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The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba

JOSE A. ORTIZ*

INTRODUCTION

Upon the Soviet Union’s complete economic and political failure, many speculated that Cuba would not have the financial capability to continue its current system of government.1 Despite

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1. See Kern Alexander & Jon Mills, Resolving Property Claims in a Post-Socialist Cuba, 27 LAW & POL’Y INT’L BUS. 137, 178–179 (1995) (stating that due to the collapse of the Soviet Union and the Council for Mutual Economic Assistance, economic growth in Cuba declined substantially, eventually becoming stagnant). See also Serge F. Kovaleski, Cuba Replacing Dollar with Euro to Ease Trade Woes, WASH. POST, Mar. 21, 1999, at A25, A30 (noting that Cuba lost eighty-five of its economic markets and its communist satellites in Eastern Europe when the Soviet Union collapsed, that Cuba is not a member of the International Monetary Fund or the World Bank, and that it has trouble obtaining credit from other sources).
the Soviet Union's collapse, a thirty-seven year U.S. economic embargo, and a massive internal economic crisis, Fidel Castro continues to defy the odds and remains in control of the island. Hence, the denial of freedom and democracy continues to plague the Cuban people.

Located just ninety miles from the United States, Cuba is the only communist country in the Western Hemisphere. In 1959, Castro led a communist revolution that systematically and progressively destroyed the fundamental human rights of the people on the island. Castro's nationalization of private property without compensation to property owners was one of his more visible attacks on human rights. Through a series of expropriations, the communist regime confiscated private residences, businesses, and lands belonging to both Cuban citizens and foreign citizens and entities—primarily those from the United States. Since taking control of the island, the Castro Government has enacted numerous laws substantially limiting the right to own property in Cuba.

How or when the "Castro era" will end is purely a matter of speculation. It is highly unlikely that Castro will make any substantive changes in his government or embrace democratic ideals. If post-Castro or post-socialist government authorities wish to create a free-market democracy and ameliorate Cuba's current economic crisis, they will need to negotiate a settlement

4. See id. at 58; see also Alexander & Mills, supra note 1, at 142.
5. See Alexander & Mills, supra note 1, at 142-144.
6. See id.
7. See Andres Oppenheimer, Free Four Dissidents, Europe Tells Cuba, MIAMI HERALD, Mar. 18, 1999, at 1A (stating that, despite great criticism from the international community, including the European Union and South America, Cuban Government officials recently demonstrated their contempt for democratic ideals when the Cuba Government tried, convicted, and jailed four peaceful dissidents for publishing a document attacking Cuba's current system of government). See also Juan O. Tamayo, Four Cuban Dissidents Convicted: Sentences of 3½ to 5 Years Widely Condemned, MIAMI HERALD, Mar. 16, 1999, at 1A (noting that the March 1999 convictions were the result of a new law threatening twenty-year sentences for dissidents who support U.S. policies regarding Cuba).
8. The average monthly salary in Cuba is about 200 pesos (ten U.S. dollars) a month; medical doctors in Cuba earn about 300 pesos (fifteen U.S. dollars) a month; some
with the international community, particularly with the United States. Implementing a new democratic government is essential to normalizing Cuba's relations with the United States. A new Cuban government will have to adopt a sound and internationally acceptable legal regime that respects and recognizes basic human rights, including the fundamental right to own and enjoy property. As such, this new government must prioritize the return of confiscated property to its former owners.

The purpose of this Article is to address the Castro Government's outrageous, unacceptable, illegal, and abusive expropriation of property in Cuba. The Castro regime violated the property provisions of Cuba's Constitution of 1940, which were technically in place at the time the illegal takings occurred at the start of the Castro era. In addition, Castro's regime flagrantly violated fundamental international law principles and deprived expropriation victims of their basic human rights. In the future, post-Castro government authorities will likely attempt to transition to a free-market economy. Accordingly, this Article proposes that recognizing property rights and compensating victims of the takings, both domestic and foreign, will be crucial early steps in Cuba's transition to democracy.

Part I analyzes the history of Castro's systematic stripping of Cuban people's constitutional property rights and describes the illegal takings and the laws Castro enacted to justify them. Part II discusses Cuba's need for a legal regime based on the 1940 Constitution and internationally accepted principles of law. Part

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pensions pay as little as sixty pesos (three U.S. dollars) a month. See John Rice, Cuba 40 Years After Aging Castro Has Outlived Friends, Foes, FLA. TIMES UNION (Jacksonville), Jan. 3, 1999, at D1.

9. See generally 22 U.S.C. §§ 6021–6091 (Supp. III 1994) [hereinafter Helms-Burton Act]. The Act does not allow the United States to engage in relations with Cuba unless Cuba first implements a transitional democratic government. See id. § 6061(14) (asserting that it is the policy of the United States to “take steps to remove the economic embargo of Cuba when the President determines that a transition to a democratically elected government in Cuba has begun.”).


III addresses the need to unequivocally identify and enumerate individual property rights within a new Cuban legal framework. In addition, Part III proposes that the new legal framework specifically incorporate a restitution scheme to provide redress for the victims of illegal takings. Part IV identifies the potential claimants in a Cuban restitution system and the laws supporting their claims. Part V analyzes some practical issues confronting a Cuban restitution scheme. Part VI analyzes other former communist countries' implementation of restitution schemes. Finally, Part VII concludes by recommending steps for a future Cuban government to take in implementing its own restitution system.

I. THE TAKINGS: A SYSTEMATIC DESTRUCTION OF INDIVIDUAL PROPERTY RIGHTS

A. The Roots of Property Rights in Cuba

1. The Constitution of 1901

Property rights in Cuba originated in the Constitution of 1901, which recognized the right of an individual to own private property. Article 32 contained the following provision: "[n]o one shall be deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property." This constitutional provision illustrates that at one point in its history, the Cuban Government acknowledged an individual's fundamental right to own and enjoy property.


14. CUBA CONST. art. 32 (1901), translated in 2 AMERICAN CONSTITUTIONS, supra note 12, at 119.
Recognition of these minimum standards for government takings is harmonious with modern international law and the current positions most democratic countries adopt. While the provision allows government takings, it requires a legitimate public use justifying the takings and compensation for the property owners.\textsuperscript{15}

Unfortunately, the Constitution of 1901 was drafted during U.S. military occupation of the island.\textsuperscript{16} Because of the occupation, the Constitution contained the Platt Amendment,\textsuperscript{17} which allowed the United States to intervene in Cuba’s domestic affairs in order to preserve Cuban independence.\textsuperscript{18} The Platt Amendment contributed to the ineffectiveness of the Constitution of 1901 and led to its eventual failure.\textsuperscript{19} The Constitution’s failure, however, does not diminish the fact that its framers nevertheless recognized an individual’s fundamental right to own private property.\textsuperscript{20}

2. The Constitution of 1940

After a period of political instability following the adoption of the Constitution of 1901, a revolution took place in Cuba.\textsuperscript{21} In 1933, Cuban revolutionaries sought a greater sense of identity and nationalism in response to the U.S. intervention in Cuba’s domestic relations.\textsuperscript{22} Between 1933 and 1939, the United State’s
involvement in Cuba's internal affairs diminished. In 1939, the Cuban people elected delegates for a constitutional assembly to draft a new constitution and bring about the end of the Platt Amendment.

