

University of Miami International and Comparative Law Review

Volume 4
Issue 1 *THE UNIVERSITY OF MIAMI YEARBOOK
OF INTERNATIONAL LAW, VOLUME 4*

Article 6

1-1-1995

Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba

Nicolás J. Gutiérrez Jr.

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Nicolás J. Gutiérrez Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. Miami Int'l & Comp. L. Rev. 111 (1995)
Available at: <https://repository.law.miami.edu/umiclr/vol4/iss1/6>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

RIGHTING OLD WRONGS: A SURVEY OF RESTITUTION SCHEMES FOR POSSIBLE APPLICATION TO A DEMOCRATIC CUBA

NICOLÁS J. GUTIÉRREZ, JR.*

- I. INTRODUCTION
- II. THE STATUS OF PRIVATE PROPERTY IN CUBA TODAY
- III. SURVEY OF RESTITUTION SCHEMES
 - A. *Baltic Republics*
 - B. *Bulgaria*
 - C. *Romania*
 - D. *Czech Republic and Slovakia*
 - E. *Eastern Germany*
 - F. *Hungary*
 - G. *Poland*
 - H. *Nicaragua*
 - I. *Summary of Restitution Schemes*
- IV. APPLICABILITY OF RESTITUTION SCHEMES TO CUBA
- V. CONCLUSION

I. INTRODUCTION

Over the past six years, the world has witnessed the transformation of a number of communist-controlled countries into democratic regimes. Among the myriad of expectations and

* Mr. Gutiérrez is a Corporate Attorney who serves as Corporate Director of the International Law Practice Group at the Law Firm of Adorno & Zeder, which is based in Miami, Florida.

questions arising from this trend is the resolution of the status of confiscated private property by the formerly communist governments. By analyzing the treatment of former owners by the newly democratic Central/Eastern European and Latin American governments, Cubans can learn valuable lessons in how to handle this crucial issue, whether Cuba should follow the lead of its former communist comrades.

II. THE STATUS OF PRIVATE PROPERTY IN CUBA TODAY

Despite the existence of official corruption, political instability, and relative wealth disparities, pre-revolutionary Cuba already ranked at or near the top of all of the Latin American nations in terms of most of the statistical categories indicative of a high standard of living and was continuing to rapidly develop.¹ Beginning shortly after Fidel Castro seized power from President Fulgencio Batista in 1959, the Cuban government has seized an estimated 100 billion dollars worth of assets (in today's dollars) ranging from sugar mills and cattle ranches to small shops and homes from both Cuban citizens and American investors. Aside from a few cooperative farms and small domestic properties, the overwhelming majority of these confiscated properties remain in the hands of the state to this day.

The U.S. Congress responded by passing the Foreign Assistance Act² back in 1961, which provides that, except as may be deemed necessary by the President, any assistance, sugar quota, or any other benefit is prohibited from being extended to any government of Cuba, until the President determines that such government has taken steps to return the confiscated properties of all of the affected American citizens and corporations (which amount to about 5% of the total confiscations by the communist

1. V. Echerri, *"Gains" of Cuban Revolution Built on Towers of Illusion*, WALL ST. J., Jan. 24, 1992, at A15.

2. 22 U.S.C. § 2370(a)(1) (1990).

regime). In addition to the Cuban exiles themselves, both American companies seeking to recover confiscated assets, as well as others seeking to invest *de novo* after Castro's fall and the subsequent lifting of the present U.S. embargo, are currently gearing up to set up their operations on the island in the near future. A still highly speculative market in pre-Castro government securities and defaulted bonds of the old Republic of Cuba has even emerged on Wall Street.³

III. SURVEY OF RESTITUTION SCHEMES

A. *Baltic Republics*

Throughout the areas formerly known as the Union of Soviet Socialist Republics, the world's first communist regime, the issue of restitution of private property has only seriously arisen in the Baltic Republics, primarily because of the long period of time that the formerly private property has been held by the state in other regions of the former U.S.S.R. While the Soviet Union was established in 1917, the Baltics were not annexed by it until 1940, when Soviet dictator Josef Stalin launched a military invasion of these three small, independent democracies, pursuant to the notorious Molotov-Ribbentrop Pact signed with Nazi Germany.⁴ The passage of 74 years from the Bolshevik Revolution in 1917 to the dissolution of the U.S.S.R. at the end of last year has rendered it extremely difficult to locate the heirs and the corresponding documentation of the former owners of confiscated properties in the non-Baltic republics of the former Soviet Union. Throughout the repressive history of the Soviet Union, and particularly during

3. P. Falk, *Plan Now for Cuba After Castro*, MIAMI HERALD, Oct. 8, 1991, p. 16A; see also A. Chardy & L. Alvarez, *Planning a Post-Castro Bonanza*, MIAMI HERALD, Sept. 29, 1991, p. 1A.

4. *The Former Soviet Republics Confront Privatization: A Russian Analysis*, HERITAGE FOUNDATION BACKGROUNDER, No. 859, Oct. 11, 1991, at 1-3.

the Stalinist era, the possession of legal documents purporting to establish ownership of confiscated real or personal property was equivalent to a death warrant in the hands of the communist authorities.⁵

The three Baltic Republics, Lithuania, Estonia, and Latvia (none of which has yet opted to join the newly established Commonwealth of Independent States), have each enacted laws providing for the return of nationalized property after over five decades of Soviet rule. Although their individual programs vary, their core principle - that confiscated private property should be returned to its legitimate former owners - is the same in all of the Republics.⁶

This legislation returning property to its former owners in the Baltics is resulting in one of the most sweeping transfers of real estate in history, as heirs re-examine the time period during which Soviet authorities confiscated virtually everything belonging to their parents or grandparents and then either deported them by the hundreds of thousands to gulags in Siberia for forced labor, or conscripted them into the expansionist Red Army.⁷ This process, however, may create significant short-term economic and political dislocations, as all three Baltic Republics already suffer from severe housing shortages, and finding new homes for displaced tenants could take years. Additionally, the conversion of farmland from collective to private cultivation, in some cases under absentee owners, is likely to hamper agricultural productivity in the short run, although it is expected to greatly enhance such productivity in the long run.⁸

The Baltic Republics, whose independence was not fully

5. *Id.* at 2.

6. M. Hiltzik, *Reclaiming the Past in the Baltics*, L.A. TIMES, Sept. 16, 1991, at A1.

7. *Id.*

8. *Id.*

recognized by Moscow until September 6, 1991, will generally issue government securities to claimants representing an interest in other state assets, in cases where nationalized property cannot be returned because it has been destroyed, lost, or irreversibly converted to permanent state use. The expense borne by these new governments is to be quite substantial. In Lithuania, for example, economists estimate that fully 51% of the country's working population, or more than 800,000 individuals, will be eligible for such compensation, as taxpayers must collectively pay for what was confiscated from them individually.⁹

The Baltics' determination to return seized property also stems from their collective preoccupation with what they term "historical continuity," or the notion that present-day Lithuania, Estonia, and Latvia should resume their national lives from where they were interrupted by the Soviet takeover of 1940. This concept of honoring pre-Soviet landholding is driven not only by nationalistic pride, but also because this legal continuity provides the new Baltic governments with stronger claims on national assets, particularly gold bullion, spirited out of the region by the Soviets, or still frozen in Western banks since the occupation.¹⁰

The long Soviet occupation of the Baltics has created a maze of mutually antagonistic rights and obligations, such as the difficult issue of compensating tenants and farmers who moved into nationalized homes or farms in good faith and may have spent their own funds on repairing such homes or cultivating such farmland, which are now being returned to their former owners.¹¹

The Lithuanian Parliament adopted its property reclamation law, which is entitled "On the Procedure and Conditions for Restoration of Citizens' Ownership Rights over Real Estate Still in Existence," after several months of debate, although no faction

