

OUTSTANDING CLAIMS TO EXPROPRIATED PROPERTY IN CUBA

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Cuba seized the properties of Cubans, Americans and other foreigners on the island starting in 1959, with the bulk of the expropriations taking place in the second half of 1960. The process started in 1959 with the Cuban government's takeover of agricultural and cattle ranches under the Agrarian Reform Law and reached a critical stage in July of 1960 with the promulgation of Law 851, which authorized the expropriation of the property of U.S. nationals. The remaining expropriations were carried out through several resolutions enacted by the Cuban government in the second half of 1960, and continued through 1963, when the last remaining U.S. companies still in private hands were expropriated. In a parallel process, most assets owned by Cuban nationals, except for small parcels of land, homes, and personal items, were seized at various times between 1959 and 1968. The laws issued by the Cuban government to expropriate the holdings of U.S. nationals contained undertakings by the State to provide compensation to

the owners. Nevertheless, in almost no case was actual compensation paid.¹

LEGAL BACKGROUND

Cuban Constitutional Laws Related to Expropriations

The term confiscation is regularly used in U.S. laws and regulations regarding the Cuban nationalization process. Cuba has insisted that the U.S. properties in Cuba were expropriated, not confiscated.²

Confiscation is the seizure of private property by the state without compensation, usually to punish the person whose property is seized for who he is or for what he has done. Confiscations are ordered for political, religious, legal, or other reasons relating to a person subjected to the taking, and not to the property itself.³ Expropriation, on the other hand, is the taking by the state, subject to compensation, of specified property for some public purpose, with the taking being independent of the acts or identity of the owner.⁴

1. Law 851 of July 6, 1960, which authorized the nationalization of the properties of U.S. nationals, provided for payment for those expropriations by means of 30-year bonds yielding two percent (2%) interest, to be financed from the profits Cuba realized from sales of sugar in the U.S. market in excess of 3 million tons per annum at not less than 5.75 cents per pound. The mechanism set up by this law was illusory because the U.S. had already virtually eliminated Cuba's sugar quota. *See* Proclamation No. 3355, 25 Fed. Reg 6414 (1960) (reducing Cuba's sugar quota in the U.S. market by 95%). Nonetheless, the inclusion of this compensation scheme in the law was an acknowledgment by Cuba of its obligations to indemnify the U.S. property owners for the takings.

2. Olga Miranda Bravo, CUBA/USA Nacionalizaciones y Bloqueo, 2003, p. 26. *See also* Olga Miranda Bravo, Compendio de Disposiciones Legales sobre Nacionalización y Confiscación, Ministerio de Justicia, La Habana, Cuba, p. 13–14.

3. Black's Law Dictionary, p. 778 (Rev. 4th Ed. 1968).

4. Black's Law Dictionary, p. 616 (Rev. 4th Ed. 1968).

Confiscation of private property was prohibited by Cuban constitutions prior to 1959. Thus, Art. 24 of the 1940 constitution declared, in relevant part:

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

A few weeks after the triumph of the revolution, however, the new government issued a fundamental law to replace the 1940 constitution.⁵ The fundamental law created an exception to the prohibition against confiscation. Art. 24 of the Fundamental Law of 1959 and its subsequent modifications read in relevant part:

Art. 24. Confiscation of property is prohibited, but it is authorized in the case of the property of the tyrant overthrown on December 31, 1958, and his accomplices, that of natural persons or corporate bodies responsible for the crimes against the public economy or the public treasury, that of those who are enriching themselves or have done so in the past unlawfully under the protection of public authorities, and that of those people who are convicted of crimes classified as counter-revolutionary, or who leave in any manner the country's territory in order to evade the reach of the Revolutionary tribunals, or those who having abandoned the country commit acts of conspiracy abroad against the Revolutionary Government.

CUBAN NATIONALIZATION PROCESS— THREE STAGES

Cuba's nationalization process occurred between 1959 and 1968 and included different legal proce-

dures such as: confiscation; forced expropriation by a judicial or administrative authority with compensation; and intervention by state agencies prior to confiscation, nationalization or liquidation of the private property. "The confiscation responded to three main grounds: whether the individual was involved with the tyranny; whether the individual committed a counterrevolutionary crime or whether the individual left the country permanently."⁶

First Stage (1959 -1960): Confiscations of the Property of Alleged Officials of the Batista Government and Collaborators and of Alleged Counterrevolutionaries

The first stage of property takings was carried out in 1959 and 1960. During those years, the government seized, brought under the control of a newly created Ministry for the Recovery of Stolen Property, and ultimately confiscated the assets of 640 individuals charged with being officials of the Batista Government (the executive, legislative and judicial branches as well as governors, mayors and union representatives) during the 1952–58 period, and 126 individuals with having benefited from graft during the Batista years. Furthermore, the Cuban Official Gazette published a list of more than 3,000 individuals and corporations confiscated and another 4,000 subject to investigation⁷ pursuant to Cuban Law No. 78 of 1959.⁸ According to Law No. 95 of 1960, there were two recourses against the resolution of the Ministry for the Recovery of Stolen Property which included an appeal before the Tribunal of Accounts and a final instance before the Cuban Ministry of Treasury, without further recourse.⁹

5. Ley Fundamental of February 7, 1959, published in Gaceta Oficial.

6. Francisco E. García Henríquez, Yarelis Martínez Lorenzo, Jhosvany Martínez Barreiro, *Compendio de Disposiciones Legales sobre Nacionalización y Confiscación*, Ministerio de Justicia, La Habana, Cuba, 2004, p. 19.