Many Cubans consider the adoption of the Constitution of 1940 a defining moment in Cuba's history. Unlike the Constitution of 1901, the Constitution of 1940 symbolized Cuban sovereignty and gave the Cuban people a great sense of national pride, which had been significantly diminished during the U.S. occupations. The Constitution of 1940 guaranteed all Cuban citizens extensive social and economic rights, including substantial property rights.

Two of the Constitution of 1940's significant property provisions are Articles 24 and 87. Article 24 reads as follows:

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

Article 87 provides that: "The Cuban Nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are established by law."

These provisions guaranteed the right to own and use...
property without government interference. Article 87 established a standard of "public necessity" or "social interest" to justify government takings.\(^{32}\) Article 24 required cash indemnification to property owners for government takings, as well as judicial protection in cases involving governmental non-compliance.\(^{33}\) Like the property provisions in the Constitution of 1901, these guarantees are perfectly acceptable under international laws and are consistent with democratic legal principles.\(^{34}\)

B. The Destruction of Constitutional Property Rights in Cuba

1. The Constitutional Act of 1952

Property rights in Cuba began deteriorating in 1952 when Fulgencio Batista led a military coup d'etat.\(^{35}\) Upon gaining control of the island, Batista issued the Constitutional Act of 1952,\(^{36}\) which repealed the Constitution of 1940.\(^{37}\) Substantively, the Constitutional Act of 1952 was virtually identical to the Constitution of 1940. Under this Act, however, only members of the Council of Ministers appointed by Batista could make amendments.\(^{38}\) This was clearly contrary to the amendment procedures in Articles 285 and 286 of the Constitution of 1940 and essentially made Batista the dictator of Cuba.\(^{39}\) Batista's Council of Ministers never reinstated the Constitution of 1940's property protections.\(^{40}\) Thus, private property became unprotected under Cuban law. Batista's actions, coupled with the Cuban people's inability to deflect Batista's constitutional violations, established

32. See id.
33. Id. art. 24, translated in I CONSTITUTIONS OF NATIONS, supra note 10, at 614.
34. See generally Wachs, supra note 13, at 543 ("In several of the [1940 Constitution's] provisions, the document raises to constitutional status rights that other countries provide only by statute.").
35. See Alexander & Mills, supra note 1, at 147-148.
37. See Alexander & Mills, supra note 1, at 147.
38. See id. at 147-148.
40. See Alexander & Mills, supra note 1, at 148.
the dangerous precedent of ignoring the important procedural mechanisms in the Cuban Constitution.41

2. Castro’s Revolution and First Attack on Property Rights

Fidel Castro used Batista’s disregard for the Constitution of 1940 to justify his own revolution.42 Castro seized control of the island on January 1, 1959 and promised to re-enact the Constitution of 1940.43 In the early days of Castro’s revolution, the Constitution of 1940 was re-enacted;44 however, Castro later appointed a Council of Ministers who, like Batista’s Council, usurped the Constitution of 1940’s amending procedures.45 One of the Council’s first amendments to the Constitution of 1940 involved a revision to the property provisions in Article 24.46 The revised text of Article 24 reads as follows:

Confiscation of property is prohibited. However, confiscation is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasury committed during the tyranny which ended on December 31, 1958, as well as in the case of property of the tyrant and his collaborators. No one can be deprived of property except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash, as fixed by a court.47

This amendment to Article 24, which was procedurally illegal under the 1940 Constitution’s amending procedures, signified Castro’s first attack on Cuban property rights.48 This revision not only allowed discriminatory takings of property from any of Batista’s followers, but also worked as a mechanism to punish all political opposition. This early revision of Article 24 set the stage for the systematic destruction of property rights in Cuba.

41. See Sánchez, supra note 39, at 144.
42. See id. at 142–144; see also Wachs, supra note 13, at 545–546.
43. See Sánchez, supra note 39, at 143.
44. See id.
45. See id.
46. See id.
47. See id. at 143–144.
48. See id.
3. The Fundamental Law of 1959

Castro’s initial confiscation plan continued until February 7, 1959, when he officially repealed the Constitution of 1940 and enacted the Fundamental Law of 1959.\textsuperscript{49} The Fundamental Law officially proclaimed Castro’s Council of Ministers as the supreme lawmaking body of Cuba.\textsuperscript{50} This law, allegedly only “temporarily” effective until Castro’s government drafted a new constitution consistent with the communist revolution’s goals,\textsuperscript{51} revised Article 24 to officially punish Batista and his followers.\textsuperscript{52}

C. Gross Violations of Accepted Property Rights

1. The Agrarian Reform Act

The Agrarian Reform Act (ARA),\textsuperscript{53} enacted on June 3, 1959, constituted one of the many amendments to the Fundamental Law.\textsuperscript{54} The Act represented the Castro Government’s first gross violation of sound, individual property rights.

The ARA converted agricultural estates into state-owned farms.\textsuperscript{55} All privately owned land exceeding five caballerias\textsuperscript{56} qualified for nationalization under the ARA.\textsuperscript{57} The government essentially forced qualifying private landowners to sell their land for a price the government deemed appropriate.\textsuperscript{58} The


\textsuperscript{50} See Sánchez, supra note 39, at 144. See also Fundamental Law art. 119, translated in IV CONSTITUTIONS OF NATIONS, supra note 49, at 391.

\textsuperscript{51} See generally Gutiérrez, supra note 3, at 54. The law was hardly temporary. See id. at 54, 61. Between February 7, 1959 and August 23, 1961, the Council of Ministers amended the Fundamental Law sixteen times. See Sánchez, supra note 39, at 144. The Fundamental Law and its subsequent amendments, designed to “strengthen state control and reduce individual political rights,” basically served as Cuba’s constitution for seventeen years, until 1976, when a new communist constitution was enacted. Wachs, supra note 13, at 546.

\textsuperscript{52} See Sánchez, supra note 39, at 144.

\textsuperscript{53} Ley de Reforma Agraria [Agrarian Reform Act], Gaceta Oficial, Special Ed., No. 7 (June 3, 1959) (Cuba).

\textsuperscript{54} See Sánchez, supra note 39, at 144.

\textsuperscript{55} See id.

\textsuperscript{56} See Gutiérrez, supra note 3, at 55 n.14 (explaining that one caballeria is equivalent to thirty-three acres).

\textsuperscript{57} See id. at 55.

