

University of Miami International and Comparative Law Review

Volume 3
Issue 1 *THE UNIVERSITY OF MIAMI YEARBOOK
OF INTERNATIONAL LAW VOLUME 3*

Article 6

10-1-1995

Some Lessons for Cuba From the Legal Changes in Eastern Europe

Matias F. Travieso-Diaz

Stephan M. Bleisteiner

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

Matias F. Travieso-Diaz and Stephan M. Bleisteiner, *Some Lessons for Cuba From the Legal Changes in Eastern Europe*, 3 U. Miami Int'l & Comp. L. Rev. 173 (1995)

Available at: <https://repository.law.miami.edu/umiclr/vol3/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.

SOME LESSONS FOR CUBA FROM THE LEGAL CHANGES IN EASTERN EUROPE

*MATIAS F. TRAVIESO-DIAZ**

AND

*STEPHAN M. BLEISTEINER***

- I. INTRODUCTION
- II. CONSTITUTIONAL LAW CHANGES
 - A. *Hungary*
 - B. *Poland*
 - C. *Czechoslovakia*
 - D. *Lessons for Cuba*
- III. LAWS ON THE RE-INSTITUTION OF PRIVATE PROPERTY
AND THE PRIVATIZATION OF STATE-OWNED ENTERPRISES
 - A. *Re-Institution of Private Property*
 - 1. Hungary
 - 2. Poland
 - 3. Czechoslovakia
 - 4. Lessons for Cuba

* Partner, Shaw, Pittman, Potts & Trowbridge, Washington, D.C. J.D. 1976, Columbia University.

** Clerk, Court of Appeals (Nuremberg, Germany). LL.B. University of Bayreuth (Germany), 1992; LL.M., Washington College of Law, The American University, 1993.

B. *Privatization*

1. Hungary
2. Poland
3. Czechoslovakia
4. Lessons for Cuba

IV. LAWS GOVERNING THE CREATION AND OPERATION OF
BUSINESS ENTERPRISES

A. *Hungary*

B. *Poland*

C. *Czechoslovakia*

D. *Lessons for Cuba*

V. GENERAL COMMERCIAL LAW

VI. LAWS PROVIDING TAX INCENTIVES FOR INVESTMENT

A. *Hungary*

B. *Poland*

C. *Czechoslovakia*

D. *Lessons for Cuba*

VII. ANTITRUST AND INTELLECTUAL PROPERTY PROTECTION
LAWS

A. *Hungary*

B. *Poland*

C. *Czechoslovakia*

D. *Lessons for Cuba*

VIII. LAWS REGULATING THE FINANCIAL SYSTEM: BANKING,
SECURITIES AND FOREIGN EXCHANGE

A. *Hungary*

B. *Poland*

C. *Czechoslovakia*

D. *Lessons for Cuba*

IX. BANKRUPTCY LAW

A. *Hungary*

B. *Poland*

C. *Czechoslovakia*

D. *Lessons for Cuba*

X. LABOR LAW AND SOCIAL WELFARE LEGISLATION

A. *Hungary*

B. *Poland*

C. *Czechoslovakia*

D. *Lessons for Cuba*

XI. CONCLUSIONS

I. INTRODUCTION

The course of Cuba's eventual transition to a free-market society¹ may be greatly influenced by the nature and timing of the laws that are enacted during the transition period.² Most observers agree that if Cuba is to return to a free-market economy without suffering severe economic dislocation it must enact legislation early in the process which would (1) create confidence in the country's economic stability, (2) establish predictable rules for economic transactions, (3) define and safeguard private property rights, and (4) provide firm but not excessive control over the country's development.³

The importance of changes to the legal system has been underscored by several analyses of the requirements for Cuba's reconstruction. For example, Pazos⁴ has listed the following to be

1. There are indications that Cuba is undertaking economic reform programs that, over time, could evolve into a "mixed" economy featuring co-existing state-owned and private economic entities. The reforms undertaken thus far, however, are uniformly viewed as inadequate in scope and too slow to be effective. See, e.g., C. MESA-LAGO, ARE ECONOMIC REFORMS PROPELLING CUBA TO THE MARKET? 69-71 (1994); R.H. Castaneda & G.P. Montalvan, *Cuba 1990-1994: Political Intransigence versus Economic Reform*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS FROM THE FOURTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY, MIAMI, FLA. at 181, 205-208 (1994).

2. See M.F. Travieso-Diaz & S.R. Escobar, *Cuba's Transition to a Free-Market Democracy: A Survey of Required Changes to Laws and Legal Institutions*, 5 DUKE J. COMP. & INT'L L. 379 (1995).

3. See, e.g., R.H. Castaneda & G.P. Montalvan, *In Search of a Way Out For Cuba: Reconciliation, Stabilization, and Structural Reform*, Address before the 1993 Annual Meeting of the Eastern Economic Association, at 40-41.

4. F. Pazos, *Problemas Economicos de Cuba en el Periodo de Transición*, Catedra Carlos F. Diaz Alejandro, Wash., D.C. (Dec. 1990), reprinted in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY, MIAMI, FL. at 246,

among the most important tasks Cuba would face if the current socialist regime collapsed:

1. Conversion from a state-controlled to a free-market economy;
2. Reorientation of foreign trade;
3. Increase in level of foreign exchange receipts, and reduction of the budget and trade deficits;
4. Realignment of prices with costs;
5. Control of inflation;
6. Re-establishment of a work ethic;
7. Creation or revamping of the institutions required for the efficient functioning of a free-enterprise system;
8. Attraction of foreign capital; and
9. Re-incorporation into the Cuban economy of the Cuban born entrepreneurs, managers, and technical and professional personnel now in exile.

Tackling these tasks would require passage of legislation to dismantle Cuba's present socialist structures and replace them with a legal regime that supports a new economic order.

This article focuses mainly on items 7 and 8 of Pazos's list and examines the legal changes necessary in Cuba to allow for the efficient functioning of a free-enterprise system and attract foreign investment.⁵ This analysis uses as reference points the legislation

248 (1991).

5. A basic assumption in this article is that Cuba's successful transition to a free-market society requires a significant inflow of foreign investment. Studies of Cuba's depressed economic conditions support this assumption. *See, e.g.*, E.H. Preeg, *CUBA AND THE NEW CARIBBEAN ORDER*, (Center for International and Strategic Studies, Wash., D.C.), 1993. However, due to Cuba's lack of financial resources and access to credit, deteriorating infrastructure, and a host of other problems, a foreign investment inflow cannot be expected to occur

enacted in the first few years of the transition in three Eastern European countries: Hungary, Poland and Czechoslovakia.⁶ These countries have been the most successful ones in converting from a state-controlled to a free-market economy and in attracting foreign investment.⁷ The authors' intent here is not to provide detailed recommendations, but instead to identify and draw some general lessons from the experiences of Hungary, Poland and Czechoslovakia that may be useful to those faced with the task of reforming Cuba's legal system.⁸

Additionally, given their likely importance to Cuba's economic transformation and the influx of foreign capital, the following areas of legal activity will be examined:

1. Constitutional law;
2. Laws on the re-institution of private property and the privatization of state-owned enterprises;
3. Laws governing the creation and operation of business enterprises;

automatically in the event of a political and economic change. Therefore, all reasonable steps must be taken to facilitate foreign, particularly U.S.-based, investment in Cuba.

6. Czechoslovakia ceased to exist on January 1, 1993, when the country divided into separate Czech and Slovak republics. This article refers to the legal changes instituted in the former Czechoslovakia during the period 1989 through 1992. These changes are generally being retained, and built upon, by the successor republics.

7. The majority of Western investors have chosen to pursue opportunities in these three countries, which together accounted for over \$7.5 billion of the \$11 billion in foreign investment in Eastern Europe in 1991-92 (Hungary alone received over \$4 billion). *A Survey of Eastern Europe*, THE ECONOMIST, Mar. 13, 1993, at 10.

8. All three countries have enacted special foreign investment laws to stimulate the influx of foreign capital. Those statutes, while not analyzed here, will be addressed in connection with the areas of law they modify.

4. General commercial law;
5. Laws to provide tax incentives to investment;
6. Antitrust and intellectual property protection legislation;
7. Laws regulating the financial system;
8. Bankruptcy law;
9. Labor law and social welfare legislation.

Other areas of law not addressed herein may also have an indirect impact on foreign investment. For example, Cuba, like virtually all former Eastern European communist countries, suffers from the absence of a true government commitment to protect the environment, a lack of enforcement in existing environmental laws, and the press of financial constraints. Accordingly, Cuba has a growing environmental crisis on its hands.⁹

With the changes in the political system, the new democracies of Eastern Europe have been free to focus their attention on environmental issues. Most countries have included in their constitutions a commitment to protect the environment. Additionally, Poland, Czechoslovakia, and Bulgaria have enacted statutes that limit the release of air pollutants, and in

9. See J.R. Oro, *THE POISONING OF PARADISE: THE ENVIRONMENTAL CRISIS IN CUBA*, (Endowment for Cuban American Studies, Cuban American National Foundation), 1992; M.D. Espino, *Environmental Deterioration and Protection in Socialist Cuba*, in *CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE SECOND ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY*, MIAMI, FLA., at 326-342 (1992). These authors point out that the Cuban government has enacted several laws and decrees towards the protection of the environment and has established a Commission on the Environment and Natural Resources (COMARNA) with ostensible authority to prevent environmental damage. However, none of these laws, or the underlying law "On the Protection of the Environment and the Rational Use of Natural Resources" (Law 33 of Jan. 10, 1981), are self-executing, and implementing regulations have not been issued, thus the laws remain mere words on paper. Moreover, COMARNA has a staff of only two dozen people, lacks enforcement authority, and is unable to take action against state-owned enterprises. Oro, *supra*, at 9-13; Espino, *supra* at 339-340.

Czechoslovakia, a strict environmental impact evaluation is to be included in all major projects.

A free-market Cuba would be likely to take steps to enforce and perhaps expand existing environmental laws so that environmental considerations are incorporated in the development of new industrial and agricultural projects. Cuba might also require the backfitting of pollution abatement technology into existing facilities. These initiatives would add to the cost of doing business in the country, but would also create investment and trade opportunities for businesses that are active in the environmental arena.