7. Gaceta Oficial Extraordinaria No. 9 and Ordinaria No. 165 of 1960.

8. Law 78 of February 13, 1959, published in Cuba's Gaceta Oficial. Subsequently, the confiscations were expanded to cover persons found guilty of counterrevolutionary activities, whether in Cuba or abroad. See also Law No. 664 of 1959.

9. See García Henríquez, et al, *Compendio de Disposiciones Legales*, p. 23.

Second Stage (1959 -1963): Agrarian and Urban Reforms; Expropriation of American, Other Foreigner and Cuban-owned Interests

The second and probably most significant category of takings occurred between 1959 and 1961 through a series of laws intended to transform Cuba's economic structure to that of a Socialist nation.¹⁰ The most important of these were: (1) the Agrarian Reform Law of 1959, which expropriated land holdings in excess of 30 caballerias (1,000 acres);¹¹ (2) Law 890 of October 1960, which expropriated a wide range of Cuban-owned industries and businesses;¹² (3) the Urban Reform Law of October 1960, which ordained the forced sale to the state of all the rental residential property in private hands.¹³

Agrarian Reforms

The Cuban government initiated State control over Cuban lands with the First Agrarian Reform of 1959 and culminated the process with the Second Agrarian Reform of 1963. The First Agrarian Reform authorized the National Institute of Agrarian Reform (IN-RA) to expropriate private companies based on social needs as well as the intervention of private lands. The First Agrarian Reform recognized the constitutional right of the owners to receive indemnification (See art. 29). According to the legislation, the amount of compensation owed to expropriated owners would be determined based on market value using the declared property taxable value prior to October 10, 1958. Expropriations of land improvements, buildings and crops would be also compensated using declared taxable values. The Reform established that the indemnification for property expropriations would be paid in negotiable bonds. To that end, the Republic of Cuba would issue bonds in the amounts, terms and conditions that would be set at the appropriate time. The bonds were to be denominated "Agrarian Reform Bonds" and would be regarded as

government obligations. The issuance or issuances would have a term of twenty years, with an annual interest rate not to exceed four and a half percent (4-1/2%). According to Law No. 576 of 1959, Cuba issued a first emission of such bonds for a value of \$100 million Cuban pesos.

The Second Agrarian Reform established the following indemnification: (1) monthly payments of 15 Cuban pesos per caballeria (33 acres) for 10 years; (2) owners of unused land would received monthly payments of 10 Cuban pesos per caballeria for 10 years; and (3) the monthly payments must be in a range between \$100 Cuban pesos and \$250 Cuban pesos. The Cuban National Bank was responsible for the payments of the indemnifications. In 1973, Cuba officially finalized the indemnification process.

Law No. 890 of 1960

This Law established the nationalization by forced expropriation of the remaining foreign corporations and their subsidiaries in Cuba as well as large corporations owned by Cuban nationals. According to article 7, the indemnification of the forced expropriations would be determined by subsequent legislation. This Law authorized the Central Planning Board (JUCEPLAN) to elaborate such legislation to be approved by Cuban Council of Ministers. Although the JUCEPLAN approved some resolutions regarding these expropriations, there is no record of any legislation establishing compensation to the owners. Approximately, 842 individuals and corporations were intervened by Cuban state agencies between 1960 and 1961.

Urban Reform Law

The Cuban State acquired the exclusive right to lease residential properties in Cuba and transferred all the rental residential properties in private hands to the Cuban State. The Urban Reform recognized only a primary and a vacation residence as well as estab-

10. Matías F. Travieso-Díaz, *The Laws and Legal System of a Free Market Cuba, A Prospectus for Business*, Quorum Books, 1997, p. 81.

11. Ley de Reforma Agraria, published in Gaceta Oficial, June 3, 1959. The Second Agrarian Law of 1963 expropriated all land holdings beyond five caballerias (165 acres).

12. Law 890 of 1960, published in Gaceta Oficial on October 15, 1960

13. Ley de Reforma Urbana, published in Gaceta Oficial on October 14, 1960

lished the right of the tenants to either acquire the properties or to obtain a usufruct over the residences (onerous or gratuitous) pursuant to the law. The Urban Reform guaranteed the right to indemnification of the real estate owners as well as the mortgage holders. The payment was established using two methods based on prior owner monthly rental income: (1) a monthly rent for life up to 100% of prior owners' monthly rental income up to \$150 or (2) a monthly rent for life up to \$250 if the rental income of the prior owner exceeded \$250 per month. Either method would limit the maximum amount of monthly indemnification regardless the number of properties owned at the time of expropriation. A similar compensation formula was prescribed for the mortgage holders.