\textsuperscript{58} See id.
government placed significant restrictions on the lands of those individuals permitted to keep their property, including: (1) outlawing sale of the property without state authorization; (2) restricting use of the land; (3) forcing owners to sell produce from any harvest to the state at prices fixed by the state; (4) restricting property transfers, including the state's reserved right of first refusal; and (5) placing burdensome restrictions on the inheritance of property.\(^5\) The ARA represented an extreme violation of the Constitution of 1940's property provisions, which were technically effective at the time these takings occurred. Additionally, the ARA differed significantly from generally accepted property law principles that do not allow government takings without a legitimate purpose and proper compensation.\(^6\)

2. Further Changes to Article 24

On November 22, 1959, the Castro Government amended Article 24 to permit expropriation of property from additional classes of persons.\(^6\) These classes included: (1) persons found guilty of offenses the law defined as counter-revolutionary; (2) persons leaving the national territory in any manner whatsoever thereby evading the jurisdiction of the revolutionary courts; and (3) persons who, having left the national territory, performed conspiratorial acts against the revolutionary government.\(^6\) In effect, this revision provided for confiscation of property belonging to anyone who opposed Castro and punishment of those who fled the country. Additionally, the Castro Government failed to provide a legitimate public purpose for the takings or compensate people who were deprived of their property. Furthermore, from a technical standpoint, Castro lacked the authority to carry out the governmental takings.\(^6\)

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59. See id. at 56.
60. See id. at 55.
61. See Sánchez, supra note 40, at 145.
62. See Gutiérrez, supra note 3, at 57.
63. See id. at 57–58.
3. Changing the Original Text of Article 24

The original text of Article 24 was changed again on July 5, 1960 to read as follows:

[No other natural or juridical person can be deprived of his property except by competent authority and for a justifiable cause of public utility or social or national interest. The law shall regulate the procedure for expropriation and shall establish legislation and forms of payment and shall determine the competent authority to declare the case to be of public utility or social or national interest and that the expropriation is necessary.]

The first critical change to the text was the replacement of the "competent judicial authority" language in the Constitution of 1940 and the Fundamental Law of 1959 with "competent authority." Removing the word "judicial" eliminated the judicial presence requirement for issues regarding the expropriation of property, which, in turn, also eliminated the safety that judicial inspection provides. Essentially, "competent authority" referred to Castro and his Council of Ministers, who the new law allowed to expropriate property based on "public utility or social or national interest." In other words, the law allowed Castro to confiscate property for whatever reason, whenever and from whomever he wanted, completely free from judicial scrutiny.

The second crucial change to Article 24 eliminated the requirement of "indemnity in cash" with regard to compensation from the government for takings. The new text, which provided that "the law shall regulate the procedure for expropriation and shall establish legislation and forms of payment," deprived victims of any defined judicial procedure to challenge the expropriation.

As a further deviation from the Constitution of 1940 property provisions, on January 24, 1961, the category of property subject to expropriation was expanded to encompass "those [cases] deemed necessary by the Government in order to prevent acts of
sabotage, terrorism or any other counter-revolutionary activities.”

Again, the purpose of this change was to eliminate all political opposition to Castro's regime.

4. Law No. 851 and Law No. 890

In July 1960, in order to punish the U.S. Government's growing criticism of and opposition to Castro's regime, Castro enacted Law No. 851, which forcibly expropriated all businesses U.S. citizens owned in Cuba. The law provided that compensation for these takings would be determined at a later date.

Soon after the enactment of Law No. 851, Castro's Government passed Law No. 890, which confiscated virtually all Cuban-owned businesses and nationalized all Cuban-owned industries. Similar to Law No. 851, Law No. 890 vaguely referenced compensation, which, as history sadly demonstrated, never materialized.

D. The Current Status of Property in Cuba

1. The Constitution of 1976

On February 24, 1976, the Castro regime enacted the Constitution of 1976, which manifests the goals of the communist revolution in Cuba. For instance, Article 14 calls for an

70. Id. at 58.
71. See id. at 59 & n.30. See also Ley Numero 851 [Law No. 851], Gaceta Oficial, Special Ed., No. 22 (July 31, 1960) (Cuba).
72. See Gutiérrez, supra note 3, at 59.
73. See id.
75. See Gutiérrez, supra note 3, at 59.
76. See id. The businesses confiscated under Law No. 890 included: sugar mills, distilleries, alcoholic beverage plants, detergent factories, perfumeries, dairy producers, confectioners, wheat mills, container makers, paint producers, chemical companies, paper companies, metallurgists, lamp makers, textile industries, rice mills, food producers, edible oil producers, whole sale food distribution warehouses, coffee mills, pharmaceutical industries, department stores, railroad companies, printers, cinematographers, construction companies, electric utilities and maritime industries ....
77. See id.
economic system based upon the "people's socialist ownership of the means of production and on the abolition of the exploitation of man by man" in the Republic of Cuba. 79 Furthermore, Chapter I, Article 15, defines "property" in the following manner:

The socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources and flora and fauna in the marine area over which it has jurisdiction, woods, waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders and the bourgeoisie; as well as over the people's farms, factories, enterprises and economic and social, cultural and sport facilities built, fostered or purchased by the state and those that will be built, fostered or purchased by the state in the future. 80

This language put the final touch on Castro's confiscation scheme. It placed virtually all land and industry in the Castro Government's hands and stripped all private property ownership of constitutional protection. 81 Furthermore, the Constitution of 1976 makes no reference to compensating the individuals whose property was seized.

2. The 1992 Amendments

In an effort to alleviate damages resulting from the Soviet Union's fall and the consequential decrease in subsidies, further amendments were made to the Constitution of 1976. 82 Such amendments allowed foreign entities to assume partial ownership of certain Cuban industries such as tourism, mining, communications, real estate, petroleum, manufacturing, sugar, and construction. 83 In addition to the Cuban Government owning


80. Id. ch. 1, art. 15, translated in V CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, supra note 78, at 9 (alteration in original).
81. See Wachs, supra note 13, at 550.
82. See Gutiérrez, supra note 3, at 62-63.
83. See id.
illegally expropriated property, foreign entities now acquired equity in confiscated property. This development makes determining ownership of property in a post-socialist Cuba difficult and troublesome. The fight for property in a post-Castro Cuba will take on heated legal, political, moral, and economic dimensions.

II. THE NEED FOR A NEW LEGAL REGIME BASED ON THE CONSTITUTION OF 1940 AND INTERNATIONALLY ACCEPTED PRINCIPLES OF LAW

The manner in which the Castro regime stripped Cuban citizens and foreign nationals in Cuba of constitutional property rights will be the primary source of discussion and controversy in negotiated settlements between a post-socialist Cuba and the international community. If post-socialist Cuban government authorities wish to take part in the global economy, they will need to implement a governmental and legal framework based on a new democratic constitution. Furthermore, government authorities must make resolving Cuba’s property dilemma a priority.

To develop a free-market economy, Cuba needs the United States as a trading partner. In return, the United States will likely demand a role in structuring the new Cuban government and legal system. The United States, however, should merely assist the Cuban people in this undertaking because the drafting of a new constitution must be left primarily to the Cuban people.