Also not covered in this paper is economic legislation to unleash market forces, such as price de-control measures. Elimination of government controls on prices is one of the basic requirements for the establishment of a free-market economy, and has largely been accomplished in Hungary, Poland and Czechoslovakia.¹⁰

II. CONSTITUTIONAL LAW CHANGES

Constitutional changes in former communist countries have typically taken the form of amendments to existing constitutions rather than enactment of totally new documents.¹¹ The amendments

10. Economists tend to agree that once Cuba begins its transition to a free-market economy price liberalization must be introduced immediately. Gradual price liberalization is regarded as counterproductive, since it could lead to spiraling prices and shortages of goods. Castaneda & Montalvan, *supra* note 3, at 17; Pazos, *supra* note 4, at 252; E.H. Hernandez-Cata, *Long Term Objectives and Transitional Policies: A Reflection on Pazos's "Economic Problems of Cuba,"* in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY, MIAMI, FLA. at 36, 43-50 (1991).

11. A. Bonime-Blanc, *Eastern Europe: Shaping Up Their Constitutions*, 9 INT'L FIN. L. REV. 28 (1990); C.G. Meyer III, *1992 and the Constitutional Development of Eastern Europe: Integration through Reformation*, 32 VA. J. INT'L L. 431 (1992). Bulgaria and Romania, however, have enacted new

have removed socialist dogma from the constitutions, deleted all references to single-party rule, and dropped provisions that ordained a socialist economy with central planning.

These constitutional amendments have signaled a clear commitment to a market economy, while seeking to preserve many elements of the "social welfarism" that prevailed under the previous communist regimes. For example, the amended constitutions still proclaim a right to work, the workers' right to benefits such as social security payments and paid leaves of absence, and the right to free education and medical care.

A. *Hungary*

Constitutional reform in Hungary proceeded by way of amendments to the 1949 constitution. Six such amendments (Laws XXXI of 1989 and XXIX, XL, XLIV, LIV, LXIII of 1990) were enacted during 1989 and 1990,¹² and intended to produce a workable interim constitution until a new document was drafted and ratified. Hungary also enacted statutes, such as the Company Act of 1988, the Foreign Investment Act of 1988, and the Privatization Act of 1989, that had "constitutional status," that is, they were functionally equivalent to constitutional amendments. These statutes fleshed out the amended constitution's commitment to a free-market economy.

The amendments to the 1949 constitution modified or replaced all provisions relating to the structure of the Hungarian government, including the roles of the Parliament, addressed in articles 19-28 (A), the President, addressed in articles 29-32, and the role of the Prime Minister and the cabinet, addressed in articles 33-40. Article 32 (A) of the amended constitution establishes a new constitutional court, while Articles 32 (B), (C), and (D) proclaim

constitutions.

12. See A MAGYAR KÖZTÁRSASÁG ALKETMÁNYA [Constitution] (Hung.) as of 12/31/1990, U.S. DEP'T OF COM.-NTIS; Meyer, *supra* note 11, at 448-449.

an expansive "bill of rights," which created an ombudsman to safeguard civil rights and protect ethnic minorities, and set up a State Audit Office (an organ of the Parliament) and the Hungarian National Bank. The Preamble to the amended constitution clearly states the country's position and commitment to a market economy by declaring that Hungary is currently undertaking a "peaceful political transition," and that its economic goal is a "socially alert market economy."

Articles 9 and 13 of the amended constitution lay the foundations for a Hungarian free-market economy. Article 9 states that Hungary has a market economy in which public and private property are to receive equal consideration and protection under the law, and recognizes the right to free enterprise and freedom of economic competition. Article 13 declares that Hungary guarantees the right to private ownership of property. Property may be expropriated only "when this is a matter of public interest, and only in the cases and in the manner regulated by law, under terms of full, unconditional and immediate indemnification."

On the other hand, the amended Hungarian constitution addresses the negative effects on the population as a result of the country's drastic change in political and economic philosophy. Article 17 commits Hungary to meeting the "wants of the needy." Articles 70 (B)-(E) provide for labor and social welfare rights, such as: the rights to work and to freely choose employment; the workers' rights to equal pay, to "rest and free time," to paid holidays, to organize in labor unions, to strike, and to receive social security, and health care. Article 70 (F) also recognizes rights to culture, while article 18 recognizes a right to a "healthy environment." Additionally, the constitution touches on many human rights issues that are currently under discussion in Western European countries, such as minorities' rights and the right of foreigners to participate in domestic elections.

B. Poland

Poland, like Hungary, followed a path to constitutional reform by amending its existing constitution. Between 1989 and 1992, Poland's 1952 constitution was amended nine times;¹³ a constitutional commission established in December 1991 has yet to come up with a proposal for a new constitution.¹⁴ The inherent difficulties in overhauling a constitution through the amendment process are exemplified by the fact that it was not until May 1991, over two years after the end of communist rule, that an amendment was passed deleting, from the constitution, references to the "socialist discipline of labor."¹⁵

The current constitutional documents are comprised of the Constitutional Act of October 17, 1992 (known as the "Small Constitution") and selected amended chapters of the 1952 constitution. Generally, the Constitutional Act addresses the governmental structure and institutions, while the surviving 1952 constitutional provisions deal with civil rights and the philosophical foundations of the Polish state. As in Hungary, many important statutes have been passed as constitutional acts.

The new Polish system of government follows the French model, and article 32 of the Polish constitution establishes a strong President who is the "highest representative of the Polish state, both

13. Constitutional Act of 10/17/1992 with Constitutional Provisions Continued in Force (The Sejm Pub. Off.); POL. CONST. amend. 41, Item 176 (1991), reprinted in CONSTITUTIONS OF THE WORLD (Gilbert H. Flanz ed., 1995); Meyer, *supra* note 11, at 453.

14. On April 22, 1994, Poland enacted a constitutional amendment setting forth the procedural rules on how to handle future proposals for a new constitution. DZIENIK USTAW (DZ. U.) (POLISH LAW GAZETTE), NO. 61, POS. 251, 1994; 38 RECHT IN OST UND WEST 147 (1994).

15. Poland's slow progress in enacting a new constitution is attributed to political difficulties plaguing the country in recent years. C.W. Gray, EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE, WORLD BANK PAPER NO. 209 95 (1993).

in internal and international relations." The establishment of the legislature was governed under articles 20-31, which vests legislative power in two chambers, the Sejm and the Senate. Articles 37-42 establish a Council of Ministers which, while appointed by the President, remains fully accountable to the legislature. Finally, Articles 33a-36a of the 1952 Constitution establish a Constitutional Tribunal to rule on the constitutionality of laws, a Tribunal of State to hear cases against government officials, and a Commissioner for Citizens' Rights.

Poland's amended constitution still lays a strong emphasis on social welfare.¹⁶ This emphasis is made clear in Articles 67-93, which specify extensive civil and social rights, including, among others, the right to work, to rest and leisure, to an eight-hour working day, to paid vacations, to receive social security payments, and to free health care and education.

Finally, Poland's constitution contains important provisions protecting economic and business rights. Article 6 states: "The Republic of Poland shall guarantee freedom of economic activities without regard to the form of ownership; restrictions of this freedom may be imposed only by means of statute." Article 7 deals with private property rights and indicates that Poland "shall protect ownership and the right of succession [inheritance] and shall guarantee comprehensive protection of personal property. Expropriation may be allowed exclusively for public purposes and for just compensation."

16. Unlike Hungary's constitution, which defines Hungary as a "market economy," Poland's constitution (art. 1) puts emphasis on the country's dedication to "implementing the principles of social justice." This declaration is interpreted as a commitment to protecting Polish society from "the brutal mechanisms of a capitalist competition." R.R. Ludikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COM. 91 (1991).

C. *Czechoslovakia*

In Czechoslovakia, between April 1990 and April 1991, Parliament passed a number of constitutional acts amending the 1960 constitution. The resulting constitutional framework had a strong orientation toward economic development. This is in sharp contrast with Poland's constitution, which is slanted toward social welfare.

The 1990 and 1991 amendments to the constitution declared the principles of a free-market economy and the right to private property and its protection. The amendments also laid the basis for the privatization of state-owned enterprises. Furthermore, a major amendment enacted on January 9, 1991, proclaimed a bill of rights.

By March 1991 there was a working draft of a new Czechoslovakian constitution. The draft constitution provided for a relatively loose federal structure and granted control of foreign policy and trade, as well as all major aspects of economic activity, to a federal government. Article 8 stated that "the economy of the Czech and Slovak Federal Republic is based on a unified domestic market, particularly on a unified currency and upon the free movement of the labor force, of goods, and of money."

The draft constitution spelled out the criteria and tasks to be observed in pursuing economic development and vested a majority of the economic powers in the federal government. It also included provisions for the protection of economic rights. Article 11, for example, guaranteed the right to own property and limited the state's ability to expropriate private property.

On the other hand, Articles 35 and 36 recognized the workers' right to create trade unions and to strike, and Articles 39, 40, and 42 guaranteed pension and social security payments, free health care, and free education. These rights were counterbalanced by a statement in Article 50 that the rights only existed to the extent that they were embodied in implementing legislation.

Czechoslovakia's draft constitution became inoperative with the dissolution of the country. However, it remains a prime

example of a constitution that seeks to provide social rights while promoting economic development.¹⁷

D. *Lessons for Cuba*

The last pre-Revolutionary Cuban constitution was enacted in July 1940. It was replaced by successive socialist constitutions issued in February 1976 and August 1992.¹⁸ These two constitutions (the second being a relatively minor revision to the first) establish a centrally-planned, state-owned, and state-controlled economy, and would therefore not be suitable for governing any Cuban economic transformation. To effect a transition to a free-market economy, Cuba would need to either return to the 1940 constitution, or enact sweeping amendments to the 1992 constitution. Either course of action would only be a stop-gap solution until a constitutional convention could be convened and a new constitution enacted.¹⁹

Cuba's constitutional documents during the period of transition would also have to expressly declare the country's commitment to freedom of economic activity and the protection of

17. The Czech National Council adopted, in December 1992, a constitution for the Czech Republic, which became effective on January 1, 1993, when Czechoslovakia divided into separate Czech and Slovak republics. The new Czech constitution is patterned after the never-enacted Czechoslovakian constitution. See Gray, *supra* note 15, at 47-48.