Third Stage (1961–1968): The Revolutionary Offensive

The Cuban government passed Law No. 989 of 1961 which authorized the takings of “abandoned property.” According to Resolution 454 of the Ministry of Interior of September 29, 1961, Cubans leaving the country for the United States had twenty-nine days to return to Cuba; those traveling elsewhere in the Western hemisphere had sixty days, and those traveling to Europe had ninety days. Failure to return to Cuba within those time periods was deemed a permanent departure from the country, rendering the person’s property subject to confiscation. This law remains in full effect today. Cubans who live abroad permanently lose their inheritance rights and any property rights in Cuba.

The final step in the takeover of private property in Cuba occurred in March of 1968 with the Revolutionary Offensive. The Cuban government announced that all private businesses, with the exception of a few small agricultural businesses, would no longer be allowed to operate.¹⁴ Several laws were promulgated during those years which created the struc-

ture to implement the offensive: Law 647/59 and Law 84/60 established the intervention process; Law 923/61 regulated confiscation due to corruption and sabotage activities; Law 954/60 regulated confiscation due to violations of consumer rights; Law 1144/64 established the nationalizations of private enterprises. However, the transfer of title in favor of the Cuban state was not completed in all cases even though the properties and businesses were controlled by Cuban state agencies.¹⁵

REMEDIES TO EXPROPRIATED PROPERTY CLAIMS

In October of 2007, a group of legal scholars under a contract with the USAID issued a report recommending a model for a property claims settlement mechanism between Cuba and the United States.¹⁶ The report proposed a Property Claims Settlement Tribunal similar to the Iran-U.S. Claims Tribunal, an international arbitral tribunal located in The Hague, which took many years to resolve outstanding claims for assets nationalized by Iran. The report recommended some legislative adjustments which may include allowing more power to the U.S. President to enter into negotiations with a Cuban government. Certain amendments to the existing legislation or a new legislation would be needed to establish a new framework for dealing with Cuba.

It would be possible for the U.S. and Cuba to arrive at a negotiated settlement that allowed alternative remedies beyond the up front payment of money, and included the possibility for individual claimants to waive their right to receive their share of the lump-sum settlement proceeds and instead negotiate directly with the Cuban government for restitution of their expropriated assets, investment concessions, payments in commodities other than cash, or compensation by means of Cuban government obligations. Such a flexible settlement may prove to be in

14. Michael W. Gordon, *The Cuban Nationalizations: The Demise of Foreign Private Property*, Law Book Publishers, 1976, p. 107.

15. See García Henríquez, et al, *Compendio de Disposiciones Legales*, pp. 42–43.

16. Report on the resolution of outstanding property claims between Cuba and the United States. Creighton University School of Law. 2007.

the best interest of all parties.¹⁷ There is also some precedent for such flexibility. The U.S. settlement agreement with Germany, for example, allowed U.S. nationals to forego their portions of the settlement amount and instead pursue their claims under Germany's program for the resolution of claims arising from East Germany's expropriations (See German Agreement at 57 Fed. Reg. 53175, 53176).

In the absence of an agreement to the contrary, an investment dispute between a state and a foreign investor would normally have to be settled by the host state's courts. From the investor's perspective, this is not an attractive solution. Rightly or wrongly, the investors will fear a lack of impartiality from the courts of the state against whom it wishes to pursue a claim. On the other hand, an agreement on forum selection for investment disputes in a state other than the host state is unlikely to be accepted by the latter and it is supported by the rules of state immunity. In addition to sovereign immunity, other judicial doctrines are likely to stand in the way of lawsuits in domestic courts. The act-of-state doctrine enjoins courts from examining the legality of official acts of foreign states in their own territory (see the *Sabbatino* case in which the US Supreme Court stated that it would not examine the validity of a taking of property by a foreign government in its territory even if its illegality under international law is alleged). Further obstacles to lawsuits against host states in domestic courts of other states would be related to doctrines of non-judiciability, political questions, and lack of a close connection to the local legal system.

It is mainly for these reasons that alternative methods have been created for the settlement of disputes between states and foreign investors. Arbitration in a neutral forum has been the most successful method of securing justice for the foreign investor. Where a bilateral treaty agreement backs up the foreign investor by creating an obligation on the host state to submit to any arbitral proceeding brought against it by

the foreign investor, a major step could be said to have been taken towards investment protection.

Cuba's Laws on Expropriation

In 1992, Cuba amended its 1976 Constitution;¹⁸ the amended Constitution acknowledged that foreign investment could not be expropriated, except for reason of public benefit or social interest. In the case of expropriation, compensation was to be made in freely convertible currency.

Article 25 of the amended Cuban Constitution of 1976 authorized "the expropriation of property for reasons of public benefit or social interest and with due compensation." Cuban law established the procedure for expropriation and the basis to establish its significance and need, and the form of the indemnification taking into account the economic and social needs of the party whose property has been expropriated. Article 60 of the Cuban Constitution established that "the confiscation of property only applies as a sanction by the authorities and in the cases contemplated by the law."