9. *Id.*

10. *Id.*

11. *Id.*

seriously disputed the principle of returning nationalized real estate to its former owners. The new law allows reclaiming owners to raise tenants' rents, but not evict them before alternative living space is found. Housing construction around Vilnius, Lithuania's capital and largest city, dropped by about half over the last two years as the country became preoccupied with its struggle for independence from the Soviet Union. Eduardas Vilkas, a Lithuanian economist and leading member of its Parliament, estimates that at the current pace of construction, enough adequate housing will be provided for displaced tenants within ten years.¹² The law also limits the amount of farmland that can be reclaimed by any one claimant and requires that such claimant be prepared to farm it or finance its cultivation. Otherwise, the land is placed in a land bank to be redistributed to other claimants.¹³

The property reclamation law's restriction that claims may only be made by current Lithuanian citizens gives rise to an additional caveat to the restitution issue, since many Lithuanian Jews had their property seized by the Nazis and redistributed to non-Jewish Lithuanians during the period of World War II in which Germany wrested control of the Baltics from the Soviet Union between 1940 and 1944. Most of these Lithuanian Jews have long since emigrated to Israel, the United States, or elsewhere and are no longer citizens of Lithuania with valid claims to their former properties.¹⁴

Of the three Baltic countries, Estonia's restitution law is the broadest, applying not only to housing and farmland, but also to securities, machinery and valuables confiscated by the Soviets. These additional categories are generally ignored in the analogous Lithuanian and Latvian statutes, on the grounds of the inherent

12. *Id.*

13. *Id.*

14. Y. Trigor, *Lithuania, the U.S.S.R. and the Jews: Time for Restitution*, MIAMI HERALD, Sept. 6, 1991, at 15A.

difficulty in tracing such property and determining its rightful ownership in a cost-effective manner. By contrast, in Lithuania's property reclamation law, the term "property" includes only land, timber and housing, as well as "economic or commercial" buildings.¹⁵ Estonia required all claimants to file their claims by December 27, 1991, although supporting documentation can be thereafter retroactively added to such claims. In order to establish property ownership, old wills, deeds, mortgages and tax records can be supplemented with witnesses' testimony.¹⁶

When it is not feasible to return confiscated property to its former Estonian owners, the new government has pledged to issue securities in other state assets to these owners equal to the value of their confiscated property. It is not yet clear what valuation method will be utilized for these calculations.¹⁷

The Latvian Parliament has passed a resolution stating that individuals who owned factories, houses and shops in Latvia before June 17, 1940 must be given preference during the ongoing national process of privatization of state property. Former owners or their heirs must either have their property returned, or be provided with compensation in the form of securities in other state assets. State property which remains unclaimed will be auctioned off to the highest bidder.¹⁸ Municipal authorities in Riga, the capital of Latvia, have not begun to auction industrial facilities as part of that country's national privatization program, because of apprehension about selling off factories which may later be claimed by their former owners or the heirs thereof (who had until October 30, 1994 to file such claims). Local authorities estimate that some

15. *Republics and R.S.F.S.R. Pass Foreign Investment Laws*, 2 SOV. BUS. L. REP., July 1991.

16. M. Hiltzik, *supra* note 6, at A1.

17. *Five Top-Ranked U.S.S.R. Republics for Foreign Investment*, U.S.A. TODAY, Sept. 30, 1991, at 6B.

18. *Defective Conversion*, EKON. I ZH., Apr. 29, 1991, at 2.

16,000 claims will be filed.¹⁹ This Latvian legislation also specifically calls for the return of property confiscated from foreigners after the Soviet annexation of 1940.²⁰

B. *Bulgaria*

Since the Iron Curtain crumbled at the end of 1989, the nations of the former Eastern Bloc have generally evolved into two separate "tiers," distinguished as much by political and economic characteristics as by geography. The "Northern Tier" countries of Poland, the Czech and Slovak Federal Republic (formerly Czechoslovakia), and Hungary have been able to implement significant legal and economic reforms, thereby attracting the bulk of Western attention and investment. The "Southern Tier" nations of Bulgaria, the former Yugoslav Federation [now consisting of Slovenia, Croatia, Serbia (which, along with Montenegro, comprises the newly reduced Republic of Yugoslavia), Macedonia and war-torn Bosnia-Herzegovina, as independent states], Romania and Albania, however, have struggled with more fundamental issues, such as replacing their former communist leaders with committed democratic reformers and dealing with ideologically/ethnically-inspired violence. As a result, this latter group has acquired a less positive investment reputation in the West than its northern counterpart.²¹

Nonetheless, Bulgaria, under its new Union of Democratic Forces-led Government, has begun to ascend above the ills plaguing its other Balkan neighbors, in order to join Eastern Europe's "Northern Tier." Bulgaria's bold bid includes the passage of key legal and economic reforms, the adoption of a new

19. *Waiting for Former Owners*, ROSSIISKAYA GAZETA, Jan. 6, 1992, at 2.

20. *Latvia to Return Seized Property*, N.Y. TIMES, Sept. 5, 1991, at A16.

21. *Bulgaria Making Strong Bid to Join Region's "First Tier"*, INT'L BUS. DAILY (BNA), Dec. 11, 1991, at 4.

constitution, and the recent normalization of trade relations with the United States (a first in the Balkans).²²

Bulgarian lawmakers have begun to grapple with the key issue of restitution of confiscated private property to its legitimate former owners. In February 1991, the Bulgarian Parliament passed the "Law for Agricultural Land Ownership and Use," with the intent of returning confiscated land to its original owners and their heirs based on the ownership rights created by that country's Agrarian Reform Law of 1946.²³ Land ownership is limited, however, to twenty hectares (49.4 acres) in "intensive" areas of cultivation, and thirty hectares (about 74 acres) in hilly or mountainous areas. In order to prevent fragmentation, the land that former owners receive is not necessarily their original holding, but owners are entitled to receive plots which are equivalent in size and quality.²⁴ The land must be used for agricultural purposes, although an owner may lease the land to a third party under this same condition. The restituted land cannot be sold for three years and foreign ownership is prohibited. As of late September 1991, ten percent of confiscated lands either in state hands or set up as cooperative farms had been claimed by their previous owners or their heirs.²⁵

The new government is currently in the process of amending this legislation to be even more favorable to the former owners, including an increase in the maximum size of the permitted land holdings following restitution.²⁶ Elements in the Bulgarian

22. *Id.*

23. *Central Europe: Agriculture in the New Market Economies*, AGRIC. OUTLOOK, Dec. 1991, at 33.

24. *Id.*

25. *Id.*

26. *Bulgaria Making Strong Bid to Join Region's "First Tier," supra* note 21, at 5.

Government, however, are cautioning against an aggressive program of property restitution, particularly in the industrial arena, which they fear will result in lengthy delays in the establishment of clear title to property. These sectors advocate the government issuance of vouchers to all of its citizens, which may be employed to purchase a variety of state assets, as a means of hastening the privatization process in general.²⁷

C. *Romania*

Despite being saddled with many of the problems afflicting the "Southern Tier" nations, Romania has also initiated serious efforts in the past year to resolve the crucial legal and economic issue of property restitution. Since most of Romania's privately held agricultural land was forcibly collectivized into state or cooperative ownership during the forty-year reign of Nicolae Ceausescu, after his overthrow the Romanian Parliament enacted legislation in February 1991 seeking to acknowledge the property rights of these former owners.²⁸

Based upon an intricate set of guidelines, each former owner-claimant is entitled to be compensated with up to ten hectares (24.7 acres) of land, although certain restrictions apply to the selling, farming, foreign ownership and family plot size of such land. Additionally, these former owners may become shareholders in new agricultural joint stock companies replacing the old state farm cooperatives, with unclaimed land being forfeited to the state. This provision induces former landowners to engage in a more individually autonomous version of cooperative farming than under previous communist rule.²⁹

27. *Id.*

28. C. Steedman, *Recent Developments in Relation to Investment, Privatization and Economic Restructuring in Romania*, INT'L BUS. LAW., Jan. 1992, at 21-23.

29. *Central Europe: Agriculture in the New Market Economies*, *supra* note 23, at 33.

At least as far as its agricultural sector, and subject to considerable restrictions, Romania has opted to implement a form of restitution to redress the takings perpetrated by the communist regime from private landowners.