18. The 1940 constitution was substantially amended by a Fundamental Law issued by executive decree on February 7, 1959. The Fundamental Law of 1959, among other things, suspended bill of rights and due process protections and merged all legislative and executive functions into the executive branch of the government, which was vested with unlimited powers. W.T. D'Zurilla, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TUL. L. REV. 1223, 1239 (1981).

19. See Travieso-Diaz & Escobar, *supra* note 2, at 406-408 (an assessment of the potential alternatives for establishing a constitutional framework to guide Cuba's transition pending the enactment of a permanent constitution).

private property rights. In addition, Cuba's constitution would also have to address the extent to which the "social welfare" system now in place will be preserved.²⁰

III. LAWS ON THE RE-INSTITUTION OF PRIVATE PROPERTY AND THE PRIVATIZATION OF STATE-OWNED ENTERPRISES

A. *Re-Institution of Private Property*

All countries in Eastern Europe have acknowledged the fundamental right of private entities, domestic and foreign, to own property and they have provided legal protection to private property rights. Expropriation in Eastern European countries can only take place if it is in the public interest and fair and adequate compensation is made available. Most Eastern European countries, however, still deny or limit foreign nationals' ability to own land.

1. Hungary

Hungary guarantees both full protection and safety of private property. Its standards for expropriation include full compensation and due-process rights.²¹ Also, foreign companies may acquire non-agricultural land and buildings, to the extent that the property is needed to carry out the purpose of the enterprise as defined in its Articles of Association. However, wholly foreign-owned

20. The socialist regime in Cuba has provided a vast network of social entitlements, including free education, health care and day care for children, free or low-cost access to sports and recreation, low-cost housing and transportation, and low-priced, yet severely rationed, food and clothing. Many of these entitlements are now being curtailed due to Cuba's deep economic crisis. Travieso-Diaz & Escobar, *supra* note 2, at 409-410.

21. A MAGYAR KÖZTÁRSASÁG ALKETMÁNYA [Constitution] art. 9(1), 13, 14 (Hung.) (amended 1990), *reprinted in* CONSTITUTIONS OF THE WORLD (Gilbert H. Flanz ed., 1995).

companies are not permitted to acquire real property for purposes of speculation or capital investment.

For foreign investors, Section 1 of the Foreign Investment Act of 1988, as amended, provides that: should any government measures cause damage to a foreign investor's property, the investor will be promptly compensated in the currency of the investment.²²

2. Poland

As noted, Poland's constitution expressly recognizes the right to own private property and guarantees the protection of that right. Acquisition of real property by foreign entities or a foreign-controlled Polish company is possible, subject to approval by the Ministry of the Interior, which requires submission of an application providing a full and detailed disclosure of the transaction.²³ In 1993, 955 such applications were granted;²⁴ 126 were denied.

3. Czechoslovakia

The right to own private property was broadly recognized in Czechoslovakia. However, foreigners could only hold real

22. For an English text, see *Unified Text of Act XXIV of 1988 Regarding Investments by Non-Residents in Hungary (With Subsequent Amendments And Supplements Until December 31st, 1991)*, HUNG. MINISTRY OF INT'L ECON. RELATIONS NEWSLETTER (Spec. Ed. No. 3), 1992; see also Klynveld Peat Marwick Goerdeler, *INVESTMENT IN HUNGARY* 11, (KPMG ed., 1992).

23. Z.M. Slupinski, *Foreign Investment and Ownership Problems in Poland*, in *JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE*, PLI Order A4-4331, 509, 529-30 (1991).

24. S. Hambura, *Immobilienwerb durch Ausländer in Polen*, 3 *WIRTSCHAFT UND RECHT IN OSTEUROPA* 140 (1994).

property interests indirectly, *e.g.*, by leasing or through a domestic legal entity.²⁵

4. Lessons for Cuba

A free-market Cuba would need to give high priority to enacting legislation guaranteeing the right of private persons, including foreign individuals and enterprises, to own property. Laws would also have to be issued providing the mechanisms for fully compensating property owners in the event of expropriation.

There is a widespread concern in Eastern Europe that if foreigners are allowed to own and trade land, the country's territorial integrity and sovereignty will soon be lost. This concern would also have to be addressed in Cuba, where prior to the 1959 revolution, much land was owned by both U.S. citizens and other foreign nationals.

B. *Privatization*

Privatization of virtually every economic sector has been a principal task faced by the Eastern European post-communist administrations. The Eastern European countries have realized that breaking up state monopolies and eliminating the planned economy regimes are necessary conditions to achieving a free-market economy, and are therefore progressing toward the privatization of enterprises of all sizes.²⁶

Eastern Europe has generally followed a two-step approach to tackling the task of the privatization of various enterprises. First,

25. S.V. Simpson et al., *Czechoslovakia, in Free Market Takeover*, INT'L FIN. L. REV., Spec. Supp. 20, 25 (July 1991); INVESTMENT IN CZECHOSLOVAKIA 53, (KPMG ed., 1992).

26. Currently, about 50% of Hungary's and Poland's GNPs are generated by private or privatized enterprises. H. Roggemann, *Privatisierungsinstitutionen in Ost und West-Ansätze zu einem Transformationsvergleich*, 38 RECHT IN OST UND WEST 106, 107 (1994).

the enterprise is transformed from a government institution to an independent legal entity owned by the State or a state agency (e.g., Hungary's State Property Agency [hereinafter SPA]). Second, the State or agency surrenders its interest in the new entity through a variety of means, such as negotiating the sale of the company to private investors, selling stock to private parties, holding auctions, etc. Different rules, however, are usually applied to small businesses, which can be privatized in a more straightforward manner.²⁷ Within this general framework, the privatization process has varied greatly from one country to another.

1. Hungary

Hungary created an independent, government-supervised agency, the State Property Agency, to tackle the privatization task. Its mission is to become the owner of previously state-owned enterprises and guide and oversee their privatization under rules set forth in the State Property Protection Act [hereinafter PPA].²⁸

27. See, e.g., Simpson et al., *supra* note 25; C.M. Cole, *Poland, Hungary, and the Czech and Slovak Federal Republic: An Examination of the Evolving Legal Framework for Foreign Investment*, 7 AM. U. J. INT'L L. & POL'Y 667 (1992); R.M. Phillips & M.G. Dent, *Privatizing Eastern Europe: A Challenge for the Nineties*, in JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE, PLI Order A4-4331, 445 (1991).

28. Act VII of 1990 on the State Property Agency; Act VIII of 1990 on the Protection of State Property Entrusted to Enterprises or the State. With the aim of speeding up the sale of state property, Parliament passed Act XXXIX of 1995 on the Sale of State-Owned Entrepreneurial Assets, which came into force in June 1995. The new law creates a State Privatization and Holding Company whose task is to manage the remaining state-owned enterprises, carrying out the measures necessary to prepare them for privatization, and transferring ownership of the enterprises to the private sector as soon as it is reasonably possible. The sales of property to the public and the transfer of ownership shall in general be through a competitive process. Only companies providing public services, those of strategic importance, and those carrying out defense work shall remain under the control of the state, with the privatization process scheduled to be essentially completed by the end of 1996. MINISTRY OF

Under the PPA, privatization can be launched by the enterprise's management ("spontaneous privatization"), outside investor initiatives, or the SPA.

The SPA plays a strong role in evaluating the proposed privatization projects and ultimately selects the method of privatization to be used in each particular case (*e.g.*, auctions, direct sales to investors, or employee or management buyouts). It is also responsible for formulating privatization programs designed to inform the public about entities scheduled to be privatized.

The privatization process is completely open to foreign bidders and not limited by any special programs, such as share give-aways to employees of the enterprise being privatized. Small businesses (*e.g.*, retail shops with less than 10 employees) are subject to a modified process where, in an attempt to encourage local ownership and investment in small businesses, auctions are held without foreigners' participation.

Hungary has categorically rejected all calls to give enterprises back to former owners, resulting in no problems with competing claims to ownership of a privatized enterprise. Vouchers valid for a variety of purposes, including buying shares in state property, acquiring land, and purchasing annuities offer compensation for earlier expropriations.

2. Poland

Poland's privatization laws established a Ministry of Ownership Transformation [hereinafter MOT]. The MOT is responsible for the formulation of a privatization policy, the administration of the privatization process, and for giving final approval to a specific enterprise's privatization scheme.

Polish law provides two methods for the privatization of non-agricultural enterprises: 1) transformation of a state-owned

enterprise into a corporation or limited liability company²⁹ followed by the sale of its shares to private parties ("bottom-up" privatization), or 2) liquidation of the enterprise through sale or lease of its assets to private parties ("top-down" privatization).³⁰ "Top-down" privatization is particularly intended for small and medium-size enterprises. The privatization process can be initiated by the government body responsible for the enterprise³¹ with the consent of the enterprise's management and employees, the management of the enterprise and its employees, or MOT itself.

With "bottom-up" privatization, MOT can object to the transformation within three months of its proposal. If the transformation is approved, the newly created legal entity is responsible for the predecessor enterprise's debts and obligations.

Auctions, public offerings, or private negotiations are all used to distribute company shares to third parties; this must occur within two years following the enterprise's transformation. Up to 20 percent of the successor company's shares must be reserved for employees of the enterprise, who, within one year of offering, can buy the shares at a 50 percent discount. Foreign investors, however, need the Foreign Investment Agency's permission in order to acquire more than 10 percent of a company's shares.

In addition to case-by-case privatization, Poland instituted, in April 1993, a mass privatization program similar to

29. Limited liability companies are a very popular form of organization for small and medium size enterprises all over Europe. They issue shares to a limited number of shareholders, and those shares may not be freely traded. Limited liability companies are analogous to England's "private companies limited by shares" or Germany's "Gesellschaft mit beschränkter Haftung."