Cuba's Law 80 of 1996, the "Law on the Reaffirmation of Cuban Dignity and Sovereignty," states in its article 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."¹⁹

17. See Matías F. Travieso-Díaz, *The Laws and Legal System of a Free-Market Cuba*, p. 75.

18. *Gaceta Oficial*, July 16, 2002.

19. *Gaceta Oficial*, December 24, 1996.

Remedies for U.S. Claimants

In 1964, the U.S. Congress amended the International Claims Settlement Act to establish a Cuban Claims Program, under which the Foreign Claims Settlement Commission of the United States (“FCSC”) was given authority to determine the validity and amount of claims by U.S. nationals against the Government of Cuba for the taking of their property since January 1, 1959.²⁰ The Cuban Claims Program of the FCSC was active between 1966 and 1972. During that time, it received 8,816 claims by U.S. corporations (1,146) and individual citizens (7,670).²¹ It certified 5,911 of those claims, with an aggregate amount of \$1.8 billion;²² denied 1,195 claims, with an aggregate amount of \$1.5 billion; and dismissed without consideration (or did not consider) another 1,710 claims.²³

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

Cuban Claims Settlement Precedents

It is instructive to examine the precedent of settlement agreements that Cuba has negotiated with

countries other than the U.S. for the expropriation of the assets of their nationals. According to a Cuban summary, those agreements have five important themes in common: (1) they were negotiated over long periods of time; (2) none of the agreements adhered to the “Hull Formula,”²⁴ and none implemented the “adequacy” standard, in that the settlements were lump sum, country-to-country government settlements that did not take into account either individually or collectively the amounts claimed by the nationals for the loss of their properties; (3) the payments were made in installments, rather than all at once; (4) the settlement payment was either in the currency of the country advancing the claim or, as was the case with Spain and Switzerland, in traded goods as well as currency; and (5) all agreements were negotiated between Cuba and the State that representing the claimants, without claimant participation.

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

Alternative 1: United States-Cuba Negotiations

The President of the United States has wide, but not plenary, power to settle claims against foreign governments for the uncompensated taking of property belonging to U.S. citizens.²⁵ The U.S. Department of State, under authority delegated by the President, acts on behalf of U.S. claimants in the negotiation of

20. 22 U.S.C. § 1643 et seq.

21. 1972 FCSC Report.

22. The FCSC certification process involved administrative hearings in which only the claimants introduced evidence on the extent and value of their losses.

23. See 1972 FCSC Report.

24. Hull Formula: U.S. Secretary of State Cordell Hull wrote a very famous letter to his Mexican counterpart in which he spelled out that the rules of international law allowed expropriation of foreign property, but required “prompt, adequate and effective compensation.”

25. See *Dames & Moore v. Regan*, 453 U.S. 654, 688, 101 S. Ct. 2972, 69 L. Ed. 918 (1991); see also *Shanghai Power Co. v. United States*, *supra*, 4 Cl. Ct. at 1244–245 (“The President’s authority is limited by the rarely-exercised power of Congress to enact legislation requiring that a settlement seen as unfavorable be renegotiated”) (*quoting Dames & Moore v. Regan*, *supra*, 453 U.S. at 688–689 and n. 13).

their claims with an expropriating foreign country.²⁶ Under the “doctrine of espousal,” the negotiations conducted by the Department of State are binding on the claimants, and the settlement that is reached constitutes claimants’ sole remedy.²⁷

In most agreements negotiated in the past, the United States and the expropriating countries have arrived at settlements involving payment by the expropriating country to the United States of an amount that is a fraction of the total estimated value of the confiscated assets. The settlement proceeds are then distributed among the claimants in proportion to their losses. In most cases, the settlement does not include accrued interest, although a 1992 settlement with Germany over East Germany’s expropriations of the assets of U.S. nationals did include the payment of simple interest at the approximate annual rate of 3% from the time the U.S. properties were taken. Under standard practice, U.S. claimants may not “opt out” of the settlement reached by the U.S. Dissatisfied claimants are barred from pursuing their claims before U.S. courts or in the settling country.²⁸

The above described traditional settlement agreement would not appear, in and of itself, to be adequate to satisfy the needs of holders of U.S. certified Cuban claims. The amount of the outstanding certified claims by U.S. nationals is so large that it would likely outstrip Cuba’s ability to pay a significant portion of the principal, let alone interest. In addition, the Cuban government is burdened already by a very large external debt and loan obligations which are already in default. Any additional obligations to U.S. claimants would only exacerbate Cuba’s debt situation.

Thus, a traditional settlement involving the payment of money, even if payment is spread out over a period

of time, would place Cuba in a difficult financial situation. Such a settlement could also have adverse political repercussions. Nonetheless, lump sum settlement proceeds could, for example, provide limited monetary compensation to some claimants to the extent that their certified losses involve residential and small farm properties.

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

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

It is possible for the United States and Cuba to arrive at a settlement that permits alternative remedies beyond the up-front payment of money, and which permits claimants to waive their right to receive a share of the lump sum settlement proceeds and instead negotiate directly with the Cuban government for restitution, investment concessions, payments in commodities other than cash, or compensation by means of a debt instrument issued by the Cuban government.