D. *Czech Republic and Slovakia*

To date, the Czech Republic and Slovakia stand as the Eastern European nations which have been the most generous in redressing communist-era takings by returning confiscated private property to its legitimate former owners. The reforms occurring in these republics may well serve as models for whether property restitution is compatible or inconsistent with efficient economic restructuring.

As their joint former names Czechoslovakia (1918-1989) and the Czech and Slovak Federal Republic (1989-1993) indicate, these countries are two independent, culturally distinct and sometimes antagonistic republics. The entire former country had a territorial size comparable to that of Louisiana and a population roughly equivalent to that of Texas (15.6 million inhabitants).³⁰

Prior to World War II, Czechoslovakia was a thriving capitalistic democracy which had achieved an economic status among the ten most developed industrial nations in the world at that time (a list which did not even include Germany).³¹

Czechoslovakia's bloodless "Velvet Revolution," led by imprisoned playwright-turned-President Vaclav Havel in late 1989, was followed by approximately a year of political debate over the nature and pace of economic reform. Actual implementation of the broad range of adopted reform measures, such as price liberalization, limited internal convertibility of Czechoslovakian currency and privatization of state assets did not begin until 1990. The so-

30. R. Sumann, *Investing in Czechoslovakia*, 24 VAND. J. TRANSNAT'L L. 369, 370 (1991).

31. *Id.* at 372.

called "Velvet Divorce" occurred in 1993, when respective majorities of Czechs and Slovaks elected to forge their own paths as separate countries.

In contrast to East German and Polish communism, which tolerated to a certain extent small, semi-private businesses in the manufacturing and service sectors, the Czechoslovak communists nationalized practically all privately held businesses and set them up as either state enterprises or cooperatives. In fact, the 1960 Czechoslovakian Constitution expressly celebrated this feat as "an astounding victory for socialism."³²

Contemporary economic thinking in the Czech Republic (more so) and Slovakia (somewhat less so) is dominated by the Austrian school and monetarism personified by Vaclav Klaus, the influential Czech Minister of Finance, who led a business-oriented group of parliamentarians in building a speedy transformation to a free market economy. The opposition Civic Forum, a dominant political party in the national legislature, promoted a more Keynesian vision of equitable distribution of income through government intervention.³³

The First Restitution Act, adopted on October 2, 1990, provides for the return to the original owners or their successors of any property expropriated by the communist state, in accordance with certain laws and decrees adopted in 1955 and 1959.³⁴ This act covers only a small portion of the private property confiscated by the Czechoslovakian communist regime, consisting mostly of small, individually-owned businesses in the service sector. The First Restitution Act provides for the return of these businesses to their original owners or their successors, with compensation being offered only if physical restitution is not feasible due to the

32. V. Pechota, *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 VAND. J. OF TRANSNAT'L L. 305, 308 (1991).

33. *Id.* at 307.

34. *Id.* at 309-310.

property's destruction, irrevocable alteration or improvement through use.³⁵ Both citizens and non-citizens were entitled to file claims prior to May 1, 1991 for their confiscated properties, although non-citizens' ability to do so would be curtailed by the existence of a relevant bilateral treaty between Czechoslovakia and their domiciliary country.³⁶ Furthermore, any enterprises or organizations, such as private companies, joint ventures or other entities, which are former owners of the confiscated property must enter into contracts with individual claimants in order to prove their titles and consequently recover their assets.³⁷

The Second Restitution Act, which was approved on February 21, 1991, allows for the return of, or compensation for, confiscated property with a total aggregate value in excess of \$10.7 billion, which constitutes a transfer of wealth on an historically unprecedented scale.³⁸ This act authorizes the return of private property nationalized, confiscated or otherwise expropriated during the period from the communist takeover on February 25, 1948 to the end of 1989. Only individuals, however, are entitled to this restitution, with companies and other legal entities specifically excluded.³⁹ This Act requires that current owners, which are usually state enterprises or municipalities, actually relinquish the appropriate property deeds to the original owners. If a dispute

35. *Id.* at 310.

36. Agreement on the Settlement of Certain Outstanding Claims and Financial Issues, Nov. 6, 1981, U.S. - Czech., 21 I.L.M. 371; *see also* Czechoslovak Claims Settlement Act of 1981, Pub. L. No. 97-127, 95 Stat. 1675 (1981); Pechota, *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 AM. J. INT'L L. 639 (1982).

37. Pechota, *supra* note 32, at 310.

38. *Id.*

39. S. Glick & W. Richter, *Legal Framework for Privatization in Czechoslovakia*, INT'L BUS. LAW., Nov. 1990, at 442, 444.

arises, the case is submitted to a court.⁴⁰ If property cannot be returned in kind, approximately \$750 million will be assigned for cash compensation to the original owners or their heirs, with the balance of such compensation being paid in government-issued bonds. Significantly, only resident citizens of the Czech Republic and Slovakia are entitled to benefits under the Second Restitution Act, with Czechs and Slovaks permanently residing abroad and foreign nationals not qualifying for such restitution.⁴¹ Similarly, this legislation does not apply to property nationalized or confiscated pursuant to any of the various decrees issued between May of 1945 and February of 1948, with certain limited exceptions. Pending future legislative action, this law does not extend either to state-owned agricultural cooperatives or to property confiscated from religious organizations after February 1948.⁴²

By law, before a state enterprise is privatized in the Czech Republic and Slovakia, the records of the registry of deeds must be examined to determine whether there was a private owner of the business prior to 1948. If one did exist, the privatization action had to be deferred until six months after the effective date of the relevant Restitution Act. Only if no valid claim was filed by a former owner during this time period was the privatization of the state enterprise allowed to proceed.⁴³

In terms of the scope of the restitution programs implemented by the Czech Republic and Slovakia, an October 1990 survey by the Czechoslovak State Institute of Public Opinion determined that one out of every four citizens intended to lodge an ownership claim to recover expropriated property. Indeed, an estimated 30% of the country's commercial properties are subject to

40. *Id.* at 444.

41. Pechota, *supra* note 32, at 311.

42. *Id.*

43. *Id.* at 312.

restitution.⁴⁴ Opponents of this restitution legislation claim that it will lead to continuing chaos and delay in the process of national privatization, while courts adjudicate numerous and complicated questions of ownership and valuation. While not unfounded, these concerns have so far been somewhat exaggerated in practice.⁴⁵

E. *Eastern Germany*

In late 1989 the East German people staged a series of peaceful, coordinated, mass street demonstrations, which resulted in the destruction of the Berlin Wall, the ouster of their communist rulers, and the evaporation of the artificially created and imposed German Democratic Republic. The result of these events was the Unification Treaty of August 31, 1991 (Einigungsvertrag), which stipulated that as of October 3, 1990 the five states comprising the territory of the former German Democratic Republic would join their western counterparts in the Federal Republic of Germany.⁴⁶ The Unification Treaty ended the post-war division imposed on Germany by the victorious Allies as retribution for its Nazi past. The newly reunified Germany is clearly the dominant actor in Europe and, coupled with the recent demise of the Soviet Union, ranks with the United States and Japan as one of the world's economic superpowers. The existence of West Germany's ready-made economic and legal infrastructure, which was in turn transposed to the former German Democratic Republic, facilitates the successful filing of claims for restitution or at least compensation by former owners deprived of their property by the East German communist regime or even by the preceding Third Reich, as a major component of the general privatization plan for eastern

44. Glick & Richter, *supra* note 39, at 445.

45. *Id.*

46. M. Gruson & G. Thoma, *Investments in the Territory of the Former German Democratic Republic*, 14 FORDHAM INT'L L.J. 540, 541-42 (1990).

Germany.