30. J.D. Sachs, *Privatization in Russia: Some Lessons from Eastern Europe*, AEA PAPERS AND PROCEEDINGS 43, 44 (May 1992); J. Kleer, *Der Privat Sektor in Polen: Probleme der Privatisierung und Reprivatisierung*, 40 OSTEUROPA RECHT 79, 85-86 (1994).

31. In Poland, as in other former socialist countries, the first step in the privatization process has been the transfer of title of state owned property to designated state or local agencies. Gray, *supra* note 15, at 96-97.

Czechoslovakia's voucher-based privatization program (see *infra*). Under Poland's program, approximately 450 entities are scheduled to be converted into corporate form, and those companies' shares will be held by fifteen National Investment Funds. These funds' shares will then be distributed free of charge to retirees or workers of the privatized enterprises or sold at reduced prices to the general public.³²

Despite numerous attempts to enact a "reprivatization" law, Poland has yet to adopt a program that would resolve compensation and restitution claims resulting from property confiscated by the communist government.³³ Current proposals to deal with this issue call for providing, in most cases, compensation in the form of bonds, rather than restitution.

3. Czechoslovakia

Czechoslovakia pursued yet another way of privatizing its economy. Specifically, Czechoslovakia sidestepped enterprise transformation by launching an extensive restitution program designed to return expropriated property to its former owners or to

32. *Law of April 30, 1993 on National Investment Funds and Their Privatization*, DZ. U. No. 44, Pos. 202, 1993, reprinted in HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA, at PL 150 (S. Breiderbach ed., Munich, 1994); Kleer, *supra* note 30, at 87; Institut für Ostrecht München, *Chronik der Rechtsentwicklung in den Osteuropäischen Staaten*, 37 RECHT IN OST UND WEST 206, 212 (1993); W. Quaisser & B. Venhor, *Privatisierung in Polen*, in HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA, at PL 15, ¶¶ 20-25, 53 (S. Breiderbach ed., Munich, 1994).

33. Kleer, *supra* note 30, at 89 (reporting that 13 unsuccessful legislative proposals have been submitted in the last four years.) See also E. Gmurzynska, *Reprivatization in Poland--An Example for Cuba?*, Address at the 1994 Annual Meeting of the American Bar Association's Section of International Law and Practice, 33-55 (Aug. 1994) (discussing the political, legal and economic factors that have blocked resolution of the property claims issue in Poland).

compensate them for its value.³⁴ This worked reasonably well for small businesses but was less frequently employed for large enterprises, where the restitution process tended to merge with privatization. Czechoslovakia also established separate procedures for the privatization of small and large businesses not subject to the restitution process and not reserved for continued state ownership.³⁵

Small businesses were sold through auctions; these auctions were only open to Czechoslovak nationals. The sale price was established by the public's demand and initially determined by the estimated value of the enterprise's real property assets. If a business could not be sold after the first auction, subsequent ones were held and foreigners were allowed to bid. In order to avoid speculation, restrictions were placed on short-term resale of property acquired through auctions.

The management of larger enterprises was responsible for submitting a privatization proposal to the governmental authority exercising jurisdiction over the enterprise. The proposal was then compared against other potentially available alternatives (*e.g.*, foreign company bids). If a proposal was approved, the enterprise was terminated and its assets transferred into a "national asset fund." The fund's administrators then transferred the assets to private parties by negotiating sales contracts or through public auction. The public was able to purchase investment vouchers (coupons) at a nominal price, which were, at the auctions, exchanged for shares, thus enabling private citizens to attain an interest in the enterprises. Other privatization methods included restitution to former owners, and a combination of various methods.

34. The Small Restitution Act of 1990 covered restitution of small businesses and homes, while larger businesses' restitution was covered by the Large Restitution Act of 1991. Agricultural and forestry lands were handled under a separate restitution law.

35. The Small Scale Privatization Act of 1990 and the Large Scale Privatization Act of 1991 were promulgated to govern, respectively, the privatization of smaller enterprises and larger businesses.

4. Lessons for Cuba

There is no simple lesson that can be drawn for Cuba from the Eastern Europe privatization methods. Each has shown advantages and disadvantages, and, in most instances, privatization has proceeded at a disappointingly slow pace. Moreover, due to the substandard condition of many Cuban industries, their privatization may not often be feasible.³⁶ Indeed, many of Cuba's larger enterprises may not be amenable to being privatized and might thus require liquidation.³⁷ On the other hand, small businesses such as shops, restaurants, and theaters may be proper subjects for an auctioning process similar to Czechoslovakia's.³⁸

The issue of privatization in Cuba is closely intertwined with the resolution of claims for compensation or restitution by property owners who suffered expropriation by the Cuban government. Almost two billion dollars in claims, excluding interest, by U.S. citizens were registered with and certified by the Foreign Claims Settlement Commission [hereinafter FCSC]. That federal agency was established in 1954 to receive and evaluate U.S. nationals' claims for loss of property in specified foreign countries.³⁹ Those

36. L.R. Luis, *Lessons from Privatization in Eastern Europe and Latin America*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY, MIAMI, FLA. at 105, 113 (1991).

37. This liquidation process may already be under way. Sixty to seventy percent of Cuba's industrial plants have, in part or in full, reportedly been shut down. Preeg, *supra* note 5, at 41. While the current shutdowns are attributed to Cuba's severe economic crisis, it is likely that, even if conditions improve, many inefficient industries will remain closed.

38. J.P. Rathbone, *Small-Scale Privatization Works!*, LA SOCIEDAD ECONOMICA BULLETIN No. 25, London, U.K. (Dec. 1992).

39. In 1964, the U.S. Congress gave the FCSC the authority to conduct a Cuban claims program. See 22 U.S.C. § 1643. The FCSC adjudicated 8,816 claims of expropriation by the Cuban government between 1967 and 1972. See

claims would have to be resolved as part of the normalization of relations between Cuba and the U.S.⁴⁰

A detailed discussion of the possible handling of restitution and compensation claims in Cuba is outside the scope of this article.⁴¹ Whatever process is followed, however, must provide a prompt and unequivocal adjudication of property rights in order to avoid any legal obstacles to the privatization of enterprises by the existence of unresolved property claims against them.⁴²

generally S.J. Glod, *Cuban Claims: Role of the Foreign Claims Settlement Commission, in Post-Castro Cuba: Dealing with the Transition*, FLA. BAR INT'L L. SEC., 1992; M.F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995).

40. Section 620(a) of the Foreign Assistance Act, 22 U.S.C. § 2370(a) (1961), authorizes the president to impose a total embargo on all trade between U.S. and Cuba and prohibits giving aid to Cuba until Cuba has taken appropriate steps, according to international law standards, to return to United States citizens property taken from them by the Cuban government, or alternatively, to provide those U.S. citizens equitable compensation. Resolution of the U.S. citizen claims issue is often cited by U.S. government officials as a prerequisite to the lifting of the trade embargo against Cuba imposed in 1961 by the U.S. government.

Some observers feel that Cuba will not be able to offer full compensation for past expropriations and may not find it in the country's best interest to return properties or businesses to their former owners. S. Fittipaldi, *Developing Business Strategies for Cuba*, BUS. INT'L CORP., Mar. 1992, at 77; Castaneda & Montalvan, *supra* note 3, at 7-8.

41. For such a discussion, see, e.g., Travieso-Diaz, *supra* note 39; S.J. Glod, *Eastern European Models for Cuban Foreign Restitution Claims*, 2 FREE-MARKET CUBA BUS. J. 5-6 (Winter 1993); R. H. Castaneda & G.P. Montalvan, *Transition in Cuba: A Comprehensive Stabilization Proposal and Some Key Issues*, in CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY, MIAMI, FLA. at 11 (1993).

42. In July 1992, the Organization for Economic Cooperation and Development reported that Poland's failure to resolve the restitution and compensation issue was one of the main stumbling blocks in the country's economic reform program. See also Gmurzynska, *supra* note 33, at 34-35, 54-55.

IV. LAWS GOVERNING THE CREATION AND OPERATION OF BUSINESS ENTERPRISES

Eastern European countries have made significant changes to their corporate laws and have enacted foreign investment laws intended to attract investors from abroad.⁴³ Their corporate laws are patterned after the German model, and to a lesser extent, after the corporate laws of France and other Western European nations. Foreign investors wishing to do business in Eastern Europe can do so by acquiring an interest in an existing operating company, entering into a joint venture with a local partner, or creating a new enterprise wholly owned by the foreign investor. Foreign companies, however, are generally not allowed to set up branch offices in Eastern European countries.

Most Eastern European countries now allow foreign investment in most areas of the economy. Government authorizations or licenses, however, are required for some activities, and foreign companies are typically required to register with a designated court or government agency. Additionally, all countries allow full repatriation of profits in hard currency by foreign investors.

43. For corporate law developments in other Eastern European countries *see, e.g.*, W.G. Frenkel, *RSFSR: Law On Foreign Investments in the RSFSR*, 31 I.L.M. 397 (1992); S.C. Carey, *Five Years Later: Evaluating Foreign Investment Experience in the 'Former USSR'*, in *LEGAL AND PRACTICAL ASPECTS OF DOING BUSINESS IN THE SOVIET REPUBLICS*, PLI Order A4-4363, 49 (1992); C.W. Gray et al., *Romania's Evolving Legal Framework for Private Sector Development*, 7 AM. U. J. INT'L L. & POL'Y 617 (1992); Gray, *supra* note 15.

A. *Hungary*

The Hungarian Company Act⁴⁴ is a new code based on both Germany's and Switzerland's corporate laws, and is comparable to Western Europe's current corporate legislation. The Act establishes several types of structures that can be used for organizing an enterprise in Hungary, including partnerships, joint ventures, limited liability companies, and "public companies limited by shares" (corporations). A limited liability company must have a total capitalization of 1 million forints (HUF), and a corporation must have a minimum capital of HUF 10 million.⁴⁵

Foreigners may own up to 100 percent of a corporation's equity, but the ownership must be in the form of registered shares, which are freely transferable. A foreign investor must make a minimum deposit in a Hungarian bank in the amount of the greater of HUF 500,000 or 30 percent of the capitalization of a limited liability company, and HUF 5 million or 30 percent of the capitalization of a corporation. Foreign investors' cash contributions must be in convertible currency or local currency obtained from an investment in another Hungarian joint venture, and the newly-created entity must be registered with the Court of Registration.