While there is no direct precedent for such a procedure and the courts have ruled that individual claimants have no right to negotiate directly with the debtor or government,²⁹ in the case of Cuba, such a flexible settlement may prove to be in the best interest of all parties.³⁰

In the 1990s, several private owners of U.S. certified claims visited Cuba under licenses from the U.S. Treasury Department to negotiate compensation

26. *Id.* at 453 U.S. at 680 and n. 9 (listing ten settlement agreements reached by the U.S. Department of State with foreign countries between 1952 and 1981).

27. *Id.* (citing *Asociacion de reclamantes v. United States*, 735 F. 2d 1517, 1523 (DC Cir. 1984)).

28. *See, Shanghai Power Co. v. United States.*

29. *See Dames & Moore v. Regan above.* Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress’ enactment of the International Claims Settlement Act of 1949, as amended in 1976.

30. There is a precedent of such flexibility. The U.S. settlement agreement with Germany, for example, allows U.S. nationals to forego their portions of the settlement amount and instead pursue their claims under Germany’s program.

with the Cuban government. While the Cubans reportedly negotiated in good faith, the deals were aborted due to political pressure from the U.S. government. These negotiations lend support for the proposition that the Cuban government is willing to negotiate with private claim owners outside of a state-to-state bilateral settlement mechanism.³¹

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

Another possible alternative to the U.S. certified claimants would be entering into a substantially similar deal as the lease between International Telegraph and Telephone (ITT) and STET International which was finalized in 1997 and also involved expropriated properties in Cuba. ITT was a U.S. company which had claims over the ownership rights to the telecommunication infrastructure in Cuba. ITT agreed to let STET, an Italian telecommunications company, utilize the telecommunication infrastructure in Cuba for a period of 10 years in exchange for approximately \$25 million U.S. dollars. After the enactment of the Helms-Burton (Libertad) Act, the U.S. State Department began an investigation based upon STET's use of the expropriated property.

Before the U.S. State Department concluded its investigation, on July 15, 1997, ITT and STET entered into a formal written agreement pursuant to which ITT: (1) allowed STET to use the confiscated property; (2) waived its rights to bring any action against STET for such use during a 10-year period;

and (3) agreed to cooperate with STET in its dealings with the U.S. State Department to help ensure that no STET personnel would be excluded from the United States under Title IV of Libertad Act. In return, STET agreed to make a substantial one-time payment to ITT. In July 1997, the U.S. State Department terminated the investigation. Subsequently, STET paid ITT the agreed-upon amount. The U.S. State Department approved the agreement and said that the it constituted a major step toward the enforcement of the Libertad Act, reinforced the principle of respect for the property rights of U.S. citizens, and would serve as a disincentive to other foreign firms currently operating in or considering investment in confiscated U.S. property in Cuba without authorization of the U.S. claimant.

In reviewing the agreement, the U.S. State Department determined that as long as it was implemented in accordance with its terms, STET's use of ITT's confiscated property did not constitute "trafficking" under the Libertad Act. The term "trafficking" does not apply when U.S. nationals authorize other parties to make use of confiscated property for which they have claims. According to the U.S. State Department, claimants may waive the Title III private right of action. The U.S. State Department also pointed out that the amount STET agreed to pay ITT was not insubstantial and, as such, suggests that the agreement was not a subterfuge for avoiding the intent of Titles III and IV.

Taking into account a possible lease-license transaction between a U.S. certified claimant and a foreign entity in compliance with U.S. laws and regulations, below are some possibilities for the U.S. government to help and support such alternative to facilitate the resolution of the Cuban claims. The U.S. government should permit U.S. certified claimants, on a case-by-case basis, to:

- Negotiate lease-license agreements with foreign companies using confiscated properties in Cuba;

31. See Timothy Ashby, *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms*. Inter-American Law Review, Vol. 40:3, 2009.

- Negotiate a compensation schedule with the foreign entities and the Cuban government; and
- Negotiate restitution of properties and promote the creation of international claims tribunals or arbitration forums to resolve the claims.

Alternative 3: Participation in Cuba’s Claim Resolution Program

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

A) Direct Restitution. Restitution of the actual property that was confiscated (“direct restitution”) would be the solution that many U.S. corporate claimants might prefer, assuming such a choice was available under Cuba’s claims resolution program.³² Some types of expropriated property (e.g., large industrial installations), may lend themselves readily to direct restitution since the identity of the former owners is likely to be uncontested and the extent of the ownership rights may be easy to establish.³³

Restitution, however, in many instances may prove difficult to implement even for readily identifiable property because the ability to grant restitution of the actual property seized by the Cuban government may be negated by a variety of circumstances. The property may have been destroyed or substantially deteriorated. It may have been subject to transformation, merger, subdivision, improvement, or other substantial changes. Another possibility is that the subject property may have been devoted to a use that may not be easily reversed or which may have substantial public utility. In such cases, some form of monetary

compensation would need to be granted to the claimant.