The framers of a new Cuban constitution must take bold initiative. They must invalidate many of the laws Castro enacted, including a majority of the property laws. Political critics will likely denounce the invalidation of Castro’s property laws as unrealistic and impractical. Cuba’s current laws, however, are so far removed from modern, moral, and sound legal principles, that no room exists for any of Castro’s laws or policies in a future democratic government. The new constitution must incorporate the world’s great democratic nations’ ideals and consider the political, economic, and social conditions in post-socialist Cuba.

85. See Williamson, supra note 11, at 312–313.
86. See id.
The Constitution of 1940 should serve as the basis for drafting the new constitution. Even if none of the specific 1940 provisions are used and an entirely new constitution is drafted, the new constitution's framers should acknowledge the Constitution of 1940's existence and authority. Such acknowledgement indicates that Castro's disregard for the Constitution of 1940 via his illegal, immoral, and intolerable actions destroyed a democracy. In the interest of creating respect for and continuity of law, development of any new legal framework should include recognition of the Constitution of 1940.

III. ADDRESSING THE PROPERTY DILEMMA WITHIN THE NEW LEGAL FRAMEWORK

A. Using the Constitution of 1940's Property Provisions

The rights and laws implemented by the Constitution of 1940 are still fundamentally sound. Thus, drafting an entirely new document is unnecessary. Because the Constitution of 1940's property provisions adhere to international standards, only minor changes are actually necessary in drafting new property laws. Any weaknesses in the Constitution of 1940 are curable via the use of the basic, universally accepted property law principles adopted in most democratic nations' constitutions. Additionally, because the Constitution of 1940 was technically operating at the time the takings occurred, it should serve as legal precedent in assessing domestic and foreign property claims. Using the 1940 property provisions, subject to minor amendments, is a viable and prudent solution for settling takings claims.

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87. See Wachs, supra note 13, at 568.
88. See, e.g., Alexander & Mills, supra note 1, at 151 (noting that Poland included pre-1939 laws in its post-communist compensation scheme and that the policy of doing so derives from a legal tradition respecting the concept of continuity of law).
90. See CUBA CONST. art. 7 (1940), translated in 1 CONSTITUTIONS OF NATIONS, supra note 10, at 611.
91. See Alexander & Mills, supra note 1, at 151–153.
B. Implementing a Restitution Scheme

As a consequence of Cuba's current archaic property laws, changes more substantial than simple reinstatement of the 1940 provisions may be necessary if the ultimate settlement of property claims in Cuba is the desired objective. For example, the framers of any new Cuban laws will have to formally declare that the Castro takings were illegal and the victims are entitled to restitution and/or compensation. The new legal framework must include a restitution scheme encouraging U.S. and foreign investment. Such investment is crucial in Cuba's transition to a market-based economy and democracy. Wealthy Cuban exiles and multitudes of U.S. and foreign corporations relish the idea of tapping into the Cuban economic market, which has remained virtually dormant since the enactment of the Fundamental Law of 1959.

Domestically, the Cuban treasury is drained, Cuba's citizens' resources are nominal, and the Cuban Government is on the verge of insolvency. Without foreign investment, it would be extremely difficult for Cuba to develop a market-based economy and without a market-based economy, establishing a democracy will be virtually impossible. Therefore, the importance of implementing restitution and/or compensation schemes cannot be overstated.

IV. IDENTIFYING THE POSSIBLE CLAIMANTS AND APPLYING THE CORRESPONDING TAKINGS LAW

There will be three primary classes of claimants vying for positions in a Cuban restitution system: (1) Cuban nationals and exiles; (2) U.S. corporations and individuals; and (3) foreign companies currently possessing ownership interests in expropriated property. An illegal expropriation restitution scheme must first identify which takings laws apply to which claimants. The next step is determining whether the expropriations by Castro's Government violated those laws.

93. See id. at 187.
94. See id.
95. See id.
A. For All Eligible Claimants: A Human Rights Violation

First and foremost, it must be noted that Castro’s takings violated all of the eligible claimants’ human rights. Every human being enjoys the right to own property and the right not to be arbitrarily deprived thereof. This principle is set forth in the Universal Declaration of Human Rights and recognized in many countries’ domestic laws.

B. For Cuban Nationals and Cuban Exiles: Violations of Articles 24 and 87 of the Constitution of 1940

For Cuban citizens, the Castro Government’s takings violated Articles 24 and 87 of the Constitution of 1940. The Constitution of 1940 allowed government takings only for legitimate public purposes and only if the property owners are compensated. Castro’s takings were illegal in that they neither served a legitimate state interest nor contemplated compensating the original owners. It is arguable, however, that the takings served a legitimate state interest in that they advanced Castro’s socialist state; but the requirement of just compensation was not satisfied, and the takings were therefore illegal.

Furthermore, the takings were also illegal under the Fundamental Law of 1959, a law Castro himself enacted. Castro attempted to legalize the takings by amending the Constitution of 1940 to reflect the changing nature of Cuban welfare. Any changes to the Constitution of 1940, however, violated Articles 285 and 286, which required that the Cuban legislature amend any Constitutional provisions. The takings not only flagrantly violated the Constitution of 1940, but they were also based on invalid amendments.

96. See Williamson, supra note 11, at 306.
97. See id. at 306–307.
98. CUBA CONST. arts. 24, 87 (1940), translated in I CONSTITUTIONS OF NATIONS, supra note 10, at 614, 626.
99. See Alexander & Mills, supra note 1, at 154.
100. See id. at 152–153.
101. See id. at 152.
Social Considerations

The Cuban citizens presently living in Cuba have virtually no economic power. Most property claims involve attempts to secure ownership of their homes. A small percentage of Cuban nationals, however, may also have takings claims for the expropriation of small businesses. Compared to the Cuban nationals in Cuba, however, the Cuban exile community possesses tremendous financial and political power. The relationship between nationals and exiles will significantly affect the early stages of Cuba’s transition to democracy. Tension between the two groups could cause civil unrest, stalling the democratic process. Cuban exiles must realize that, although they suffered great losses in leaving Cuba, the Cubans who remain on the island endure the hardships accompanying life in a freedom-less society. It is further notable to this discussion that although many exiles took citizenship in other countries, they, or their descendents, were Cuban nationals at the time the takings occurred, and thus should also be entitled to restitution.\(^{102}\)

C. U.S. Citizens and Corporations: Violations of International Law

At the time the taking of U.S. properties occurred, Cuba was a member of the United Nations.\(^{103}\) Thus, it is appropriate to analyze the taking of U.S. property in Cuba in accordance with international law—more specifically, the United Nations’ view on government takings of foreign-owned property. Furthermore, in accordance with the Constitution of 1940, “[t]he Cuban Nation adopts the principles and practices of international law that favor human solidarity, respect for the sovereignty of peoples, reciprocity between nations, and universal peace and civilization.”\(^{104}\)

\(^{102}\) See Frances H. Foster, Restitution of Expropriated Property: Post Soviet Lessons for Cuba, 34 COLUM. J. TRANSNAT’L L. 621, 656 (1996). Under the Estonian and Latvian restitution schemes, if a claimant (who is now a citizen in another country) was a national at the time the takings occurred, the claimant is treated the same as are current citizens, for purposes of the claim. See id.