A foreign company may establish a "trade representation office" or an "information or service office." The trade representation office may, for example, participate in the formation and negotiation of contracts between the represented firm and

44. For an English text see, *Unified Text of Act VI of 1988 on Business Organizations (Company Act)*, HUNG. MINISTRY OF INT'L ECON. RELATIONS NEWSL., (Spec. Ed. No. 1), 1992; see also Hungarian Foreign Investment Act, *supra* note 22.

45. U.S. \$1=HUF 134 (as of October 31, 1995).

Hungarian enterprises, while the information or service offices can provide publicity, information, and technical assistance, but are not authorized to engage in commercial activity within the country.⁴⁶

B. *Poland*

Poland's company law is part of its Commercial Code.⁴⁷ Together with the Joint Ventures Act of June 14, 1991,⁴⁸ it sets the conditions for the establishment of business enterprises in Poland.

Joint ventures do not exist in Poland as separate legal entities, and the term only indicates that an entity is owned at least in part by a foreign investor. Polish law does not allow foreigners to either establish sole proprietorship of companies or to participate directly in a partnership. The investment vehicles available to foreigners are therefore limited to limited liability companies and "joint stock companies" (corporations). Foreign investors are, however, allowed to own one hundred percent of such companies.

A limited liability company can be founded with a minimum capital of 4,000 zlotys (ZI) by at least one person; a joint stock company requires ZI 100,000 and at least three founders.⁴⁹ Capital contributions can be made in Polish currency (purchased with hard currency or derived from operations in Poland) or in kind. A new company has to be registered with the Court of Registration.

Permission by the Ministry of Ownership Transformation is required to conduct certain businesses such as managing airports or

46. G. Gluck, *Hungary*, in *Free Market Takeover*, INT'L FIN. L. REV., Spec. Supp. 38, 39; DOING BUSINESS IN HUNGARY 78 (Price Waterhouse ed., 1990).

47. Pol. Com C., DZ. U. No. 57, Pos. 502, 1991, WL 333735 (Polska); DOING BUSINESS IN POLAND 73-90 (Price Waterhouse ed., 1992).

48. DZ. U. NO. 60, Pos. 253; No. 80, Pos. 350; No. 111, Pos. 480, 1991, *reprinted in* S. Breiderbach (ed.), *supra* note 32 at PL 310.

49. U.S. \$1=ZI 2.4. (The current currency went into effect on January 1, 1995. One "new" zloty is equivalent to 10,000 "old" zlotys).

engaging in wholesale trade in imported consumer goods, or if the company includes a state-owned enterprise, making an in-kind capital contribution. Other activities that require permission are the operation of a foreign company in Poland, the establishment of a representative office (technical information office or supervisory office), and contracting with an agent.

C. *Czechoslovakia*

Several statutes, particularly the Company Act of 1992 and the Foreign Investment Law of 1990, were enacted to regulate the establishment of business enterprises in Czechoslovakia. The laws recognized a number of investment vehicles, including corporations, limited liability companies, partnerships, and sole proprietorships.⁵⁰ All these vehicles were open without limitation to foreign investors. However, every foreign investor had to apply to the Ministry of Finance for authorization to do business. All areas of economic activity were open to foreign investment, except industries important to national defense and security.⁵¹

Limited liability companies and corporations were most commonly used for foreign investment. Both required at least one founder; the minimum capital requirements were 100,000 and 1,000,000 korunas (KC), respectively.⁵² Both company types had to be registered in the Companies Register, and a company had to establish and maintain a reserve fund in the minimum amount of 10 percent of its registered capital.

Finally, the Ministry of Trade could permit the establishment of a commercial representation office for marketing purposes.

50. DOING BUSINESS IN CZECHOSLOVAKIA, 46-54 (Price Waterhouse ed., 1991); Simpson et al., *supra* note 25, at 23-24.

51. Simpson et al., *supra* note 25, at 21-22.

52. US \$1=KC 26.

D. *Lessons for Cuba*

Cuba has sought to create a framework for foreign investment through enacting Legislative Decree No. 50 on February 15, 1982 and, more recently, Law No. 77 of September 5, 1995.⁵³ The decree and the recent law authorize the establishment of economic associations of Cuban state-owned enterprises and foreign entities to achieve "the expansion of exports and foreign tourism." The joint ventures can take the form of corporations ("joint enterprises") or "other diverse forms that do not imply the creation of a body corporate." The latter are to be formalized "by means of partnership contracts." In addition, Law No. 77 allows the establishment of 100 percent foreign-owned enterprises.

Legislative Decree No. 50, and its successor Law No. 77, are full of ambiguities that would leave foreign investors unsure of their rights and at the mercy of arbitrary government actions.⁵⁴ Accordingly, Cuba's foreign investment legislation would have to ultimately be modified, clarified and expanded along the lines of Eastern Europe's foreign investment laws, or replaced with new legislation.

As further described below, Cuba's corporate laws (including those governing the formation of business enterprises) were part of the Commercial Code that existed before the 1959 revolution and have never been repealed. Therefore, the existing law, although in need of modernization, could provide the company organization rules during the initial phase of the transition. Ultimately, Cuba would need to follow the Hungarian example and

53. *Cuba: Legislative Decree on Economic Association Between Cuban and Foreign Entities*, 21 I.L.M. 1107-16 (Sept. 1982); Law No. 77 on Foreign Investment, GACETA OFICIAL, Sept. 6, 1995.

54. JORGE F. PEREZ-LOPEZ, *THE 1982 CUBAN JOINT VENTURE LAW, CONTEXT, ASSESSMENT AND PROSPECTS* (1985); M. F. Travieso-Diaz, *Cuba's Sham Investment Law*, JOURNAL OF COMMERCE, Oct. 25, 1995, at 6A.

provide a wide variety of organizational formats under which enterprises might be established. Those organizational arrangements would need to be available to foreign investors as well as domestic enterprises.

V. GENERAL COMMERCIAL LAW

Eastern European nations, like Cuba, derive their legal systems from the civil law tradition. The German and French civil and commercial codes have influenced counterpart legislation in Eastern Europe in the areas of contract and tort law, commercial transactions, and the laws and rules governing partnerships and other business entities.⁵⁵

The Eastern European commercial and civil codes were adopted in the late 1800s or early 1900s. Communist rule precluded the evolution of those codes to meet today's business needs, and superimposed upon them certain norms required by a socialist economic system. Surprisingly, however, the basic commercial law principles remained intact.⁵⁶ The codes were not relevant to the day-to-day operation of a planned economy, so they were never substantially revised or repealed.

Following the demise of their socialist governments, the Eastern European countries have rediscovered their commercial and civil codes. The legislatures have begun a systematic review and modernization of the statutes, while preserving their essential organization and features.

55. Typically, civil codes contain the basic rules of contracts, torts, property, and creditors' rights. The commercial codes include the norms of commercial transactions and business organizations.

56. Daniel T. Ostas, *Institutional Reform in East-Central Europe: Hungarian and Polish Contract Law*, 26 J. ECON. ISSUES 513 (1992).

Polish law provides a good example of this process.⁵⁷ The Civil Code was first enacted in the 1920s, based on the French and German codes. The Polish Commercial Code [hereinafter PCC] was issued in 1934. After the communist takeover, both codes were infrequently used. Revisions to the commercial and civil codes were made to suit the planned economy and regulate "administrative contracts" (those involving state owned enterprises).

Starting in 1989, Poland's commercial laws have been aggressively amended to conform with Western standards, and in particular, those of the European Community. The Civil Code was revised in 1990, and the changes repealed many socialism-inspired provisions, including the special rules on administrative contracts and those defining different types of property rights under socialism.⁵⁸ Together, the PCC and the amended Civil Code contain provisions on contracts, business organizations, agency relations, commercial transactions, the commercial register, partnerships, limited liability joint stock companies, and rules governing the transformation and merger of such entities. . Even though these codes provide an adequate framework for the initial stages of the country's transition to a free-market system, it is recognized that they are not sophisticated enough for the needs of a modern economy. Consequently, efforts are underway to further modernize the codes, making them consistent with both the laws of the rest of Europe and with current international conventions.⁵⁹

57. Hungarian commercial law has developed in a similar manner to Poland's. *Id.*

58. *Id.* at 516.

59. Gray, *supra* note 15, at 105. A brief summary of the change in the Commercial Code of Czechoslovakia (CSCC) provides an idea of the extent to which commercial laws may have to be rewritten. The CSCC was amended in November 1991. The revision addressed a variety of issues, from business names and the role of the company register to rules on commercial contracts (*e.g.*, instruments to secure credit, statute of limitations, delivery of goods). In addition, the CSCC created a whole spectrum of legal forms for enterprises and

Cuba, like Poland, has a Commercial Code that dates back to 1886. Cuba's code was in fact Spain's, and was a typical European civil law code of the 19th Century. Cuba's Commercial Code was amended numerous times prior to the 1959 revolution, and, similar to Poland's, the Code has survived thirty-seven years of socialist rule during which only three amendments have been introduced defining the rules for administrative contracts.⁶⁰ The Commercial Code is currently being utilized to set up government-owned corporations ("sociedades anonimas" or "S.A.s") that function in many ways like private companies.⁶¹ It appears that Cuba would be able to draw upon its existing Commercial Code during the early transition phase, but, like Poland and Czechoslovakia, would need to update the code significantly to support economic development.