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

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

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

32. Restitution has been used as a remedy of choice for expropriations in many countries in Central and Eastern Europe, including Germany, Czechoslovakia, the Baltic Republics, Bulgaria and Romania. In contrast, Hungary, Russia and all other ex-Soviet republics (with the exception of the Baltic republics) have expressly refused to grant restitution of the property expropriated during the Communist era.

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

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

Substitution type restitution may be appropriate, for example, in cases where the confiscated property is farmland that has been conveyed to co-operatives or divided among small farmers. Rather than dispossessing the current occupants, Cuba may offer to convey to the U.S. claimants other comparable lands possessed by the Cuban government.

Restitution, whether of the direct or substitution type, is likely to be an important ingredient in the mix of remedies granted to U.S. claimants under Cuba's claims settlement program. It will be inappropriate in many instances, and even where appropriate, its use should be tempered by the realization that restitution will often be a slow and difficult process, and one subject to contentious disputes among a variety of claimants, including former owners and their successors, current occupants, and others.

Alternative 4: Issuance of State Obligations

A number of Eastern European countries have used state-issued instruments, which will be generally referred to here as "vouchers," to provide full or partial compensation to expropriation claimants. The vouchers may not be redeemed for cash, but can be used instead as collateral for loans to repay (fully or in part) property sold by the state, including shares in privatized enterprises; to purchase real estate put up for sale by the state; to purchase annuities; or as investment instruments.³⁴

The voucher system provides a potential way of resolving many of the U.S. nationals' expropriation

claims in Cuba, particularly those of former owners of small and medium enterprises who may not be interested in recovering the properties they once owned. The alternative recognizes the limits of the country's ability to pay compensation claims, and avoids the costs and disputes associated with direct restitution systems. As with restitution remedies, an issue that would need to be resolved at the outset would be the compensation to be offered in relation to the loss.

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

There are several potential drawbacks to a system of vouchers or other state-issued instruments. The instruments will fluctuate in value, and are likely to depreciate if Cuba's economic recovery falters. In addition, to the extent the instruments are used as income-generating devices, the rate of return is likely to be very low. Also, the basic underpinning of a voucher system is confidence in the state's ability to make good on its commitments. Therefore, the security, transferability, and marketability of the compensation instruments is a serious concern that the Cuban government will need to overcome in order for the remedy to be acceptable to claimants.

Alternative 5: Other Compensation Mechanisms

Other remedies which might be utilized in Cuba, which have not yet been tried elsewhere, could consist of economic incentives to invest in the country. These remedies could include giving credits on taxes and duties to the extent of all or part of the claim amount. This would permit the claimant to exchange the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, or preferences in government

34. Hungary has used compensation vouchers as the sole means of indemnifying expropriation claimants. In Hungary, vouchers can be used to purchase farmland in auctions held by the state. However, only former owners of land may use their vouchers for that purpose.

contracting. Each claimant might be interested in a different “package,” so separate negotiations would need to be conducted, at least to resolve the most significant claims.

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

Remedies for Cuban Nationals

Resolution of the Cuban nationals’ expropriation claims is a political as well as a legal issue. A Cuban court will decide if the takings were legally valid and effective. It is likely that such court will determine that the takings were effective in transferring title of the properties to the state even if the takings were invalid.³⁵ Therefore, the state has still the legal obligation to comply with both the Cuban 1940 Constitution and the Cuban Fundamental Law of 1959 in its article 24. Article 24 states in its last paragraph:

... Failure to comply with these requirements shall give rise to the right by the person whose property has been expropriated to the protection of the courts and, if appropriate, to have the property returned to him.

Under this article, it is clear that transfer of property back to the owners is neither automatic nor constitutionally required. Indeed, under the procedure established by art. 24, the owner of an expropriated prop-

erty who wished to contest the validity of the taking had to sue the government and, if successful, could obtain relief from the court in the form of damages or if justice so required restitution of the property. Thus, unless and until a court ruled that restitution should take place, title to the property remained with the state.³⁶

Some of the remedies discussed for U.S. nationals are also applicable to Cuban nationals. The key issue is whether different types of property (industrial, commercial, agricultural, residential and personal) should be treated differently. It is important to recognize Cuba’s priorities and the best use of the property and the “actual” public utility or social interest of the property. In our opinion, the best and more realistic strategy of dealing with the resolution of the claims should be based on special forums oriented by property types and taking into consideration Cuba’s priorities. For example, a claim court or arbitration forum designated to handle agricultural claims and takings under the Agrarian Reforms of 1959 and 1963. That special court may also review claims related to sugar mills owned by U.S. and Cuban nationals.

Therefore, resolution of the expropriation claims may be resolved according to three methods: (1) the Cuban judicial system using a special designated court; (2) international and investment commercial arbitration in a third country or using mutually selected international arbitration court; or (3) direct negotiations between the parties with the assistance of a neutral party or a mutually selected mediator or panel of mediators.