\(^{104}\) CUBA CONST. art. 7 (1940), translated in I CONSTITUTIONS OF NATIONS, supra note 10, at 611.
In 1974, the United Nations adopted Resolution 3281 of the Charter of Economic Rights and Duties of States. Article 2.2(c) of Resolution 3281 provides that each state has the right:

[to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means. Cuba could argue that its domestic laws do not require full compensation; thus, its actions do not conflict with the current U.N. position. This argument is problematic because Cuba has neither provided nor contemplated providing any compensation to U.S. citizens and corporations. Thus, according to the U.N., the Cuban takings are clearly illegal.

Together, U.S. corporations' and citizens' claims against Cuba exceed 1.6 billion dollars. Some argue that Cuban nationals' claims should take priority over U.S. claims. Such an argument is unwise, however, because the law should treat all claimants equally. Furthermore, because U.S. investment is critical to the future of Cuba's economy, U.S. claimants must receive compensation for the illegal takings.


107. See Alexander & Mills, supra note 1, at 145.


109. See generally Travieso-Diaz, supra note 108, at 221 (noting that "[t]here are ... reasons why the early resolution of this issue is urgent: (1) U.S. laws require resolution of U.S. citizen expropriation claims before foreign aid can resume ... ").
D. Foreign Companies with Proprietary Interests in Confiscated Property

Foreign companies that obtained equity in confiscated property should not have valid claims in, and should be excluded from, any restitution scheme. Absent compensation, an expropriating country cannot transfer legally valid title to third-party purchasers. "[T]here can never be a secure right to private property if a thief can pass good title." Although a sovereign state may rightfully expropriate property with just cause and fair compensation, absence of either requirement constitutes theft and negates the notion of enforceable rights to property.

Foreign company claimants could argue that they acquired partial ownership of the confiscated property in good faith. The fact that "it was worldwide knowledge that the [Castro] regime was confiscating private property without compensation," however, may significantly weaken this argument. "[T]hird-party purchasers of the nationalized property sold by Castro, 'knowing that the property was confiscated without payment to the rightful owner,' are trafficking in stolen goods . . . and are engaging in illicit commercial activity even under a mainstream civil law analysis." Categorizing third-party investors that unlawfully acquired land from Castro as claimants deserving of restitution undermines the democratic process in Cuba, and therefore must be invalidated.

110. "For example, the Inter-America Judicial Committee's opinion on Helms-Burton (sadly joined in by the U.S. member) implicitly held that a confiscating state can pass good title to the confiscated property . . ." Williamson, supra note 11, at 294. The Committee also held that "international law does not recognize any right by the former property owner to assert a claim against the confiscating state, and that the former property owner's claim can only be asserted through an espousal by his or her state." Id. Furthermore, the former property owner must have been a national of the espousing state at all times—from the time the expropriation occurred to the time he or she asserted the claim—and cannot have been a national of the confiscating state at the time the confiscation occurred. See id. According to Williamson, if this view is the correct one, then a change in customary international law governing confiscation is necessary. See id.


112. Id. at 83.

113. See id. at 82.

114. Id.

115. Id.
V. PRACTICAL LEGAL MATTERS ARISING IN A RESTITUTION SCHEME

In light of the problems facing present-day Cuba, clearly, a new legal scheme identifying property rights, declaring Castro's takings illegal, and utilizing a restitution scheme should be implemented. The challenge of drafting sound property laws and declaring Castro's expropriations illegal, however, are minor compared to the tasks involved with implementing a successful restitution scheme. The successful application of such a scheme requires a fair and unambiguous system with well-defined rules, standards, and procedures.116 In addition to the legal issues presented in this Article, a variety of other practical, legal, and administrative matters arise in the restitution schemes that other former communist countries employ.

A. Establishing Agencies and Procedures

A governmental body designed to handle expropriation claims is necessary for creating a restitution scheme.117 Most restitution schemes establish government agencies, commissions, or committees118 with legal authority over the settlement of claims.119 These governmental bodies may exist at either local or national levels.120 Some schemes create appellate divisions within the governmental bodies.121 Other schemes provide for appellate review through the courts.122 A scheme may also involve different governmental bodies created to handle domestic and foreign claims.

A successful restitution scheme requires well-defined procedures, such as enforcing strict deadlines for filing claims, implementing clear rules establishing claimants' eligibility, and applying fixed evidentiary standards of proof.123 Establishing well-defined procedures and agencies to implement them is crucial to avoid confusion and controversy in the restitution process.

116. See Foster, supra note 102, at 656.
117. See generally id. at 633-645 (discussing forms of restitution).
118. See id.
119. See id.
120. See id.
121. See id.
122. See id.
123. See id. at 656.
B. Treatment of Claimants

After ascertaining the applicable law, it is necessary for a new Cuban government to understand how restitution schemes apply to different types of claimants. Many schemes treat domestic and foreign claimants separately; others establish priority hierarchies of claimants. Several schemes exclude certain types of claimants from receiving certain types of property and some exclude certain types of claimants from recovery altogether. Still other schemes do not allow restitution of any kind, unless the claimant currently resides within the country or intends to return thereto. With many of these schemes, issues arise as to whether claimants who were nationals at the time the taking occurred, but have since become citizens of other countries, deserve the same restitution as current nationals.

C. Physical Restitution or Compensation?

One of the primary purposes in creating a restitution scheme is to provide claimants with either restitution or compensation, or both. There are two types of restitution: natural and substitutional. Natural restitution involves returning confiscated property to the original owners. Substitutional restitution provides former owners with replacement property equivalent in value to the stolen property.

Compensation entails providing victims with financial restitution for the value of the confiscated property rather than literally returning the property. Compensation usually comes in the form of lump-sum cash payments or interests in government securities. Some compensation schemes account for accrued interest and increases or decreases in property values in estimating the value of claims—other schemes ignore such valuations.

A problem common to all restitution schemes involves the fact that confiscated property is often destroyed, lost, or irreversibly converted to state use. In such instances, returning the property to its former owners is impossible. Therefore, some

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124. See id. at 633.
125. See id. at 635.
126. See id.
127. See id. at 635–636.
128. See id. at 636.
129. See Gutiérrez, supra note 89, at 115.
property is intentionally excluded from restitution schemes because of "state needs," and former owners are only eligible for compensation.

Housing often presents problems with restitution schemes. Many restitution schemes do not remove families from their current homes before returning the property to the former owners. In such cases, some restitution schemes allow current tenants to buy the property. As a result, the former owners are again only eligible for compensation.

D. Categorizing Property

Restitution schemes often exclude certain types of property from restitution and only provide former owners with compensation. Restitution systems categorize and define property in different ways. Whereas one scheme limits the definition of property to industrial buildings, housing, and agricultural lands, another classifies securities, machinery, and valuables as property eligible for a claimant's restitution and/or compensation.