The Unification Treaty also effectively extended the federal law of the Federal Republic of Germany to the five new states, subject to several significant exceptions contained in the treaty itself.⁴⁷ The basis for the statutory guidelines regarding property restitution and compensation claims is the Joint Declaration of the governments of the Federal Republic of Germany and the former German Democratic Republic issued on June 15, 1990, which has been incorporated into the Unification Treaty. Based upon the Joint Declaration, the Unification Treaty provides that the "Law Concerning Regulation of Unresolved Property Issues" (the "Property Law") and the "Law Relating to Special Investments in the German Democratic Republic" (the "Special Investments Law") became applicable to property claims in eastern Germany.⁴⁸

Unfortunately for some former owners, the Joint Declaration states that confiscations executed on the basis of Soviet occupation law between 1945 and 1949 (including those resulting from the implementation of extensive land reform) are no longer reversible, with the authority to compensate these former owners in any form reserved to the Parliament.⁴⁹ The constitutionality of this provision of the Joint Declaration was unsuccessfully challenged in the German Constitutional Court (Bundesverfassungsgericht).⁵⁰

According to the Property Law, any property of which a former owner has been deprived by state acts either (i) transferring such property to state ownership (Volkseigentum) (as in the nationalizations carried out by the East German communists); or

47. *Id.* at 542.

48. *Id.* at 553.

49. K. Brammen, *German Reunification - Privatization of Socialist Property on East Germany's Path to Democracy*, 21 GA. J. INT'L & COMP. L. 123, 129 (1991).

50. N. Doman, *Options for Those Filing Compensation Claims in Germany*, N.Y.L.J., Feb. 11, 1991, at 1.

(ii) transferring ownership to a third party with insufficient or zero compensation to the owner (as in the Nazi-orchestrated redistributions and forced sales of Jewish properties to non-Jews) is to be reconveyed to its former owner or the successors thereof.⁵¹ The Property Law applies to, *inter alia*, real estate (land and/or buildings), chattels, claims for payment of money, equity interests in companies, and ownership in branches of companies having their domicile outside the former German Democratic Republic.⁵²

Under the Property Law, German companies and foreign owners are also permitted to file claims for restitution and/or compensation. The U.S. Foreign Claims Settlement Commission, the division of the Justice Department responsible for adjudicating private claims against foreign governments, had unsuccessfully attempted since 1981 to retrieve approximately \$78 million in cash settlements for 1,900 American citizens and companies who had their properties confiscated by the East German communist regime. That figure was arrived at during a series of hearings before the Commission between 1979 and 1981.⁵³ The U.S. State Department, however, has been able to recoup lump-sum payments from some other East Bloc nations as compensation for part of what it claims was confiscated from American citizens and companies, including \$90 million from Czechoslovakia, \$40 million from Poland, and \$21 million from Hungary.⁵⁴

Former owners may opt to relinquish their claims to reconveyance of their former property and demand compensation

51. *Id.*

52. Gruson & Thoma, *supra* note 46, at 555-556; see also *The Compensation and Restitution of Property Confiscated by Communist Governments to Former Owners: The Example of Eastern Europe*, 12 FUNDACIÓN SOCIEDAD ECONÓMICA DE AMIGOS DEL PAÍS (Interim Report 1), Apr. 8, 1991, at 2-4.

53. R. Sherman, *A Scramble to Retrieve Property*, NAT'L L.J., Oct. 15, 1990, at 3, 27.

54. *Id.* at 27.

instead, if they so decide.⁵⁵ The Property Law, however, is silent on the questions of how the compensation will be computed and how the compensation fund to be created will in fact be funded. Proving ownership of title is often complicated by the fact that Germany's title registry (Grundbuch) is riddled with gaps due to documents lost as a result of fires caused by the Allied bombing during World War II and the blacking out of key entries perpetrated by both Nazi and communist revisionists.⁵⁶

In the case of a reconveyance, a former owner may have to pay an adjustment to the state for an increase in the value of his property, which was financed with public funds. Correspondingly, an owner will be compensated for a decrease in the value of his property due to its confiscation by the state.⁵⁷ In certain cases, former property owners are limited to compensation payments or substitute property, and are barred from demanding reconveyance of their own property, such as when a church or non-profit organization has acquired the property in good faith from the state. A lack of good faith is defined as involving some sort of corruption, coercion, deception, or undue influence, not as simply having the knowledge that the property was originally owned by someone other than the regime which confiscated it.⁵⁸ Similarly, reconveyance of property is excluded if it would not be feasible because the property has been materially altered, dedicated to common use (such as for streets or "complex housing"), or inextricably incorporated into a public enterprise.⁵⁹ Recent amendments to the Property Law now permit former owners to retain ownership of the fee underlying certain public buildings,

55. Gruson & Thoma, *supra* note 46, at 556.

56. K. Hafner, *The House We Lived In*, N.Y. TIMES, Nov. 10, 1991, at C32.

57. Gruson & Thoma, *supra* note 46, at 556.

58. *Id.* at 557.

59. Brammen, *supra* note 49, at 130.

which cannot be reconveyed, and then enter into a market-based ground lease with the state.⁶⁰

The most flexible exception to reconveyance at the disposal of the Treuhandanstalt (which is the statutorily-created, Berlin-based public agency entrusted with directing all aspects of the privatization process in the five new federal states), and the one which is the greatest potential obstacle to former owners, is the special investment purpose exception. This somewhat ambiguous exception, which was created by the Special Investments Law, relegates a former owner's claim only to compensation rather than reconveyance, if the subject property is deemed necessary by the government in order to (i) create jobs; (ii) satisfy housing needs; or (iii) develop the infrastructure required for the creation of such jobs and housing.⁶¹ Consequently, the Treuhandanstalt may decide that a former owner's property must remain in government hands or (more likely) be auctioned off to a western German or foreign investor, whose presence is necessary to offset eastern Germany's temporary economic dislocations, such as a relatively high unemployment rate and a lack of adequate housing.⁶² The present or prospective owner is required to apply for a certification of a special investment purpose by the Treuhandanstalt, which is subject to review by German courts, and arrangements must then be made to compensate the former owner.⁶³

The Treuhandanstalt is prohibited from privatizing state

60. Gruson & Thoma, *Investments in the Territory of the Former German Democratic Republic - A Change in Direction*, 14 FORDHAM INT'L L.J. 1139, 1141 (1991).

61. K. Herold & S. Taibl, *Trade Law Rewritten in Germany*, NAT'L L.J., Sept. 16, 1991, at 19-20.

62. *Id.* at 20.

63. T. Marshall, *In the Old Bloc, Who Owns What?*, L.A. TIMES, Apr. 9, 1991, at A1; see also *Benefits of Investing Promptly Outlined by Treuhand Official*, INT'L BUS. DAILY (BNA), Dec. 3, 1991.

property which is subject to a reconveyance claim by its former owner, if such claim was filed by the filing deadline of October 13, 1990 (there are also certain allowances for late filings). In order to encourage foreign investment by decreasing the liability of new purchasers to reconveyance claims by former owners, the Treuhandanstalt or the present owner (usually either another state enterprise or a foreign investor) are required to investigate the existence of any such claims.⁶⁴ Recent amendments to the Special Investment Law have granted further concessions to former owners in obtaining reconveyance of their confiscated properties, notwithstanding state efforts to otherwise privatize such properties.⁶⁵

The Treuhandanstalt has sought to set up a somewhat delicate balance between the often competing legal and economic interests of the resolution of reconveyance claims by former owners versus the promotion of speedy privatization efforts in general, by making certain allowances for stepped-up privatization efforts to offset temporary economic dislocations, while still maintaining a relatively high degree of deference to claims by former owners.

F. *Hungary*

Even before the Hungarian people were able to oust the reigning communist regime, the country enjoyed relatively high levels of Western orientation and economic liberalization by East Bloc standards. This background favors a rapid transition to a free market economy, including the compensation of former owners of property confiscated by a series of totalitarian regimes in Hungary.