As is the case in most civil law countries, Cuba has a Civil Code setting forth the fundamental principles of contracts, torts, property, inheritance, and creditors' rights. Unlike the Commercial Code, Cuba's pre-socialist Civil Code (adopted from Spain's in 1889 and amended several times thereafter) was replaced with a totally new Civil Code in 1988.⁶² The Preamble to the current Civil Code declares that the code is based "on the Revolution's social practices" and "departs from the individualist postulations that had

established transitory rules on trademarks and on competition and antitrust issues. By the time it was completed, the revised CSCC had grown to 775 sections. For a description of some of Czechoslovakia's efforts to adopt modern legal rules for business transactions, see P. Holec et al., *Secured Lenders Face Uncertainty Under New Czechoslovak Rules*, 11 INT'L FIN. L. REV. 34 (1992).

60. Law 15 of July 7, 1978 on Basic Norms of Economic Contracts, Decree No. 53 of Nov. 23, 1979 on General Terms of Supply Contracts, and Decree No. 80 of Feb. 27, 1981 on General Terms of Special Contracts for the Sale of Farm Products.

61. Andrew Zimbalist, *Teetering on the Brink: Cuba's Current Economic and Political Crisis*, 24 J. LATIN AM. STUD. 407, 415 (1992).

62. COD. CIV., Law No. 59 of 1987 (effective Apr. 12, 1988).

characterized the former Civil laws." Indeed, the new Civil Code would be of little use in the delineation of legal rights in a free-market society, and would need to be either replaced or totally overhauled.

VI. LAWS PROVIDING TAX INCENTIVES FOR INVESTMENT

All Eastern European countries have sought to develop incentives to attract foreign capital. These incentives typically take the form of tax benefits. Free trade zones and exemptions from otherwise applicable general laws (*e.g.*, labor laws) also provide incentives.

A. *Hungary*

The 1991 Corporation Tax Act⁶³ (in effect as of January 1, 1992) brought uniformity to the tax laws of Hungary and established a modern tax system. Under the law, the base corporate tax on profits is 40 percent.⁶⁴ Companies owned by foreign investors are eligible for considerable tax concessions, provided their capitalization exceeds HUF 50 million and the foreign stake is at least 30 percent. These tax benefits apply only to companies set up by December 31, 1993, and are as follows:

* A 60 percent reduction in corporate tax in the first five years and 40 percent in the following five years, provided more

63. For an English text, see *Act LXXXVI of 1991- Corporation Tax*, in HUNG. MINISTRY OF INT'L ECON. RELATIONS NEWSLETTER, (Spec. Ed. No. 2), 1992. Amendments to the law that went into effect in January 1995 divide the corporate tax into two components, one (18%) that must be paid under all circumstances and another (23%) which is assessed only on the amount of dividend actually paid. INVESTMENT BRIEF HUNGARY, *supra* note 28, at 12.

64. A flat 20% withholding tax is imposed on shareholders' dividends paid by companies. Dividends paid to parent companies are not subject to withholding taxes.

than half of the company's income originates from manufacturing or from operation of a hotel constructed by the company.

* In the case of priority activities (electronics; the manufacture of vehicles and vehicle parts; agricultural food processing equipment; forestry machinery and equipment; machine parts and components; packaging technology; pharmaceutical products; plant protecting agents; plant propagating materials and breeding stock; certain agricultural products; tourism; telecommunications services; and manufacture of goods and equipment for environmental protection), there is a 100 percent tax exemption on income earned in the first five years ("tax holiday"), and a 60 percent exemption in the next five years.

* Tax exemption on re-invested profits.

* Infrastructure development grants of up to HUF 100 million may be available from the Investment Promotion Fund, mainly for joint ventures in manufacturing with a capital of at least HUF 50 million and a foreign stake of at least 30 percent.

* Companies are generally subject to a value added tax (VAT) ranging from 0 percent to 25 percent. Companies with foreign participation, however, can claim in certain cases a 100 percent refund of the VAT paid.

In addition to tax breaks, contributions in kind to the equity of a company by a foreign investor, production equipment, and spare parts bought by the foreign investors using their hard currency equity contributions, are all free of customs duties. Equipment imported this way becomes retroactively liable for customs duties if sold or leased within a period of three years after purchase.

The Foreign Investment Act allows the establishment of free trade zones. Companies can designate themselves (subject to approval by the Minister of Finance) as such zones, provided they intend to import raw materials and manufacture goods for sales abroad. Companies operating as free trade zones are treated as if located in a foreign country for the purpose of customs, currency exchange, foreign trade restrictions, and price controls. Companies

in such zones, however, are required to keep a certain amount of funds in a Hungarian bank for taxes, wages, etc. The Minister of Finance has authority to grant free trade zone benefits to companies not qualifying for free trade zone classification, but including foreign participation.⁶⁵

B. *Poland*

Originally, Poland's 1991 Foreign Investment Law and its Corporate and Personal Income Tax Laws granted a three-year tax holiday to businesses with foreign participation.⁶⁶ To qualify, foreign investors had to contribute at least 2 million European Currency Units to the enterprise or had to either operate in an area with high unemployment, introduce modern technologies, or export at least twenty percent of their production. For companies formed after December 31, 1993, the Ministry of Finance may, at its discretion, grant a company a two year tax holiday, but may also require concessions from the company in exchange.⁶⁷

Poland has also established a system of free trade zones. Companies operating in such zones will receive income tax reductions, exemptions from real estate taxes, and customs and valued added tax relief exemptions. In addition, no customs duties are assessed on capital goods constituting a foreign investor's in-kind contributions to capital, provided ownership of the goods is not transferred for three years.

65. KPMG, *supra* note 22, at 27-28; Gray, *supra* note 15, at 79-80.

66. The base corporate tax rate in Poland is 40%. A 20% withholding tax is imposed on all dividends regardless of the recipient as long as tax treaties do not provide otherwise. Personal income tax rates range from 20% to 40%.

67. B. Hess, *Devisenbestimmungen, Investitionsschutz, Kapitalund Gewinntransfer*, in HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA, *supra* note 32, at PL 51, ¶ 15.

C. *Czechoslovakia*

Czechoslovakia intended to overhaul its still existing communist tax system, which was complex and onerous and provided minimal investment incentives.⁶⁸ The principal taxes under that system were the corporate tax, personal income tax, wage tax and sales tax.⁶⁹

A tax holiday of up to two years could be granted at the discretion of the Ministry of Finance. Profit repatriation was not allowed during such a tax holiday. Apart from that restriction, repatriation of profits was generally free, but limited to hard currency reserves of the company. Other incentives, such as free trade zones, were still under consideration when the country split into two separate states.⁷⁰

D. *Lessons for Cuba*

A new tax code needs to be enacted early in Cuba's transition. The Cuban government should use it and the other tax laws as tools to encourage the influx of foreign capital. Proposals for the economic reconstruction of Cuba generally call for a simple

68. See Cole, *supra* note 27, at 673-74; S. Salzmann, *Stenerrechtliche Rahmenbedingungen für ausländische Investitionen in der CSFR*, in *HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA*, *supra* note 32, at CS 71.

69. The base corporate tax rate was 55%. Companies with over 30% foreign ownership had their tax reduced to 20% for the first KC 200,000 of income, and to 40% for any income above that sum. There was also a 25% withholding tax on dividends, an employer social security contribution equal to 50% of employee salaries, and personal income taxes which for expatriates ranged from 20% to 55%.

70. It should be noted that both the Czech Republic and Slovakia eliminated all special incentives to foreign investment and established a uniform legal system to govern both domestic and foreign investors. Now all investors are subject to the same corporate tax rate. P. Bohata, *Erneute Steuerreform in der CR*, 3 *WIRTSCHAFT UND RECHT IN OSTEUROPA* 99 (1994).

system based on low individual and corporate tax rates. Imposition of value added taxes and excise taxes is also recommended.⁷¹ Whatever tax structure is used, however, should incorporate, during the early transition years, tax incentives similar to Hungary's and Poland's. This will help to stimulate foreign investment. The incentives could be focused on either specific industries or particular aspects of the economy, and should be kept to the minimum necessary to allow Cuba to attract foreign investment.

Cuba should also negotiate a tax treaty with the U.S. to avoid double taxation of U.S. corporation income earned in Cuba.

VII. ANTITRUST AND INTELLECTUAL PROPERTY PROTECTION LAWS

All communist regimes in Eastern Europe enacted some fair competition laws (*e.g.*, the Hungarian Unfair Business Practices Act of 1984, which was amended in 1990) as well as laws that protected intellectual property.⁷² However, these laws were generally inadequate and poorly enforced. This has changed; over the last several years the Eastern European countries have enacted, and tried to enforce, modern antitrust and intellectual property laws aimed in good measure at establishing a positive environment for foreign investors.

A. Hungary

Current Hungarian antitrust laws prohibit misuse of

71. See, *e.g.*, Castaneda & Montalvan, *supra* note 3, at 24-26.

72. On antitrust laws, see R. Pittman, *Merger Law in Central and Eastern Europe*, 7 AM. U. J. INT'L L. & POL'Y 649 (1992); M. Reynolds, *Anti-trust Comes to Eastern Europe*, 10 INT'L FIN. L. REV. 11 (1991). On intellectual property rights see M. Hoskova, *The Evolving Regime of the New Property Law in the Czech and Slovak Federal Republic*, 7 AM. U. J. INT'L L. & POL'Y 605 (1992); A.J. Baden & C.R. Brainard, *Slow Progress for Intellectual Property Protection*, THE AM. LAW., Spec. Supp. 41 (Nov. 1992).

monopoly power, cartels, unfair pricing, unfair advertising, and tying arrangements. Notice of mergers must be given to the government if the value of the transaction exceeds HUF 10 billion, or if the combined market share of the merging parties exceeds 30 percent. Hungarian authorities may object to the transaction within three months of notice, and the deadline for objections may then be extended for up to 6 months. The statute contains detailed criteria for determining the legality of the merger.

Hungarian law gives extensive protection to trademarks, copyrights, patents, and inventions of all kinds, including plant and animal breeding rights. In general, patents and similar rights last for 20 years from the date of registration, trademarks for 10 years, and copyrights for the lifetime of the creator plus 70 years.⁷³

B. *Poland*

Poland's Anti-Monopoly Act of 1991 established conditions and rules applicable to monopolistic enterprises.⁷⁴ The Anti-Monopolies Office is the government agency that concerns itself with the elimination of monopoly practices. The office is empowered to require companies with a greater than 80 percent share of the Polish market to register with it. The Office has legal authority to enforce the break-up of companies dominating the market, impose penalties, and enjoin enterprise activities that contravene the Act.