Another issue arising in categorizing property is whether restrictions on a former owner's use of the re-acquired property are necessary. Examples of such limitations include limiting the amount of land a former owner may re-acquire and restricting the use of the returned property by requiring that the former owner use it exclusively for state-related needs.

E. Evidentiary Matters

Under any scheme, a claimant seeking restitution for expropriated property usually must provide evidence of ownership. In most former communist countries, records of original ownership are difficult to obtain. Thus, proving ownership may represent a significant hurdle for many claimants.

130. See Foster, supra note 102, at 633.
131. See id.
132. See id.
133. See id.
134. See Gutiérrez, supra note 89, at 116–117.
135. See id. at 116.
136. See Foster, supra note 102, at 634.
137. See id. at 633.
138. See id. at 643; see also Alexander & Mills, supra note 1, at 186.
F. Insufficient Natural and Financial Resources

A major concern under any restitution scheme is the availability of natural (e.g., land) and financial resources to satisfy claims. Cuba and its government are currently in financial turmoil.\textsuperscript{139} Clearly, if a restitution system is implemented, Cuba will lack the natural and financial resources necessary to satisfy a majority of the expropriation claims for restitution. Other countries facing such a dilemma create special compensation funds to raise money to satisfy restitution claims;\textsuperscript{140} issue government securities when cash is unavailable; require claimants choose between restitution and compensation to reduce government liability; and privatize large state assets and use the funds to satisfy compensation claims.\textsuperscript{141}

VI. LESSONS LEARNED FROM FORMER COMMUNIST COUNTRIES

Fortunately, Cuba will have some guidance in addressing some of the practical issues involved in the application of a restitution scheme.\textsuperscript{142} Several former communist countries in Central and Eastern Europe implemented massive restitution schemes in the wake of their failed communist governments.\textsuperscript{143}

A. The Baltic Republics (Lithuania, Estonia, and Latvia)

The Baltic Republics (Baltics) adhere to the principle that confiscated property should be returned to the former owner.\textsuperscript{144} Baltic Government authorities also believe that their citizens are entitled to resume their lives as they were prior to the communist takeover.\textsuperscript{145}

Estonian legislation calls for the State Property Department to create a special commission to handle claims and provide judicially guaranteed restitution or compensation to expropriation claimants.\textsuperscript{146} The Latvian and Lithuanian schemes take a

\textsuperscript{139} See Alexander & Mills, supra note 1, at 137, 178–179.
\textsuperscript{140} See Foster, supra note 102, at 636.
\textsuperscript{141} See id.
\textsuperscript{142} See generally Gutiérrez, supra note 89 (discussing restitution schemes implemented in several former communist countries, including the Baltic Republics, Bulgaria, Romania, East Germany, Slovakia, and the Czech Republic).
\textsuperscript{143} See id.
\textsuperscript{144} See id. at 114.
\textsuperscript{145} See id. at 115.
\textsuperscript{146} See Foster, supra note 102, at 639 & n.96, 627 n.20 (citing the Law of the Republic}
different approach. For example, the provisions of the Latvian scheme regarding restitution of buildings assign the responsibility of reviewing claims to commissions that municipal or regional deputies' councils create. Final decision-making responsibility resides with executive committees that local deputies' councils create. The Latvian scheme also allows claimants to appeal to the Council of Ministers' Property Conversion Department or to the Latvian courts.

The Lithuanian scheme, in contrast, allocates claims to different bodies for evaluation according to the type of property at issue. For example, a government-created ministry evaluates claims involving forests and land, municipal or regional bodies evaluate claims for residential and commercial buildings, and Lithuanian courts handle only appeals of administrative decisions.

All of the Baltic schemes recognize natural, substitutional, and financial restitution and favor returning property to the former owners via natural restitution. If this is not possible, then the Baltic schemes attempt to redeem former owners via substitutional restitution. Under circumstances where natural or substitutional restitution is unavailable, the Baltic schemes provide compensation (i.e., financial restitution). One mechanism of restitution compensates former owners in the form of lump-sum payments equal to the property's value at the time it was expropriated. Another mechanism compensates former owners by issuing government securities "similar in value" to their confiscated assets, shares in a compensation fund, or stock in

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147. See id. at 639.
148. See id. at 639 & nn.97–98, 628 n.23 (citing the Republic of Latvia Law on the Denationalization of Buildings in the Republic of Latvia art. 2 (Oct. 30, 1991) (Lat.)).
149. See id.
150. See id.
151. See id.
152. See id.
153. See id.
154. See id. at 640.
155. See generally id. at 633–635 (discussing the spectrum of restitution forms the three Baltic states offer: natural restitution; substitutional restitution; and compensation, the two types of which are financial and voucher restitution).
156. See id. at 633–637.
157. See id. at 635.
158. See id. at 636.
newly privatized enterprises, housing, or land parcels.\textsuperscript{159}

Restitution schemes should also establish claimant eligibility requirements. For example, the Estonian system defines eligible restitution claimants as individuals who were citizens at the time the takings occurred or are current citizens or their heirs.\textsuperscript{160} Foreign citizens within any of these categories are also eligible for compensation.\textsuperscript{161} Estonia also includes government, religious, and nonprofit organizations in the category of eligible claimants.\textsuperscript{162} Foreign states, legal entities, and foreign nationals must use a different restitution system\textsuperscript{163} by resolving their claims through mutual agreements with Estonia and their respective states.\textsuperscript{164}

The Lithuanian scheme does not allow a former owner to reoccupy his or her former home unless the current tenant finds alternate living space.\textsuperscript{165} The title of the property, however, returns to the former owners who may then charge rent for occupancy.\textsuperscript{166} The Lithuanian laws also limit the size of farmland a former owner claims and may impose land use requirements.\textsuperscript{167} If the former owner does not comply, the land is re-distributed to other claimants.\textsuperscript{168} Under the Latvian scheme, unclaimed land is auctioned off to the highest bidder.\textsuperscript{169}

Estonia's restitution law applies to housing, farmland, securities, machinery, and valuables.\textsuperscript{170} The Latvian laws apply only to housing and farmland because it is too difficult to trace other categories of property in a cost-effective manner.\textsuperscript{171} Lithuania's system is similar to Latvia's except that it defines "property" as land, timber, housing, and "economic or commercial" buildings.\textsuperscript{172}

The typical Baltic restitution scheme requires that claimants file their claims before specific deadlines. Estonia's laws allow