35. On February 3, 2011, Spain’s Supreme Court ruled that the transfer of the trademark registration of Havana Club in Spain by Cuba and its partners violated Spanish public law. The court ruled that Havana Club Holdings “does not deserve to be considered a good faith third party purchaser of the Spanish trademark of Havana Club,” and noted that the company José Arechabala, S.A. (and Bacardi as its successor) was illegally deprived in Spain of the Spanish trademark registration for Havana Club. The court however did not restore the Spanish trademark registration to Bacardi only on the grounds of a technicality involving the statute of limitations for a claim. The Provincial Court of Madrid has ruled that confiscation is not a valid right to ownership for Spanish brands. In April 2010, a U.S. federal court also recognized that Bacardi “acquired any remaining rights to Havana Club, as well as the recipe from the Arechabala family.” The First Amendment of the U.S. Constitution protects “Bacardi’s ability to accurately portray where its rum was historically made.”

36. See Matías F. Travieso-Díaz, *The Laws and Legal System of a Free-Market Cuba*, p. 84.

GOVERNMENT SUPPORT TO RESOLVE CLAIMS TO PROPERTY

Restitution of the actual property that was expropriated would be the solution that many Cuban claimants, like their American counterparts, would favor. However, the possibility of granting restitution of the actual property seized by the Cuban government would depend on many economic, social and political factors, as well as on the current condition of the property.

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 an independent agency of the Cuban government with jurisdiction over the determination of the validity of the claims to title over confiscated property and the dispensation of remedies. The procedures for handling property claims would need to set strict, short time limits for filing remedy requests; define the means and procedures for providing title; establish mechanisms for adjudicating title disputes, dispensing remedies and appealing agency determinations; define and enforce duties of those who are granted restitution of properties (e.g., payment of taxes, environmental cleanup, economic use of the property); and set the administrative procedures and bureaucratic apparatus needed to identify and list the applicable remedy in each case. The experience in other countries demonstrates that it is extremely important to have these mechanisms in place before attempting to consider any claims.

The types of remedies available under Cuba's domestic claims program would of necessity have to be few in number, relatively straightforward in execution, and demanding little in the way of up front cash outlays by the state. The results of the process are likely to leave many dissatisfied. Therefore, both the Cuban government and the claimants should be prepared to exhibit flexibility in working toward as fair and reasonable a resolution of the claims as can be achieved under these constrained circumstances.

There is a precedent of granting licenses to certified claimants to visit their properties in Cuba as well as to hold meetings with Cuban authorities. Taking into account the aforementioned scenario, these are some suggestions to the U.S. government in order to help and support any initiative to facilitate the resolution of the Cuban claims:

- Provide licenses to all "legitimate"³⁷ U.S. claimants to visit, inspect, and conduct legal, economic, environmental and feasibility studies on the expropriated properties;
- Provide licenses to all "legitimate" U.S. claimant to negotiate the compensation of the claims with a "recognized" Cuban agency, arbitration court or judicial forum; and
- Provide licenses to cover legal fees regarding title searches in the Cuban Property Registry and due diligences needed to complete the filing, negotiation and resolution of the claims in Cuba.

LEGISLATIVE REVIEW ON PROPERTY CLAIMS

Any proposal for the resolution of the U.S. nationals' expropriation claims against Cuba must recognize the objectives of a claims resolution program. These objectives include the fundamental differences between the various types of property subject to claims, and the practical limitations that will be encountered by the Cuban government as it seeks to provide remedies to both U.S. and Cuban expropriation victims. The interaction between these factors adds a significant degree of complexity to the problem. Cuba will also be confronted with political as well as financial constraints which will limit its ability to provide certain remedies. A settlement that involves huge financial obligations over a long period of time may be resisted politically by, among others, the generation that came of age in Cuba after the expropriations were carried out.

There is no doubt that the U.S. President's power to settle international claims and to eliminate these

37. "Legitimate" claimants are either certified claimants or claimants holding legal title, nationalization papers, decrees, resolutions or any legal document asserting their rights in Cuba. The claimant is responsible for providing legal supporting documents and evidence about their property rights in Cuba to obtain a U.S. license.

sources of friction is an integral aspect of his authority to conduct the foreign relations of the United States. Such power permits the President to maintain the foreign assets at his disposal for use in negotiating the resolution for a declared national emergency. The claims serve as a bargaining chip to be used by the President when dealing with a hostile country. However, the use of diplomatic espousal and settlement authority should be the last resource when U.S. claimants run into difficulty collecting a debt from a foreign government. As such, a government-to-government settlement is not generally appropriate unless the U.S. claimant has exhausted all available remedies that may be open to him and has suffered a “denial of justice,” as that term is understood in international law.

The U.S. government needs to make a number of important policy decisions to prepare itself to discuss with Cuba the potential resolution of the claims issue. For example, the U.S. government will need to decide whether to organize its settlement approach around the traditional “espousal” principle and preclude claimants from engaging in separate negotiations with Cuba, or whether it will adopt a more flexible approach that allows claimants to be represented by the U.S. government or pursue other remedies on their own. For example, allow U.S. certified claimants to “opt-out” of a U.S.–Cuba Settlement with certain guarantees including the submission of the dispute of the claim to arbitration if agreement was not reached between the U.S. claimant and a Cuban government representative.