The Anti-Monopoly Act restricts acquisitions and mergers that would create enterprises with a predominant market position. The Act also defines what conditions must be fulfilled to conduct

73. B. Horvath, *Gesetz Nr. VII: Modifizierung verscherdener gesetzlicher Regekingen bzgl. des Gewerbeschutzes und Urheberrechts*, 38 RECHT IN OST UND WEST 105 (1994).

74. DZ. U. No. 89, Pos. 403, 1991; A.W. Kawecki and S. Soltysinski, *Polnisches Kartellrecht*, in HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA, *supra* note 32, at PL 42.

lawful mergers and enterprise transformations. Parties interested in merging with or acquiring a Polish enterprise must notify the Anti-Monopolies Office of their intention. If the office decides that the transaction in question puts the enterprise into a predominant position in the market, it may intervene to prevent the deal.

Poland is notorious for the widespread violations of foreign copyrights. Although Poland is party to all major international agreements on intellectual property protection, enforcement of intellectual property rights has often been non-existent. A special government agency has, however, been established to prosecute video piracy.

Patents in Poland are protected for 15 years and trademarks for 10 years, although extensions are possible. Under the Copyright Act of February 1994, copyright protection extends fifty years beyond the lifetime of the author.⁷⁵ Under a 1990 Business Treaty with the U.S., Poland has committed itself to more stringent standards, such as the protection of software and extension of patent rights to 20 years.⁷⁶

C. *Czechoslovakia*

Czechoslovakia's 1991 Competition Protection Act prohibited the misuse of monopoly power, as well as other restraints on competition, such as price-fixing and market allocation. Under the Act, notice had to be given of mergers that would create a dominant position, *i.e.*, a market share of more than 30 per cent. The relevant government department could object to

75. DZ. U. No. 24, Pos. 83, 1994; M. Wilke, *Gesetz über das Urheberrecht und verwandte Rechte vom 4 Februar 1994*, 38 RECHT IN OST UND WEST 97 (1994).

76. S. Soltysinski, *Das polnische Recht des geistigen Eigentums: Eine Bewertung seines gegenwärtigen Zustands und seiner geplanten Reform*, in HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA, *supra* note 32, at PL 41.

the deal within three months after notice was given.⁷⁷

Czechoslovakia had been a trouble spot for copyright violations in the computer software area. New or amended laws were enacted in 1988 and 1990 to protect patents (20 years protection), trademarks (10 years), and copyrights (author's lifetime plus 50 years). The country was a party to multilateral intellectual property rights agreements, and as in Poland's case, a trade agreement with the U.S. provided U.S. investors with additional protection.

D. *Lessons for Cuba*

Cuba should enact modern antitrust legislation early in the transition to a free-market economy. Such legislation would be needed in the turbulent economic environment to avoid the reconstitution of the former state monopolies and to prevent anti-competitive practices, such as market allocation and price fixing,⁷⁸ that will likely exist during the transition period.

Cuba would also have to provide adequate patent, trademark, and copyright protection to assure foreign companies that their rights are protected should they invest in Cuba.⁷⁹ These

77. See A. Verwy, *Die Kartellrechtlichen Bestimmungen in der Tschechischen und Slowakischen Republik*, in *HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA*, *supra* note 32, at CS 41.

78. It has been argued, however, that some activities prohibited by the U.S. anti-trust laws, such as price discrimination and resale price maintenance, should not be banned in Cuba. N. Cruz, *Legal Issues Raised by the Transition: Cuba From Marxism to Democracy, 199?-200?*, in *CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE SECOND ANNUAL MEETING OF THE STUDY OF THE CUBAN ECONOMY*, MIAMI, FLA. 51, 54-6 (1992).

79. Cuba has enacted an "Author Law," Law 14 of Dec. 28, 1977, which provides limited protection to the rights of intellectual property created in Cuba. The law, however, expressly does not cover the rights of foreign intellectual property, which are to be established by "such agreements and treaties as may be signed." (Article 6).

topics would certainly be included in the trade agreements Cuba would negotiate with the U.S. upon the resurgence of economic relations between the two countries.

VIII. LAWS REGULATING THE FINANCIAL SYSTEM: BANKING, SECURITIES AND FOREIGN EXCHANGE

A viable financial system is the foundation of a free-market economy. Establishing such a system has proved one of the most difficult endeavors for the Eastern European countries. Shortage of local investment capital is cited as the primary obstacle to the speedy creation of capital markets.⁸⁰

None of the former Soviet bloc countries have so far been able to establish an externally convertible currency. Hungary, for example, believes that it is still within two or three years of achieving convertibility.⁸¹

A. *Hungary*⁸²

Hungary, during the communist era, established an integrated banking system that includes, as the central bank, the Hungarian National Bank, and also includes commercial banks (now over 40 of them) authorized to engage in a wide variety of activities. This move was a significant departure from the typical socialist scheme, which was to have just a central bank also acting as a commercial bank, and limiting individuals' banking capabilities to borrowing and making deposits at designated savings co-operatives. The use of checks, credit cards, and automated banking

80. A. Kawecki & Z.M. Slupinski, *Emerging Stock Markets in Eastern Europe*, 9 INT'L FIN. L. REV. 23, 24 (1990).

81. KPMG, *supra* note 22, at 68.

82. INVESTMENT BRIEF HUNGARY, *supra* note 28, at 7-10.

systems have been introduced in Hungary. Foreign investors can fully participate in the banking business, and offshore banking is permitted.

The Budapest Stock Exchange, the first of its kind in the former Eastern bloc, was established on June 21, 1990. It is a fully self-governed and self-regulated body that has over 50 members and which more closely resembles the Anglo-American exchanges than Germany's and Austria's stock markets. The exchange is governed by Law XXXIX of 1994, which created rules for the establishment of a commodity exchange.

Under Sections 31 and 32 of the Foreign Investment Act, foreign currency contributions to capital may be maintained in a separate foreign currency account and may be used freely to import production equipment and other goods needed for its operation and for hard currency expenses. Foreign currency earnings must be converted into forints at the official rate set by the National Bank of Hungary, which controls conversion.

Like the banking sector, the insurance sector has been opened to private investors.

B. *Poland*

Starting in 1989, a number of banking law reforms have helped to establish a system of about 100 private banks in Poland. Foreigners can invest in the banking system, but may repatriate only up to 15 percent of their profits.

The Warsaw Stock Exchange re-opened in April 1991, fifty-two years after its 1939 closure. A number of unregulated exchanges existed prior to the re-opening. Joint stock companies whose shares may be publicly held can apply to be listed on the exchange. Foreign investors are allowed to purchase shares of listed companies. As of July 1994, twenty-seven companies were listed on the Warsaw Exchange.⁸³

83. FOREIGN TRADE RESEARCH INSTITUTE, *POLAND YOUR BUSINESS PARTNER* 40 (1995).

The Foreign Investment Law permits convertibility and repatriation of profits and investments. Under the law, foreign currency receipts must be converted into zlotys. In order to convert Polish currency profits into hard currency, an investor must obtain a certificate issued by the Minister of Finance verifying the investor's share of the company's profits. No permit is required to repatriate the profits. Polish currency obtained from the sale of shares or through the liquidation of a joint venture may be converted to hard currency without a certificate or permit.

C. *Czechoslovakia*

Starting with its banking reform in 1990, Czechoslovakia introduced an integrated banking system with a central bank and private commercial banks. A Czech Stock Exchange opened in Prague on April 6, 1993, and by the end of July 1993 had 56 listed companies. The same day, a Slovak Stock Exchange opened in Bratislava.⁸⁴

Czechoslovakia enacted a currency control law in November 1990. The law required the conversion of all foreign currency earnings into korunas. Companies, however, could obtain permits which allowed them to convert their korunas back into hard currency in order to pay hard currency obligations, including profits to be repatriated. The government determined the official rate of conversion.

D. *Lessons for Cuba*

Re-introduction of a commercial banking system and creation of capital markets, including the establishment of a stock exchange, would be important elements of Cuba's economic recovery program. These institutions would also play an important

84. J. Ziebe, *Das Börsenrecht und der Börsenhandel in der Tschechischen und Slowakischen Republik*, in HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA, *supra* note 32, at CS 52, ¶¶ 1-8.

part in the administration of other programs, such as privatization and compensation.

The experience in Eastern Europe suggests, however, that financial system changes tend to proceed at a slower pace than other economic reforms, and should not be expected to take place in the first few years of the transition. Shortage of investment capital, among other things, will pose an obstacle to the speedy creation of efficient capital markets in Cuba.

IX. BANKRUPTCY LAW

The transformation of state-owned enterprises into private entities does not guarantee their success in the marketplace. The vast majority of privatized businesses in former communist countries experience economic difficulties, which often lead to failure. Hungary, which has made the most progress with economic reforms, had approximately 6,800 bankruptcy proceedings and 13,000 liquidations pending in 1992, with 14,300 new filings in that year alone. Bankrupt companies accounted for 20 percent of Hungary's gross domestic product during 1992.⁸⁵

Those figures suggest the importance of having effective bankruptcy legislation in a country that is in the process of transforming its economy to a free-market system. Properly devised bankruptcy procedures allow the state to rid itself of unproductive companies, and permit salvaging those that may be viable despite temporary difficulties.

85. *Bankruptcy and Liquidation Figures for 1992*, MTI ECONews, Mar. 22, 1993; Gray, *supra* note 15, at 82.

A. Hungary

Hungary's Insolvency Law went into effect on January 1, 1992.⁸⁶ The law distinguishes two types of procedures: bankruptcy procedures aimed at restoring the debtor's solvency and liquidation procedures to terminate operation of a business.

