often required to be experts in a specific area relevant to the jurisdiction of the court.

Countries have been able to benefit from the selection of judges for courts of limited jurisdiction from among a pool of professionals specialized in specific areas. Specialized professionals seem to work well on panels with professional judges because they contribute subject matter expertise to complement the legal analysis.

Cuba's courts of special jurisdiction will benefit from, and may require, the inclusion in their ranks of lay personnel—professionals with specialized knowledge if not legal training. Such lay personnel could serve, in a strictly advisory capacity, on panels with judges, and should have such training or experience to add value to the court's deliberations.

CONCLUSIONS AND RECOMMENDATIONS

It is beyond dispute that implementation of the necessary changes to Cuba's legal institutions must be at the core of Cuba's market transition. It is also very likely that instituting the required changes to the legal system in a short time frame may be beyond the transition government's capabilities. In particular, the Cuban judiciary—already short in numbers and perhaps further thinned out by the implementation of lustration measures—may be unable to cope with the gargantuan task of applying the transition period laws and managing the flood of litigation that may ensue as a result of the country's legal and economic changes. At a minimum, Cuba should consider establishing courts of special jurisdiction in the areas discussed in this paper as a way to relieve court congestion and provide timely access to justice to the people.

In addition, the Cuban Government should work with the governments of interested countries (particularly the United States) and international lending institutions such as the World Bank to obtain technical assistance in the development of programs to train, qualify and deploy at least the minimum number of qualified judges and other legal practitioners that will permit the sustained progress of the transition process.