On July 11, 1991, the Hungarian Parliament passed the "Law to Provide Partial Compensation for Unjust Damage Caused by the State to the Property of Citizens," which became effective

64. Gruson & Thoma, *supra* note 60, at 1142-43.

65. *Id.* at 1144.

on August 10, 1991.⁶⁶ Designed to partially re-establish private property rights in Hungary without delaying the national process of privatization, this legislation does not return confiscated property to its former owners, but does provide for compensation to such owners in the form of interest-bearing certificates that may be used to buy state-owned property, businesses, or shares in businesses put up for sale by the State Property Agency or by local governments. These certificates may also be sold or traded to Hungarians and foreigners alike. Former owners have priority, but not exclusive, rights to re-acquire their own properties, either with cash or with their compensation certificates, except in the case of apartments, where current tenants are awarded priority rights.⁶⁷

Passage of the compensation law has been delayed because President Arpad Goncz, after conferring with the Ownership and Privatization Committee affiliated with the Hungarian Government's Economic Cabinet, vetoed a previous version of this statute because of concerns that the proposed compensation for land at higher rates than for other types of property would be violative of the Hungarian Constitution. After review by the Constitutional Court, demanded by the opposition party Free Democrats, the measure was revised and enacted.⁶⁸

The final version of the act invalidates 64 laws and decrees permitting the confiscation and nationalization of private property without any compensation from May 1, 1939 to the present. In order to avoid a potentially bitter controversy, however, the act lays down the conditions for actual compensation only for the period from June 8, 1949 (the day the first Hungarian communist regime convened) to the present, and only vaguely requires the Parliament to decide how to provide compensation for property confiscated

66. *Property Compensation Law to Take Effect in Hungary*, INT'L BUS. DAILY (BNA), Aug. 9, 1991.

67. *Id.*

68. *Id.*

during the tumultuous decade between 1939 and 1949.⁶⁹

The significance of the compensation cut-off dates is heightened because of the ideological and ethnic complexity of Hungary's past confiscations. Between 1938 and 1939, a quasi-fascist government, backed by Nazi Germany, came to power in Hungary and began to enact laws curtailing the property rights of Hungarian Jews, as well as barring them from entering certain professions. Jewish stores, for example, were confiscated and in many cases awarded to Swabian and other ethnic Germans living in Hungary at that time.⁷⁰ Next, after the Nazis were driven from Hungary in 1944, many of these ethnic Germans were held collectively accountable for the Nazi occupation and expelled from Hungary. Ethnic Hungarians, in turn, occupied their abandoned shops and offices. Finally, in the late 1940's and early 1950's, virtually all Hungarian property owners had their assets nationalized by the then ruling communist regime.⁷¹

The dates contained in the compensation act have been hotly debated among ethnic Hungarians, ethnic Germans in Hungary, the surviving Hungarian Jews and even small farmers. The Smallholders, a key member party in the current government's coalition, represents a constituency made up largely of small farmers who obtained land in 1945 under a land reform law and lost it to more hard-line communist-inspired collectivization programs in the 1950's.⁷² According to some reliable estimates, 98 million acres, 3,970 small factories and roughly 400,000 dwellings and shops could be covered by the act. Out of these, ethnic Germans estimate that 980,000 acres and about 60,000

69. *Id.* at 774.

70. C. Bohlen, *Hungarians Debate How Far Back to Go to Right Old Wrongs*, N.Y. TIMES, Apr. 15, 1991, at A1.

71. *Id.* at A4.

72. T. Bauer, *Reforming the Planned Economy: The Hungarian Experience*, PRIVATIZING AND MARKETING SOCIALISM, Jan. 1990, at 103, 106-107.

homes were seized from them after the World War II, when the ethnic German population in Hungary was about 550,000 people (in 1991, it was only about 200,000).⁷³ Hungary's Jews number only about 80,000, out of a group that was comprised of over half a million persons before the war. An estimated 337,000 properties belonging to Jews exterminated in Nazi concentration camps were turned over to the Hungarian state after World War II (under deeds that showed that the former owners had died of "poisoning"). Much gold and other valuables seized from Jews, in connection with the mass deportations staged by Hungary's Nazi-backed government during World War II, have never been recovered either.⁷⁴

The compensation act provides for compensation of up to 200,000 forints (\$2,700) for each small property and compensation not to exceed 5 million forints (\$67,500) for each large property. A sliding scale sets the level of partial compensation for values in between: e.g., (i) 50% compensation for values between 201,000 and 300,000 forints (\$2,700 - \$4,050); (ii) 30% compensation for values between 301,000 and 500,000 forints (\$4,050 - \$6,700); and (iii) 10% compensation for values between 501,000 and 5,000,000 forints (\$6,700 - \$67,500).⁷⁵

The value of buildings, apartments, shops, workshops and vacant lots is to be determined according to a sliding scale ranging from 200 - 2,000 forints (\$2.70 - \$27.00) per square meter. In the case of companies, the number of former employees will determine the value of the compensation. In most cases, former owners can claim only up to 20% of the value of their old commercial properties, which they must purchase either with cash or with their

73. *Id.* at 107.

74. Bohlen, *supra* note 70, at A4.

75. *Proposal on Privatization Strategies in Hungary*, MTI ECONews, Jun. 3, 1991.

government-issued compensation certificates.⁷⁶ Land, however, is to be valued against a fictitious currency, the golden crown, which has traditionally been used to assess the value of land in Hungary. The law stipulates that one golden crown currently is to be valued at 1,000 forints (\$13.50). If no such valuation data are available, the average yields of the period between 1982 and 1985 are to be taken as a basis.⁷⁷ Hungarian economists first estimated that the cost of compensation, a crucial sticking point on whether this bill would pass, was between 70 and 90 billion forints (\$1 - \$1.28 billion), but already the estimate has surged to more than 100 billion forints (approximately \$1.5 billion).⁷⁸

Hungary has foregone physical restitution to former owners of confiscated property and opted for compensation instead, primarily as a means of trying to prevent the stalling of national privatization efforts (already hampered by the complexity of competing claims by Hungary's various classes of past confiscation victims), without simultaneously being unduly unresponsive to the legitimate claims of former owners.

G. *Poland*

Many analysts agree that the initial spark which precipitated the liberation of Central/Eastern Europe and even the Soviet Union occurred in Poland in the early 1980's, as the Solidarity trade union pioneered the concept of organized opposition to communist rule. Since the return of democracy to Poland in 1989, that nation has been attempting to redress the past wrongs perpetrated by its former communist regime, while simultaneously striving to privatize (or more correctly, reprivatize, which is an allusion to its capitalist past prior to communist rule, a past it shares with the

76. *Id.*

77. *Id.*

78. *Id.*

other countries of Eastern Europe's "Northern Tier") its economy, rejoin the West and move forward towards the twenty-first century (despite recent electoral gains by Poland's former communists).

Poland's President Lech Walesa and its parliament, the Sejm, jointly sponsored eagerly awaited reprivatization legislation compensating only those persons or their heirs whose property was taken without legal compensation by the state between 1944 and 1960, but only when this was done in contravention of the laws then in force.⁷⁹ Former landowners may still file lawsuits in order to regain land confiscated in accordance with one of the various Polish nationalization decrees, but must do so at their own expense and without any government policies to back them.⁸⁰

Rather than restitution, the government decided that the usual form of compensation would be capital bonds enabling former owners to purchase shares in state enterprises being privatized and guaranteeing them priority in purchasing shares in their own former enterprises.⁸¹ Former owners can only reacquire their property if they pay the state in cash the market value of real estate or the reproduction value of other immovable property.⁸² In a compromise measure, it was agreed that chemists' shops, forests, and estates (as long as outlays on their reconstruction or modernization by the state or state farms were not too large) are to be returned to their former owners. This exception also applies to other property forcibly taken by the state that can be separated from existing state, municipal, or cooperative property currently in use.⁸³ Although the 4.2 million acres of agricultural land redis-

79. J. Billewicz, *Reprivatization: Government vs. President*, WARSAW VOICE, June 23, 1991.

80. *Id.*

81. *Id.*

82. C. Banasinski, *Poland*, 1991 INT'L L. 771, 773-774.

83. *Id.* at 774.

tributed by the communists in their various land reform programs and any land sales made during the first Solidarity-led government of Prime Minister Tadeusz Mazowiecki in 1990 will be honored, some former landowners have been promised 50 to 100 hectares (125-250 acres) each of substitute land, if they agree to live there, cultivate it and finance its cultivation.⁸⁴