\textsuperscript{159} See id.
\textsuperscript{160} See id. at 629.
\textsuperscript{161} See id.
\textsuperscript{162} See id. at 629–630.
\textsuperscript{163} See id.
\textsuperscript{164} See id. at 630.
\textsuperscript{165} See Gutíérrez, supra note 89, at 116.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{168} See id.
\textsuperscript{169} See id. at 117.
\textsuperscript{170} See id. at 116.
\textsuperscript{171} See id. at 116–117.
\textsuperscript{172} See id. at 117.
claimants to file supporting documentation after the initial filing.\textsuperscript{173} All of the Baltic schemes require documentation supporting the claims, such as wills, deeds, or other confirming ownership documents.\textsuperscript{174} Evidence may also include the description, dimensions, location, and estimated value of the property.\textsuperscript{175} An eligible heir must prove his or her relationship to the original owner by providing marriage or birth certificates.\textsuperscript{176}

\textbf{B. Germany}

In post-unification Germany, the basis for statutory guidelines regarding property restitution and compensation claims is the Joint Declaration of the Governments of the Federal Republic of Germany and the Former Democratic Republic, which has been incorporated into the Unification Treaty.\textsuperscript{177} The \textit{Treuhandanstalt} is the public agency responsible for resolving property claims.\textsuperscript{178}

The German scheme provides for restitution and compensation.\textsuperscript{179} Former property owners may relinquish their claims for restitution and instead opt for compensation.\textsuperscript{180} The German property legislative scheme offers no guidance for computing compensation or finding the source of such compensation funds.\textsuperscript{181} When property is returned, the former owner may have to pay for any improvements to the property that increased its value.\textsuperscript{182} Accordingly, if the value of the property decreased as a result of the confiscation, the former owner is compensated for the decrease.

In certain instances, former property owners may be completely barred from obtaining natural restitution.\textsuperscript{183} For example, if a church or non-profit organization purchased property from the state in good faith, the former owner is limited

\begin{itemize}
\item \textsuperscript{173} See id.
\item \textsuperscript{174} See Foster, \textit{supra} note 102, at 638.
\item \textsuperscript{175} See id.
\item \textsuperscript{176} See id. at 638–639.
\item \textsuperscript{177} See Gutiérrez, \textit{supra} note 89, at 125–126.
\item \textsuperscript{178} See id. at 129.
\item \textsuperscript{179} See id. at 125–130.
\item \textsuperscript{180} See id. at 127.
\item \textsuperscript{181} See id. at 128.
\item \textsuperscript{182} See id.
\item \textsuperscript{183} See id.
\end{itemize}
to compensation.\textsuperscript{184} Mere knowledge that the state confiscated the property does not constitute a lack of good faith on the part of a third-party purchaser.\textsuperscript{185} Furthermore, claimants are limited to compensation only in those cases where property "has been materially altered, dedicated to common use (such as for streets or 'complex housing'), or inextricably incorporated into a public enterprise."\textsuperscript{186}

German law offers compensation only when the government needed the confiscated property to create jobs, satisfy housing demands, or develop infrastructure required to create such jobs or housing.\textsuperscript{187} The \textit{Treuhandanstalt} is authorized to auction property to former West German or foreign investors in the interest of offsetting East Germany's economic problems, such as high unemployment and housing shortages.\textsuperscript{188} The present or prospective owner must present a special investment purpose to the \textit{Treuhandanstalt} in order to keep or acquire the property.\textsuperscript{189} German courts possess authority to review the special investment proposal.\textsuperscript{190} If the property has a special investment purpose, the former owner is entitled to compensation.\textsuperscript{191}

The German scheme does not allow for the privatization of state property if a claim is filed before the required deadline, and concessions are made to former owners if the deadline was missed.\textsuperscript{192} To encourage risk-free investment in property, prospective investors and the \textit{Treuhandanstalt} must determine whether claims on such property exist prior to privatization.

One of the greatest obstacles confronting the German model is the unavailability of technical records proving ownership.\textsuperscript{193} Allied bombing during World War II and destruction of property records by the Nazis and the communists have left little, if any, evidence of ownership.\textsuperscript{194}

\begin{itemize}
\item \textsuperscript{184} See id.
\item \textsuperscript{185} See id.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} See id. at 129.
\item \textsuperscript{188} See id.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See id.
\item \textsuperscript{191} See id.
\item \textsuperscript{192} See id. at 129–130.
\item \textsuperscript{193} See Alexander & Mills, \textit{supra} note 1, at 185.
\item \textsuperscript{194} See Gutiérrez, \textit{supra} note 89, at 128.
\end{itemize}
C. Hungary

The Hungarian Parliament passed the Law on Partial Compensation for Damages Unlawfully Caused by the State to Properties Owned by Citizens in the Interest of Settling Relations to serve as a legal basis for expropriation claims. The Hungarian restitution scheme does not return property to former owners. It does, however, provide compensation to former owners in the form of interest-bearing certificates, which may be used to purchase state-owned property, business, or shares in businesses that national and local governments offer for sale. These interest-bearing certificates may be sold to Hungarian citizens or foreigners. Former owners have priority, but not the exclusive right, to repurchase their property with cash or certificates. Foreign citizens and residents can obtain compensation if they were Hungarian citizens at the time the takings occurred.

D. The Czech Republic and Slovakia

The Czech Republic and Slovakia's restitution scheme is one of the most generous of the Eastern European schemes. These two countries, formerly united as Czechoslovakia, enacted different laws governing claims for different types of property. The First Restitution Act (Act I) provides for the return of properties, confiscated between 1955 and 1959, to the original owners and their successors. The property in Act I primarily consists of small individually owned businesses. The Act offers

196. See id. at 131.
197. See id.
198. See id.
199. See id.
201. See Gutiérrez, supra note 89, at 121.
202. See id. at 121–125.
204. See Gutiérrez, supra note 89, at 122.
205. See id.
compensation instead of restitution when the property has been destroyed, irrevocably altered, or improved through use.\textsuperscript{206} Under Act I, third parties who invested in confiscated property must enter into contracts with claimants to recover their investments.\textsuperscript{207}

The Second Restitution Act (Act II)\textsuperscript{208} addresses properties taken between 1948 and 1989, with a total aggregate value in excess of $10.7 billion.\textsuperscript{209} Under Act II, only resident citizens of the Czech Republic are entitled to compensation;\textsuperscript{210} companies and other legal entities are specifically excluded.\textsuperscript{211} Czechs and Slovaks residing abroad\textsuperscript{212} and foreign nationals also are not entitled to restitution.\textsuperscript{213} Act II requires that the current owners of confiscated property return the property deeds to the original owners.\textsuperscript{214} Any disputes arising are submitted to the courts.\textsuperscript{215} If natural restitution is impossible, original owners are compensated in cash and government-issued bonds.\textsuperscript{216}

Before the state privatizes property in the Czech Republic or Slovakia, it examines the records of the registry deeds to determine whether a private owner was listed prior to 1948.\textsuperscript{217} If there is an eligible previous owner, the privatization is delayed until six months after the applicable Restitution Act’s effective date.\textsuperscript{218} Thus, privatization only occurs if no valid claim is filed during that six-month period.\textsuperscript{219}

\begin{thebibliography}{9}
\bibitem{206} See id. at 122–123.
\bibitem{207} See id. at 123.
\bibitem{209} See Gutiérrez, supra note 89, at 123.
\bibitem{210} See id.
\bibitem{211} See id.
\bibitem{212} See id. at 124.
\bibitem{213} See id.
\bibitem{214} See id. at 123.
\bibitem{215} See id. at 123–124.
\bibitem{216} See id. at 124.
\bibitem{217} See id.
\bibitem{218} See id.
\bibitem{219} See id.
\end{thebibliography}
E. Bulgaria