Filing a declaration of bankruptcy in court is compulsory if the debtor is unable to repay debts within 90 days of maturity. Upon filing a bankruptcy declaration, the debtor is granted a debt moratorium of up to 90 days, which can be extended for up to 60 additional days by agreement between debtor and creditors. Within that period, the debtor must submit a composition proposal to its creditors, who must approve the composition if it is to become effective. If debt renegotiation between a debtor and creditors is unsuccessful, the court initiates liquidation proceedings.

A debtor is deemed insolvent if, *inter alia*, it has not paid an acknowledged debt within 60 days after it became due, has failed to pay a debt without disputing it, or has not lived up to a composition agreement in a bankruptcy proceeding. The court may, however, grant a debtor a final 30-day period to pay its debts before it is liquidated.

The Hungarian bankruptcy law was criticized as having a number of deficiencies.⁸⁷ In response to the criticism, the Hungarian government introduced important modifications to the law, which were enacted in 1993.⁸⁸ Under the amendments,

86. Act IL of 1991 on Bankruptcy Procedures, Liquidation Procedures and Final Settlement. For an analysis, see I. Molnar, *New Insolvency Law in Force*, 11 INT'L FIN. L. REV. 46 (1992).

87. *Hungarian Bankruptcy Law May Be Too Harsh*, MTI ECONews, July 23, 1992.

88. Act LXXXI of 1993, effective September 2, 1993, *see generally Bankruptcy Law-One Year On*, MTI ECONews, Jan. 20, 1993; *Bankruptcy Law Modified*, MTI ECONews, Feb. 25, 1993.

companies must request a "vote of confidence" from their creditors before they can file for bankruptcy. A two-thirds majority of creditors, representing 60 per cent of the total debt, is required to grant such a vote and avert the filing. A filing would still be mandatory where the debts exceeded two thirds of the debtor's assets and the debtor had been unable to meet its bills within 60 days of maturity. After filing the bankruptcy petition, the debtor would be required to submit a recovery plan requiring approval by a majority of creditors representing two-thirds of the debtor's outstanding debt.

B. *Poland*

The bankruptcy rules for each type of business entity recognized in Poland are contained in the Bankruptcy Act of 1934, amended in 1990.⁸⁹ If a company is permanently unable to satisfy its debts or if the company's assets are insufficient to satisfy debts due, it must file a bankruptcy proceeding with the local courts. An application for bankruptcy can also be filed by a one of the company's creditors.⁹⁰

A bankrupt company may be liquidated and all its assets sold to satisfy outstanding debt. Liquidations are advertised in the press and creditors are given three months from the last publication to submit claims. Unless otherwise specified in the articles of incorporation, Polish shareholders have first rights to purchase a liquidating company's assets.

89. Gray, *supra* note 15, at 105-107; POLISH AGENCY FOR FOREIGN INVESTMENT, POLAND FUNDAMENTAL FACTS, FIGURES AND REGULATIONS 18 (Spring 1995).

90. INVESTMENT IN POLAND 21-23 (KPMG ed., 1991).

C. *Czechoslovakia*

A bankruptcy law entered into effect in Czechoslovakia on October 1, 1991.⁹¹ The law had a one-year phase-in period, during which a court could only declare a bankruptcy upon a finding of excessive indebtedness.

The law authorized the debtor, a creditor or a liquidator to file a bankruptcy petition if the debtor had several creditors and had been unable to pay them, or if the debtor was insolvent. Upon filing of a bankruptcy petition, a creditors' committee was established. The committee could reach agreement by simple

majority vote. The law included special settlement provisions intended to avoid, wherever possible, a bankruptcy adjudication.

Creditors had thirty days from the date of filing to register their claims. The bankrupt company's assets were then used to pay off debts in the following order: secured claims, administrator's costs, other administrative costs and employees' wages, other employees' claims, taxes and social security payments and finally, all other claims.

D. *Lessons for Cuba*

Cuba's state-owned enterprises, particularly its industries, are increasingly suffering from obsolescence and lack of inputs and spare parts.⁹² As a consequence, Cuba is likely to find itself with many non-economically operable enterprises. An effective bankruptcy law will therefore be needed early in the transition period.

Cuba's bankruptcy laws must provide for a quick adjudication of involuntary bankruptcy if an enterprise is insolvent

91. CZECH AND SLOVAK LAW ON BANKRUPTCY, SETTLEMENT, U.S. DEPT. COMM. NTIS; *see also* Holec et al., *supra* note 59.

92. Preeg, *supra* note 5, at 21-22.

or is clearly unable to stage an economic comeback. On the other hand, it is in the interest of both debtors and creditors that an adequate opportunity be given for a recovery plan to be developed and negotiated. Bankruptcy judges should play an active role in the development and implementation of such plans, which suggests that bankruptcy courts should be staffed with experienced business professionals and not be a part of the traditional court system.

X. LABOR LAW AND SOCIAL WELFARE LEGISLATION

Eastern European countries have faced a difficult challenge in attempting to reconcile the needs of their strained economies with pressures to retain worker and social welfare rights established during the communist era. The need for social safety net protection is generally increased where such institutions as the right to employment are abolished.⁹³

The Eastern European countries retain many of the labor and social welfare rights instituted under the socialist regimes. This retention has proven an obstacle to foreign investment because of its tendency to increase the cost of labor (which is nonetheless lower than comparable costs in Western Europe) and has created the impression among foreign investors that the countries are not fully committed to moving towards a modern, market-oriented economy.

A. *Hungary*

Hungary's 1989 Labor Law regulates the collective rights of employees, including the right to strike and the requirement that enterprises with more than 200 employees must have a supervisory

93. See M.M. Hager, *Constructing a New Liberal Capitalism: Czechoslovakian Labor Law in Transition*, 7 AM. U. J. INT'L L. & POL'Y 503 (1992); L. Florek, *Job and Unemployment Security in Poland*, 7 AM. U. J. INT'L L. & POL'Y 529 (1992); L. Bierman, *The New Hungarian Labor Law: A Model for Modern Dispute Resolution*, 7 AM. U. J. INT'L L. & POL'Y 543 (1992).

board. One-third of the board's members are employee elected. Employers must notify the local labor office between 15 days and 6 months in advance of any planned layoffs.

Wage control mechanisms are in place, but do not apply to enterprises where foreigners own more than 20 percent of the shares, or where the investment exceeds HUF 5 million. Wage controls are also being circumvented by the frequent payment of bonuses, a practice left over from the days of socialism. Minimum statutory paid vacation ranges from 15 to 24 days.

Social security benefits include pensions, sick pay, and maternity and child care. The system is financed by contributions of the employer (44 percent of the total employee's salary) and the employee (10 percent of his or her salary).

B. *Poland*

The 1974 Labor Code and the 1989 Acts on Mass Layoffs and on Employment and Unemployment provide the legal framework for Poland's labor relations.⁹⁴ The labor statutes provide for severance payments in the case of mass layoffs and establish a system of unemployment benefits and so-called "labor exchange" offices.

The Polish workforce is highly organized in the form of unions, and former state-owned enterprises still have worker councils. Employees can give up rights granted to them under the social net legislation by taking over equity interests in the enterprise. Workers are entitled annually to a one-month salary bonus and 14 to 26 work days of paid vacation. Except in case of serious misconduct, termination of employment is subject to written notice of up to 3 months.

Social security contributions are mandatory. The employer has to pay social security and unemployment fund taxes for its employees equal to 48.5 percent of gross wages. The state

94. See generally INVESTMENT IN POLAND, *supra* note 90, at 53-58.

furnishes free health care, pays 70-100 percent of prescription medicine costs, and provides pension payments.

C. *Czechoslovakia*

Czechoslovakia enacted a Collective Bargaining Act in 1990 and revised its Labor Code in 1991. These laws regulated such matters as trade unions, the right to strike, unemployment compensation, termination for cause, vacations, and workplace safety. The provisions on worker participation in company management were similar to those in Hungary and Poland.

Wages were controlled and employers had to pay penalties if the wages increased over a preestablished amount. The employer

had to make social security contributions equal 50 percent of the total salaries.

D. *Lessons for Cuba*

Title VI of Cuba's 1940 Constitution established a progressive labor regime that called for minimum wages, social security, workers' compensation, one-month paid vacation, paid holidays, paid maternity leave, workers' right to organize and to strike, termination only for cause, retirement plans, and other benefits. Cuba's practice under socialism has been to effectively eliminate with all worker rights (*e.g.*, voluntary, non-remunerated labor is sanctioned by the socialist constitution and widely used), while at the same time provide a social net that includes guaranteed employment, free education and medical care, and retirement benefits.

There have been calls for a return to the 1940 constitution labor provisions during a transition to a free-market society.⁹⁵

95. The 1976 and 1992 Cuban Constitutions do not recognize any of the labor rights that existed before the revolution. Omission of these rights has been termed surprising in view of socialism's avowed concern for the needs of the

Some assail this concept as beyond what Cuba can afford; others point out that the labor standards in the 1940 Constitution are obsolete and inadequate.⁹⁶ The Eastern European experience suggests that a transition government in Cuba will have to provide a modicum of labor and social net benefits to its work force, whether by returning to the standards set in Title VI of Cuba's 1940 Constitution, or by issuing new legislation.

XI. CONCLUSIONS

Cuba is near the end of a string of countries making the transition from a socialist to a free-market society and can benefit from the accumulated knowledge that is developing in Eastern Europe.

Perhaps the most important lesson that Cuba can draw from the Eastern European experience, with regard to its legal system, is that changes to socialist laws must be comprehensive and take place early in the transition process. An imperfect law, such as Hungary's bankruptcy legislation, can always be amended; a law that is delayed unduly, like Poland's privatization scheme, acts as a restraint on economic activity and discourages foreign investment.

Those interested in Cuba's successful transition to a free-market society may be able to facilitate the process by working now to develop proposals that can assist Cuba's government in enacting, in relatively short order, the large amount of important and complex legislation needed for Cuba to make the difficult transition to a free-market economy.

working class. D'Zurilla, *supra* note 18, at 1264.

96. E. CORDOVA, SOBRE EL FUTURO REGIMEN LABORAL DE CUBA (Center for Labor Research and Studies, Fla. Int'l U.) 10-17 (1992).