This reprivatization statute applies only to individuals of Polish nationality and residence, who can legally prove that they are the former owners or the descendants thereof, of confiscated industrial or agricultural fixed assets in Poland. Poles living abroad are eligible for physical restitution of property or compensation in the form of state bonds, if they adopt Polish citizenship (in cases in which it has been given up) and return to Poland permanently in order to administer the enterprises and/or farm the lands which they regain.⁸⁵

Former owners, who filed claims during a specified time (and whose property did not qualify under any of the specific categories guaranteeing physical restitution), were entitled to compensation in state bonds or vouchers financed by the proceeds of the general reprivatization sales, which began in 1991 and were scheduled to be completed by 1993.⁸⁶ The Polish Cabinet is responsible for separately processing the claims of persons whose Warsaw real estate was confiscated pursuant to the communist regime's state administration decree of October 26, 1945, as well as former property owners beyond the Bug River (this former Polish territory was annexed by the Soviet Union after World War II and today is part of Ukraine). Claims concerning war damages and pre-war state bonds are not considered valid and will not be

84. *Id.* at 775.

85. *Poland Enacts Reprivatization Initiative to Pay for Communist-Era Losses*, INT'L FIN. DAILY (BNA), Jun. 18, 1991.

86. *Id.*

honored.⁸⁷ Before reprivatizing any state assets, Polish authorities must prepare a legal analysis investigating the status of the enterprise's assets with regard to any possible claims by former owners subjected to illegal expropriation by the communist regime.⁸⁸

This Polish legislation intends to lure more foreign investment by eliminating the uncertainty generated by the lack of clear title to property and instituting a uniform system of ownership relations.⁸⁹ The Polish Privatization Ministry reports that well over 70,000 applications have been filed to reclaim property with an aggregate value of over \$1 billion, including 2.4 million acres of land and more than 2,000 factories. In fact, the Privatization Ministry estimates that compensation might eventually cost the state as much as \$14 to \$23 billion, a sum roughly seven to ten times larger than Poland's 1991 annual budget.⁹⁰

At least 52 private organizations have sprung up in Poland to make the legal and economic case for respecting the private property rights of the scores of thousands of former owners who had their lands, factories, and homes seized subsequent to the installation of a communist government in Poland by the Soviet Union in 1944.⁹¹ The communist state took over nearly all industries in Poland following World War II, allowing only a few private businesses to survive in vestigial form as work shops. Jerzy Grohman, heir to Poland's largest pre-war textile factory, is President Walesa's chief advisor on reprivatization issues and has sought to represent the views of the former owners both to the

87. *Id.*

88. Z. Slupinski, *Polish Privatization Law of 1990*, 1990 INT'L BUS. L. 456, 457-58.

89. *Id.* at 458.

90. *Bids to Reclaim Property Increasing*, INT'L BUS. DAILY (BNA), Dec. 3, 1991.

91. *Editors' Note*, WARSAW VOICE, Jan. 5, 1992.

President and Privatization Minister Janusz Lewandowski.⁹²

Groups such as the Polish Landowners' Association and the Committee for the Defense of Private Property continue to negotiate with the Privatization Ministry for the return of as many as 150,000 diverse properties to the previous owners, which include brickmaking and other plants, forests, lakes, medieval castles, palaces, mansions, agricultural lands, and state bonds.⁹³ Although the current legislation fails to do so, these landowners contest the legality of the various land reform and nationalization acts passed in post-war Poland, especially those passed in 1944, 1946, 1949 and 1958.⁹⁴ Some former owners have also even volunteered to actively participate in the management of factory assets once belonging to their families, attempted to restore the traditional logos and names of their family businesses, and have demanded that the state at least symbolically recognize their moral right to legally confiscated property.⁹⁵

While the government claims that both restitution and compensation must be limited due to Poland's cash-poor status and need to sell off industries to foreigners in order to bring in revenues, former owners stress that it is in the interests of Poland's economy to have former owners managing factories which they (i) have acquired expertise in running (rather than obtaining vouchers from the government granting them shares in an industry which they know little about); and (ii) are tied to by tradition and thus will actually invest in for the future (as opposed to spiriting profits out of the country as foreign investors have a tendency to do).⁹⁶

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. M. Swiecicki, *Against Minister Lewandowski's Mass Privatization Plan*, GAZETA WYBORCZA, Aug. 8, 1991.

The government often responds by asking former owners to write off the balance of their claims as a "patriotic donation" to their cash-strapped nation. Some workers and unions, fearing a return to what they consider to be Poland's inequitable pre-war social order, also claim rights to the state enterprises at which they have toiled for at least 45 years, while demanding job guarantees prior to any restitutions of companies to their former owners.⁹⁷

Although Poland's reprivatization programs do seek to compensate former owners of property confiscated by the communist regime either by restitution, in special cases, or more typically by partial compensation with capital bonds, the government has placed more emphasis on reprivatizing the state's moribund industries and attracting foreign investment, with an eye towards the concomitant revenues to the struggling state treasury.

H. *Nicaragua*

After overthrowing Nicaraguan strongman Anastasio Somoza Debayle on July 19, 1979, the Marxist-Leninist Sandinista National Liberation Front aligned itself with its Soviet and Cuban backers and proceeded to impose a totalitarian system on that Central American nation of roughly three million inhabitants, featuring the confiscation of thousands of factories, farms, mines, and homes. Nicaragua's democratic opposition fought an eight-year counter-revolution against the Sandinistas, which culminated in a surprising presidential electoral victory on February 24, 1989 for the Unión Opositora Nacional ("UNO"), a fourteen-party, right-of-center coalition led by Violeta Barrios de Chamorro.

During the month before the president-elect was sworn into office, the Sandinistas initiated what has come to be known as the "piñata" by passing Law Nos. 85 and 86 through the then Sandinista-dominated National Assembly, which deeded to themselves and their supporters approximately 40,000 confiscated

97. M. Battista, *Issue of Seized Property Divides Poles*, WASH. POST, May 5, 1991, at A35.

homes and 700 acres of land.⁹⁸ Last year, UNO, now firmly in control of the National Assembly, passed Law No. 133 seeking to nullify Law Nos. 85 and 86. President Chamorro, however, intimidated by Sandinista-inspired violence in the streets of Managua, Nicaragua's capital and largest city, vetoed Law No. 133 and just recently narrowly avoided having that veto overridden by the required two-thirds vote of the National Assembly.⁹⁹ President Chamorro then decreed a compromise requiring the Sandinista occupants of the homes and farms deeded under the "piñata" to pay the market value of those properties to the state, but only if they choose to sell or rent them out.¹⁰⁰

In an attempt to recover their confiscated properties, over 6,000 former owners have filed petitions with a Nicaraguan government review board assigned to handle their claims. If the board decides that a property was unjustly confiscated, it issues an order awarding such property to the former owner.¹⁰¹ At the end of 1990, the Nicaraguan government had either returned to its previous owners, sold, or shut down 86 of the 352 enterprises in state hands when President Chamorro took office in April 1990.¹⁰² Although such an order theoretically represents the last step in the legal process of restitution, many former factory and farm owners have nonetheless been prevented from entering their properties by armed Sandinista union members supported by the national police. Although electoral losers, the Sandinistas demanded that General Humberto Ortega, their own defense minister and brother of unsuccessful Sandinista presidential

98. R. Boudreaux, *Whose Factory is it?*, L.A. TIMES, Dec. 18, 1991, at A14.

99. *Id.*

100. C. Goldfarb, *Dispossessed Nicaraguans Fight to Recover Businesses*, MIAMI HERALD, Dec. 23, 1991, at 1A.

101. *Id.* at 11A.