Bulgaria's attempt to create a democracy involves legal and economic reforms, a new constitution, and normalization of Bulgaria's relations with the United States. The Bulgarian Parliament implemented the Law on Ownership and Use of Agricultural Land for purposes of returning confiscated land to former owners and their heirs. The law limits land ownership to twenty hectares (49.4 acres) in areas of intense cultivation and thirty hectares (about 74 acres) in hilly or mountainous regions. The Law on Ownership and Use of Agricultural Land entitles former owners to natural or substitutional restitution. With substitutional restitution, former owners receive land of equal size and quality to the land taken from them. Former owners must use the new land for agricultural purposes—they may lease the land to third parties, but the same land use restrictions apply to the leases. Both sale of the land during the first three years after substitution and foreign ownership are prohibited.

F. Poland

The Polish Government is still creating restitution laws to address communist takings. Poland's restitution scheme seems to favor privatization as the central means of raising funds to satisfy property claims. Through privatization, most large properties will be sold to private enterprises; thus, the original owners only receive compensation for lost properties. The Polish privatization scheme will raise funds primarily via selling

220. See id. at 118–119.
222. See Gutiérrez, supra note 89, at 119.
223. See id.
224. See id. at 118–120.
225. See id. at 119.
226. See id.
227. See id.
228. See id.
230. See id.
231. See id.
"some [seventy] companies by public tender or initial public offerings." Former owners, whose property is legally acquired through privatizing state assets, will receive vouchers equivalent to the value of their property. These vouchers can be used to purchase shares in state-owned companies undergoing privatization. The Polish scheme also guarantees former owners priority in buying back their old property. Approximately nine billion dollars worth of state property is currently allocated for vouchers. Before privatization occurs, investigation into properties' past ownership is required.

Property not subject to privatization will be returned to former owners. According to the Treasury Ministry, the Polish Government plans to return about twenty billion dollars worth of property held by state or local authorities to its former owners. Some property is exempt from privatization, including chemists' shops, forests, and other property "that can be separated from existing state, municipal, or cooperative property currently in use."

Eligible claimants include individuals of Polish nationality and residents who can prove they are descendents of the confiscated properties' original owners. Polish claimants living abroad are eligible for restitution or compensation provided they return to Poland permanently and administer the enterprises and/or farm the lands.

Although the Polish system allows for restitution and compensation, its main priority seems to be privatizing large industries to promote foreign and domestic investment in the Polish industrial sector. According to Polish Government officials, Poland's poor economic situation precludes it from

233. See Pasek, supra note 229, at A4 (noting that the government, through a voucher system, plans to return to former owners property still held by the state or local authorities).
234. See id.
235. See id.
236. See id.
237. See id.
238. See id.
239. Gutiérrez, supra note 89, at 135.
240. See id. at 136.
241. See id.
242. See id. at 139.
satisfying all property claims.\textsuperscript{243} Therefore, eliminating Poland’s economic crisis through privatization is really its best alternative to provide effective restitution to the former owners of expropriated property.\textsuperscript{244}

\textbf{VII. CONCLUSION}

Implementing new Cuban political and legal systems is an absolute requirement if a post-socialist Cuba is to become a free-market democracy. Drafting a new constitution with property laws based on the Constitution of 1940 and internationally accepted legal principles will legitimize a new Cuban government in the international community’s eyes. Implementation of a restitution scheme will demonstrate Cuba’s commitment to upholding fundamental notions of fairness, freedom, and democracy, while encouraging foreign investment.

Considering Cuba’s economic conditions, executing a restitution scheme will undoubtedly be a difficult task. A post-socialist Cuba should learn from the failures and successes of other European restitution schemes. In creating their own scheme, Cuban legislators must give careful consideration to the island’s social and economic conditions—key factors affecting Cuba’s transition to democracy. Certain aspects of the restitution scheme must be flexible to accommodate such conditions.

Cuban lawmakers should begin by emulating Bulgaria’s policy and implementing new social and economic reforms and a new constitution. Similar to the Lithuanian scheme, the Cuban scheme should create different agencies, ministries, or committees to handle different types of properties. As in most restitution schemes, the Cuban scheme should establish and enforce strict deadlines.

Cuban exiles should be treated as Cuban citizens for expropriation claim purposes, provided they were citizens at the time the takings occurred. Foreign nationals, companies, and heirs of eligible claimants should also be eligible to file claims. Third-party investors should not be allowed to file claims for properties until original owners’ claims are satisfied. Any Cuban scheme should consider the Czech Republic and Slovakian schemes allowing third-party investors to enter into contracts with

\textsuperscript{243} See Pasek, supra note 229, at A4.
\textsuperscript{244} See id.
original owners to recover their investments.245

The Cuban scheme should also establish a separate system and agency for foreign claims. Because most foreign claims will come from the United States, the two governments should reach a settlement regarding specific laws and procedures governing resolution of such claims. Furthermore, like the Baltic scheme, a Cuban restitution scheme should allow for natural, substitutional, and financial restitution and require that eligible claimants choose either physical or financial restitution, thereby limiting the government’s liability. Special funds should be created to satisfy claims of claimants eligible for compensation and unclaimed property should be auctioned to the highest bidders and the proceeds used to satisfy claims. If cash is unavailable, claimants could be paid with government securities or vouchers.

Perhaps the major industries in Cuba such as sugar, coffee, and cigars should be privatized or re-privatized to raise money for funding claim settlement. Placing these industries in the hands of wealthy, private companies may prove beneficial to the Cuban economy. Stock in the newly privatized industries could also constitute compensation. The original owners should receive rights of first refusal, however, before privatization occurs.

Property claims should be limited to homes, businesses, and land—allowing claimants to file claims for other types of property is too costly and time consuming. Also, restrictions should be placed on certain reclaimed properties. For example, current residents should not be removed from their homes—claimants attempting to regain their now-occupied homes should only receive monetary compensation.

The Cuban scheme should utilize a flexible evidentiary standard for establishing ownership. That is not to say that the evidentiary standard should be relaxed. Because Cuba will face problems similar to Germany’s, in that records of ownership have been destroyed or lost,246 the Cuban scheme should follow the Baltic schemes, which allow for consideration of a wide array of evidence, including witness testimony, in determining ownership.

In conclusion, the Cuban restitution scheme should be implemented as quickly as possible after the fall of communism. The prompt return of and fair compensation and restitution for

245. See Gutiérrez, supra note 89, at 123.
246. See Alexander & Mills, supra note 1, at 186.
expropriated property will redevelop the Cuban economy and facilitate its transition to democracy.