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

Case Study: Shanghai Power Company

The Shanghai Power case may serve as a precedent for what U.S. Certified Claims owners can expect in a future bilateral settlement negotiated by the federal government. Unlike all previous U.S. claims programs, Cuba has no frozen assets in the U.S. from which Certified Claims could be paid. In 1983, Shanghai Power Company³⁸ brought suit against the Federal Government alleging that its property was taken without just compensation in violation of the Fifth Amendment by the U.S. settling its claim against the People’s Republic of China (“PRC”) for \$20 million—\$125 million less than the value of the nationalized assets (including interest) as determined by the FCSC. Shanghai Power argued that the U.S. had “settled its claim against the PRC for a mere fraction of its value in order to achieve broader foreign policy objectives” and contended that “the President and the State Department considered the outstanding claims of U.S. nationals a hindrance to normalization of relations and decided to remove the obstacle by sacrificing those claims.”³⁹

Shanghai Power lost its case against the U.S. Government. In addition, the Court invalidated the value of the claims as determined by the FCSC, stating that the Justice Department “made its valuation entirely on an ex parte basis, with plaintiff alone producing evidence.”⁴⁰ Furthermore, the Court said: “The value of that claim might have been the same as that of the underlying property but it might have been different. That value would depend upon the likelihood of finding a forum for presenting the claim, overcoming all relevant defenses and obtaining satisfaction from the debtor’s available assets” (emphasis added).

While the Shanghai Power decision proved onerous for the plaintiff, the case affirmed that claimants should pursue “self-help” remedies against foreign governments prior to the U.S. government “espousing” their claim for a diplomatic solution. Espousal is not generally appropriate unless “the American national has exhausted such local remedies as may be

38. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237

39. *Id.*, 239

40. *Id.*, 241

open to him and has sustained a denial of justice as that term is understood in international law.”⁴¹

The court chided Shanghai Power for not attempting self-help remedies, stating: “For well over 20 years after the PRC seized its plant, plaintiff did absolutely nothing to obtain compensation.”⁴² The Plaintiff responded that they felt that they could do nothing because there was no opening to China and no communication. In contrast, while there has been no U.S. diplomatic opening to Cuba to date, there is ample communication with the island, and Cuban-Americans (as well as other OFAC licensees) regularly travel to and communicate with people there.

CONCLUSIONS

There is little doubt that the Cuban government will need to provide a remedy to those whose property was seized by the revolutionary government after 1959 and have not yet received compensation for the takings. Such an assumption is based on the requirements of international and Cuban law, fundamental notions of fairness, and the evident political necessity to settle property disputes before Cuba can achieve stability.⁴³

Cuba will need to quickly develop a new legal system that promotes economic development, while ensuring market competition, preventing extreme income inequality and protecting the public health and the natural environment. The rule of law need to prevail to promote foreign direct investment and economic growth in Cuba.

There will come a time when the United States and Cuba will sit down to negotiate a settlement of the expropriation claims of U.S. nationals in Cuba. The expected conditions under which the settlement will be negotiated will greatly restrict the remedies that Cuba will be able to offer to the US claimants. Therefore, both the Cuban government and the U.S. claimants should be prepared to exhibit flexibility in working toward as fair and reasonable a resolution of the claims.

The conclusion of a U.S.-Cuba Bilateral Investment Treaty (BIT) or a similar bilateral agreement between Cuba and the United States will imply the prior resolution of pending expropriation claims which will add credibility to the Cuban BITs. From the standpoint of a potential investor (whether U.S. based or coming from a third country), the resolution of outstanding property claims is crucial precondition to doing business in Cuba as a rather risky proposition and may be discouraged from stepping into the country.

U.S. law arguably requires resolution of U.S. nationals’ expropriation claims before the embargo on trade with Cuba is lifted and foreign aid can resume;⁴⁴ and apart from any legal requirements, resolution of U.S. nationals’ expropriation claims has been since President Kennedy’s administration one of the stated political conditions for the normalization of relations between the U.S. and Cuba. These factors demand the speedy negotiation of an agreement between the U.S. and Cuba toward the resolution of the claims of U.S. nationals.

41. Shanghai Power, quoting letter from Attorney Advisor Matre, Office of the Assistant to the Legal Adviser for International Claims, to Hershel Davis (May 14, 1956).

42. *Id.*, 245.

43. See Matías F. Travieso-Díaz, *The Laws and Legal System of a Free-Market Cuba*, p. 71

44. Section 620(a) (2) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370 (a) (2) (1988) (amended 1994) prohibits U.S. assistance to Cuba until Cuba has taken “appropriate steps under international law standards to return to U.S. nationals, and to entities no less than 50% beneficially owned by U.S. citizens, or provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after 1959, by the government of Cuba.” The Cuban Democracy Act (CDA) of 1992, 22 U.S.C. § 6001 et seq., sets very specific conditions for the lifting of the U.S. trade embargo against Cuba, yet it makes no reference to payment of compensation to U.S. citizens for the Cuban government’s expropriation as a preconditioned to lifting the embargo and resuming economic assistance to Cuba. However, the Cuba Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C § 6021 et seq., would make assistance to Cuba contingent upon Cuba returning to U.S. citizens the expropriated properties, or providing full compensation for them to their owners.