102. Boudreaux, *supra* note 98, at 14.

candidate Daniel Ortega, remain in his office during the Chamorro presidency and that the Sandinistas be given control *de facto* of the national army and police.¹⁰³ Given Sandinista control over the armed forces and police, there is no adequate enforcement mechanism to implement Nicaraguan government restitution orders in favor of former owners. The Nicaraguan Supreme Court's Sandinista majority has stricken down government decrees awarding hundreds of commercial properties to their former owners. Accordingly, the government re-assumed control of the newly privatized properties and reached a compromise with Sandinista leaders to let some of the previous owners manage the properties, as long as plant workers were collectively issued a 25% interest in each of the affected companies.¹⁰⁴ Under pressure by the Sandinistas, Nicaragua's government has dealt with former owner claimants in a more or less *ad hoc* manner, requiring returning former owners to either grant ownership interests to current workers, guarantee certain job force levels, assume company debts incurred during the period of Sandinista control, pay the government varying amounts of cash, or regain one confiscated property at the expense of relinquishing all claims to another.¹⁰⁵ Additionally, certain Western governments, such as Finland's, which are ideologically sympathetic to the Sandinistas and provided aid to certain state enterprises during the period of Sandinista rule, have protested to the new Nicaraguan government that returning former owners may benefit from the modernization of plants financed with such aid (much of which, former owners claim, has already been squandered due to Sandinista corruption and ineptness).¹⁰⁶

103. *Id.*

104. S. Christian, *Unrest in Nicaragua as Sugar Harvest Nears*, N.Y. TIMES, Nov. 6, 1991, at A5.

105. Goldfarb, *supra* note 100, at 11A.

106. *Id.* at 11A.

Despite the extraction of some concessions from returning former owners in exchange for physical restitution, and the lack of state funds with which to compensate other owners, the Nicaraguan government has attempted to implement an enlightened system *de jure* for the legal restoration of private property rights. Nicaragua's experience with restitution is actually the first in Latin America following the demise of a full-fledged communist regime, although in 1973-74 General Pinochet's free market-oriented, military government in Chile sold off assets, which had been previously nationalized by the short-lived Marxist government led by Salvador Allende, at fire sale prices to its former owners. Sandinista control of the Supreme Court, the defense forces, militant labor unions, and the infamous "turbas divinas" (violent mobs of sympathizers), however, render nearly impossible the enforcement of former owners' restitution orders. Much like in Eastern Europe's "Southern Tier" countries, neither foreign investors nor Nicaraguan exiles (many of whom are former owners and about 150,000 of which now live in South Florida) have ventured back to Nicaragua in great numbers.

The relatively short period of communist control in Nicaragua (a single decade versus four or five decades in Central and Eastern Europe) is certainly advantageous for the return of confiscated property, because claims can be brought by the actual former owners, rather than having to rely on claims made by their children or grandchildren as in Central and Eastern Europe (although Nicaraguan exiles have had less time to amass fortunes outside their country to now invest back home upon their return, as compared to their Central and Eastern European counterparts), and because of the greater availability of documents to prove title of ownership. On the other hand, since the Sandinista revolution has had less time in which to stagnate and lose its ideological fervor than its former role models and benefactors in Central and Eastern Europe, the Sandinistas' continued hostile and obstructionist presence in that country makes the transition to a democracy with a market economy more difficult in Nicaragua than in Europe.

I. *Summary of Restitution Schemes*

Essentially, the governments of formerly communist nations have thus far adopted two basic models of restitution to former owners with regard to their confiscated private property. The first of these models is based upon actual physical restitution to the former owners of nationalized assets if at all possible, with compensation in cash, bonds or vouchers being reserved as a fall-back measure in special circumstances (which we will refer to as the "Restitution Model"). The Czech Republic and Slovakia have implemented the purest and most well-defined applications of the Restitution Model. The Baltic Republics of Lithuania, Estonia, and Latvia, although less far along in terms of instituting their own restitution schemes, are also basing these schemes on the Restitution Model. Similarly, in eastern Germany the current system of property restitution is again based on the Restitution Model, albeit with certain significant limitations (which include elements of the second model described below). In Nicaragua, a dangerously divided government has conditionally embraced the Restitution Model at least in theory, but has been largely unable to enforce and implement its corresponding decisions and plans in practice. Finally, Bulgaria and Romania, which are still mired in the more embryonic stages of reinstating property rights throughout their respective territories, seem to have adopted, with certain restrictions, significant aspects of the Restitution Model, particularly with regard to agricultural properties.

Generally, the existing applications of the Restitution Model (i) deal primarily, yet not exclusively, with commercial as opposed to domestic properties; (ii) often impose various conditions on the newly restituted former owners; and (iii) just like the other main competing model mentioned below, is based on a claims deadline and the often difficult process of establishing clear title to the confiscated assets after the passage of many, often turbulent, years (particularly, when there are various competing classes of claimants).

The other major model of re-establishing property rights in

formerly communist countries involves varying forms of compensation to former owners, with actual physical restitution reserved only for certain limited cases (which we will refer to as the "Compensation Model"). Both Hungary and Poland have adopted the Compensation Model, each implementing its own distinct variation. While both the Restitution Model and the Compensation Model recognize the property rights of former owners to one extent or another, and consequently must grapple with some (although not all) of the same practical problems that arise, the differences are not so much philosophical distinctions as ones of degree and emphasis. For former property owners, however, these differences between the competing schemes can be very substantial, given the new governments' limited compensation funds and the general disposition of most foreign investors to purchase these assets from whomever holds title to them.

IV. APPLICABILITY OF RESTITUTION SCHEMES TO CUBA

In the past four years, Castro has watched while communist regimes in Nicaragua, Central/Eastern Europe, and even in the very cradle of communism, the Soviet Union (his former role models, benefactors and client-states), have ceded to democracy and free market capitalism. Consequently, (i) Cuba has lost its geopolitical importance as a Soviet pawn due to the waning and eventual end of the Cold War; (ii) rationing and shortages have become even more unbearable on the island as its Soviet-bloc subsidies dry up and eventually disappear; (iii) dissident and human rights groups have begun to emerge inside of Cuba; (iv) record numbers of "balseros" (rafters) continue to flee the island across the shark-infested Florida Straits to freedom in Miami; and (v) diplomats, military officers and entertainment celebrities are defecting in foreign embassies around the world. Meanwhile, both the Bush and Clinton Administrations maintained the currently less-than-water-tight embargo against Cuba, which is now tighter, however, after one of its major circumventers, Panamanian dictator Manuel Noriega, was removed by U.S. forces in December 1989, and was

even further tightened with the passage of the Cuban Democracy Act of 1992, which was introduced by New Jersey's Democratic Congressman Robert G. Torricelli (sanctioning third countries and U.S. subsidiaries, which insist on continued dealings with Castro).¹⁰⁷ The Cuban exile community has also intensified its efforts to isolate the Castro regime on all fronts from lobbying U.S., Russian, and other government officials, to beaming radio news broadcasts into Cuba, to training for military raids against the island.

A series of private organizations of Cuban former owners, workers, and professionals in exile have emerged to educate and influence public opinion on the future of private property rights in Cuba, such as the Asociación Nacional de Hacendados de Cuba (sugar mill owners), the Asociación Nacional de Colonos de Cuba (sugar cane growers), the Federación Nacional de Trabajadores Azucareros (sugar industry workers), the Asociación Nacional de Ganaderos de Cuba (cattlemen), the Asociación Nacional de Industriales de Cuba (manufacturers), the Asociación Nacional de Mineros y Petroleros de Cuba (mineral and petroleum right holders), the Asociación de Bancos de Cuba (banks), the Asociación Nacional de Tabacaleros de Cuba (tobacco growers), the Colegio Nacional de Abogados de Cuba (attorneys), the Colegio Nacional de Arquitectos de Cuba (architects), and the Colegio Nacional de Periodistas de Cuba (journalists).¹⁰⁸ These organizations support the principle that all existing Cuban state assets, which have been confiscated from individuals and companies that can prove that they are the legitimate owners of such property, should be physically returned by the state to such owners, with compensation being reserved only for cases of

107. See C. Blasier, *Moscow's Retreat from Cuba*, PROBLEMS OF COMMUNISM, Nov.-Dec. 1991, at 96-99.

108. *Claim Staked to Cuban Properties*, MIAMI HERALD, Oct. 19, 1991, at B2; see also A. Remos, *Three Sectors of Cuban Sugar Industry in Exile Proclaim their Unity*, DIARIO LAS AMÉRICAS, Oct. 10, 1990, at 11-A.

dismantled or materially altered property. These groups' emphasis has been on commercial properties, rather than homes, which they believe the former owners have some right to, subject to compensation for improvements paid for by the current occupants and possibly also to their relocation to other adequate housing.¹⁰⁹ They generally favor a restoration of Cuba's 1940 Constitution (still internationally viewed as a model for new Iberian and Latin American democracies), Civil Code and *Ley de Coordinación Azucarera* (a statute regulating Cuba's paramount sugar industry, which was based on the pegging of profits, rents, and wages to the current world market prices for sugar; a three million-ton, preferentially priced U.S. sugar quota; a fixed number of sugar mills; and extensive protection for tenants and industrial/agricultural workers), but modified in order to eliminate some of the more paternalistic and protectionist provisions of these laws.¹¹⁰ These former owners are firmly opposed, however, to various proposed plans, whereby they would have to bid for, temporarily rent, purchase, or merely receive compensation for, their (non-materially altered) confiscated assets.

The Cuban-American National Foundation, an influential Cuban exile lobbying group, has established a Blue Ribbon Commission on the Economic Reconstruction of Cuba (whose membership includes, among other dignitaries, such prominent U.S. economists as Nobel Prize-winning conservative/libertarian Milton Friedman and renowned supply-sider Arthur Laffer), which has proposed (although its position seems to be moving towards a more restitution-oriented one) that a massive auction to the highest bidder be held by Cuba's new government of all of its confiscated state assets, with former owners relegated to receiving only long-term, interest-bearing government bonds at 1959 values as compensation and possibly also a right of first refusal to the top

109. E. Díaz, G. Escagedo & R. Sardiña, *For the Respect of Private Property*, EL NUEVO HERALD, Oct. 18, 1991, at 9A.

110. *Id.*

bid for their former properties. Such bonds would presumably be financed with the proceeds from the auction.¹¹¹ The Foundation claims that this approach is necessary to bring badly needed revenues into the new country's treasury, avoid social upheaval and resentment by Cubans on the island against exiles (which can be exploited by Castro to extend his brutal reign), prevent inequities stemming from the return of some materially altered confiscated properties, and discriminate against non-property owner victims of the communist dictatorship.¹¹² Although this approach is intended to attract foreign investment and expedite the reprivatization process in Cuba by avoiding a time-consuming and expensive litigious backlog of claims on Cuba's future court dockets, it has been criticized as an anti-nationalistic selling off of Cuban assets primarily to foreign bidders and some of the wealthier exiles, as well as a repudiation of the rights of all former owners in Cuba, including thousands of American citizens and corporations (most of whom have already filed claims with the Foreign Claims Settlement Commission established by the U.S. Justice Department for this specific purpose) and other foreigners.¹¹³

Former property owners favor an auction of state assets only for unclaimed state properties, property created by the communist regime (such as the national fishing fleet and certain defense, intelligence, and energy production facilities), and for those hotels, tourist resorts, and other new properties constructed by the Spanish, Mexican, Venezuelan and other investors collaborating with the Castro regime through the formation of joint ventures with a 51% controlling interest issued to the communist state (and from which Cuban citizens are strictly barred.)¹¹⁴

111. J. Tamayo, *Divining Cuba's Future*, MIAMI HERALD, Sept. 29, 1991, at 1C.

112. *Id.* at 6C.

113. L. Esquiroz, *Cuba's Claims: Property Rights and Justice*, INT'L BUS. CHRON., Nov. 25, 1990, at 1.

114. *Id.*

Groups of former owners have also warned the respective consulates of these foreign investors that sugar mills, lands, and other confiscated properties recently leased to them or their citizens to operate by the Castro regime, in its desperation to acquire hard currency reserves and boost sagging production, will likely be subject to claims for restitution by their former owners in a future, post-communist Cuba.¹¹⁵

Proponents of the auction approach cite the importance of establishing a more equitable new system of property rights in Cuba, with workers being given a stake in the newly privatized industries. The proponents claim it would be unfair to compensate former property owners, yet not similarly reward political prisoners and other ideological dissidents who suffered in different ways at the hands of the repressive communist regime, either through incarceration, torture, beatings, denial of daily living privileges, exile, or even executions.¹¹⁶ Critics counter that compensation to political prisoners and restitution to former owners do not have to be mutually exclusive concerns, and point to the examples of Germany (where Jewish victims of the Holocaust throughout the world were compensated for both property and non-property-related offenses perpetrated by the Nazis) and Hungary (where former property owners are receiving compensation in lieu of restitution, alongside of about 15,000 survivors of "malenki rabot," the Russian term for the mass deportation to Siberian gulags by the Soviets of Hungarians and ethnic Germans at the end of World War II, who became eligible for cash supplements to their pensions in 1989).¹¹⁷

Although many of the same issues arise as in Central/Eastern Europe and Nicaragua concerning the superficially competing interests of legal property restitution and rapid privati-

115. Díaz, Escagedo & Sardiña, *supra* note 109, at 9A.

116. Tamayo, *supra* note 111, at 6C.

117. Bohlen, *supra* note 70, at A4.

zation (such as investor confidence and short-term economic dislocations of workers), Cuba's situation is somewhat more favorable to former owners than that of some of its Central and Eastern European counterparts because there is essentially only one class of confiscation victims (not several mutually antagonistic ideological/ethnic waves of claimants), and because of the existence of nearly two million relatively wealthy Cuban exiles concentrated only ninety miles away in South Florida and closely monitoring the situation in Cuba, a resource not readily available to the Central and Eastern European nations to the same degree (with the notable exception of Germany).

V. CONCLUSION

Not restoring confiscated properties to their former owners is tantamount to ratifying the past illegal seizures of property perpetrated by totalitarian regimes. Property restitution based upon the Restitution Model should be the goal for the future reprivatization of Cuba. Although the Restitution Model has been accused of allegedly slowing down privatization and scaring off private investors in some Central and Eastern European countries, the restoration of past property rights should have the opposite effect, inspiring more lasting confidence in foreign investors that the new government will also respect their own initial investments in the newly liberated country. Speed in privatization should not be made the primary value, to the exclusion of adopting a sound legal basis for the new market economy through the restitution of confiscated private property to its former owners. At any rate, it is unclear that effective restitution will take any longer than auctioning off economic assets to the highest bidder. The ability of foreign investors to deal directly with the former owners with their newly returned properties, rather than with the usually inefficient government privatization bureaucracies, should not be discounted.

The situation in Cuba in the near future may hold some promise for former owners, since not so much time has passed (less

than 35 years) that many of the actual former owners are no longer identifiable or physically viable (many have had enough time to become economically comfortable in exile, thereby facilitating investment on the island upon their return), but enough time has passed to considerably temper the ideological fervor of the communist revolution. The deadlock in Nicaragua highlights how crucial it will be to completely eradicate the communist infrastructure in Cuba before restitution or even compensation to former owners can take place.

Despite some dire warnings of social upheaval and resentment (which tend to ignore the emerging worldwide consensus on the moral and economic superiority of individual ownership versus state administration), Cuba would benefit most by adopting a Restitution Model plan such as those of the Czech Republic and Slovakia, while perhaps also borrowing some elements from the Baltic and eastern German schemes, rather than a Compensation Model approach such as those being implemented in Hungary and Poland. As illustrated by the rising public sentiment in Central/Eastern Europe and Nicaragua, restoring full ownership rights to former owners whose property was confiscated by past totalitarian regimes has emerged as an issue not only of critical moral and legal importance, but as one which is inextricably intertwined with the rapid economic recovery of formerly communist countries. The twin goals of restoring legitimate property rights and expediting the transition to a free market, far from being antagonistic, can be compatible and even mutually reinforcing objectives.