

8-28-2017

The Future of U.S. Claims for Property Restoration in Cuba

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Ashley Morales, *The Future of U.S. Claims for Property Restoration in Cuba*, 24 U. Miami Int'l & Comp. L. Rev. 159 ()
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THE FUTURE OF U.S. CLAIMS FOR PROPERTY RESTORATION IN
CUBA

Ashley Morales

I.	INTRODUCTION	161
II.	HISTORICAL BACKGROUND	163
A.	THE HISTORY OF RELATIONS BETWEEN THE UNITED STATES AND CUBA	163
B.	NATIONALIZATION AND VALUATION OF U.S. ASSETS IN CUBA	165
III.	SURVEY OF RESTORATION SCHEMES	168
A.	EAST GERMANY	168
B.	CZECH REPUBLIC AND SLOVAKIA.....	171
C.	POLAND	174
D.	HUNGARY	176
IV.	ARGUMENT FOR PRIVILEGED INVESTMENT	177
V.	APPLICATION OF RESTORATION SCHEMES TO CUBA	183
A.	EAST GERMAN MODEL	183
B.	CZECH AND SLOVAKIAN MODEL	185
C.	POLISH MODEL	187
D.	HUNGARIAN MODEL.....	188
E.	PRIVILEGED INVESTMENT.....	189
VI.	CONCLUSION	192

I. INTRODUCTION

Disputes between the United States and Cuba have caused tensions between the two countries since Fidel Castro's government took power in Cuba in 1959.¹ Opposing that government, the United States maintained a trade embargo against Cuba since 1962, and refused to grant diplomatic recognition until recently under the Obama administration.² New developments under the Obama administration and the opening of the U.S. embassy on Cuban soil point to the possibility of a higher degree of cooperation between the two countries than there has been in the past. As Cuban economic conditions continue to deteriorate and out-migration does not decline, the possibility of an end to the trade embargo and repaired relations with the United States could suggest a major political transformation in Cuba.

In order for Cuba to complete a transition into a post-socialist market economy, any future government must address claims for expropriated property that arose out of the revolution in 1959. In order to evaluate issues and problems that could arise for Cuba, it is important to take into consideration other post-socialist and post-communist governments in order to have reference points. This paper will look to some of the governments in post-communist Eastern Europe in order to evaluate possible property

¹ Kern Alexander and Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 LAW & POL'Y INT'L BUS. 137, 137 (1996).

² *Id.* at 138.

restoration schemes for Cuba. Different schemes include compensation laws, restitution laws, and an argument for privileged investment.

Part I of this paper discusses the history between the United States and Cuba. In order to understand the current economic condition in Cuba and the lack of compensation to owners of expropriated property, it is essential to take a look back at the events that built up to the status of current relations between the two countries. Before long, compensation will emerge as a central issue in newly normalized US-Cuban relations.

Part II will take a look at Eastern Europe and evaluate the restoration schemes implemented by other post-socialist and post-communist countries. This Part will look to East Germany, the Czech Republic, and Slovakia for restitution models and to Poland and Hungary for compensation models. Part III of this paper then goes on to make the argument for privileged investment in Cuba as a form of compensation for owners of expropriated property rather than the previous two models.

Part IV will then apply the schemes of compensation, restitution, and privileged investment to Cuba while looking to the countries of Eastern Europe in order to evaluate and form a suggestion as to the best model for Cuba. Part V recommends that, for the most effective resolution of the property claims of Cuban and U.S. claimants, privileged investment would be the wisest choice of the three schemes in order to ensure that claimants receive some sort of compensation while also providing the Cuban government the opportunity to rebuild its economy. The privileged investment schemes are the best recipe for success for both countries involved.

II. HISTORICAL BACKGROUND

A. THE HISTORY OF RELATIONS BETWEEN THE UNITED STATES AND CUBA

Fidel Castro and his revolutionaries defeated the government led by Fulgencio Batista.³ In 1960, the revolution enacted the Urban Housing Reform of October 14, 1960 that abruptly transferred property rights from former owners to tenants.⁴ Also, residencies belonging to those who fled Cuba were declared abandoned and redistributed to constituents.⁵ The Cuban government seized a lot of real and personal citizens and others within the first decade of the revolution.⁶ The Castro government expropriated all property owned by United States citizens and corporations.⁷ Castro used the

³ John J. Coughlin, *Cuban Foreign Investment Act: Opportunities For United States Corporations in a Post-Embargo Era*, 23 SUFFOLK TRANSNAT'L L. REV. 299, 301 (1999).

⁴ Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba: Transforming Trauma into Opportunity*, BROOKINGS PUBLICATIONS ON CUBA 1 (December 2015).

⁵ *Id.*

⁶ *Id.*

⁷ John J. Coughlin, *Cuban Foreign Investment Act: Opportunities For United States Corporations in a Post-Embargo Era*, 23 SUFFOLK TRANSNAT'L L. REV. 299, 301 (1999).

properties as a way to consolidate power.⁸ The government monopolized wealth and income while at the same time depriving opponents of resources.⁹ In 1961, a group of Cuban exiles, armed by the US, were defeated by the Cuban military at the Bay of Pigs while attempting to overthrow the Castro government.¹⁰ After the failed attempt at the Bay of Pigs, the United States ended diplomatic relations with Cuba and imposed a trade embargo.¹¹

Relations between the United States and Cuba continued to deteriorate, and tensions between the two countries reached their peak in 1962 when the Soviet Union placed nuclear weapons in Cuba.¹² The Cuban Missile Crisis further worsened the tensions between the United States and Cuba. As a result, the United States continued to tighten the embargo against Cuba and attempted to remove Fidel

⁸ Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba: Transforming Trauma into Opportunity*, BROOKINGS PUBLICATIONS ON CUBA 1 (December 2015).

⁹ *Id.*

¹⁰ U.S.-Cuban Relations - Council of Foreign Relations, <http://www.cfr.org/cuba/us-cuba-relations/p11113> (last visited Feb. 15, 2016).

¹¹ *Id.*

¹² John J. Coughlin, *Cuban Foreign Investment Act: Opportunities For United States Corporations in a Post-Embargo Era*, 23 SUFFOLK TRANSNAT'L L. REV. 299, 301 (1999).

Castro from power and replace his communist regime with a friendly government.¹³ Fidel Castro has been succeeded by his brother, Raul Castro, who shows no indication of any intention that he will voluntarily relinquish power in favor of a non-communist government.¹⁴

The United States had held firm its policy of replacing Castro with a different government. In more recent years, inertia rather than commitment has driven policy. Finally, in 2015 the United States began talks of lifting the long-standing embargo, and reigniting United States and Cuban relations.

B. NATIONALIZATION AND VALUATION OF U.S. ASSETS IN CUBA

The Cuban government nationalized most U.S. owned assets on the island. These properties included the telephone system, most of the mining industry, oil refineries, bottling plants, warehouses, and over two million acres of land.¹⁵ The nationalizations carried out by Fidel Castro's regime were the largest uncompensated taking of American

¹³ *Id.* at 302.

¹⁴ *Id.* at 303.

¹⁵ Cuban Claims, <http://www.certifiedcubanclaims.org/faqs.htm> (last visited Feb. 15, 2016).

property by a foreign government in history.¹⁶ The United States initially did not oppose the takings of agricultural land, stressing that adequate and effective compensation be given to land owners.¹⁷ The Cuban government responded and recognized that it had an obligation under Cuban law to provide prompt and adequate compensation but stated that it had the right to delay any compensation due to the country's weak economic and financial situation.¹⁸ The government chose to provide compensation in the form of bonds.¹⁹

The value of the bonds was calculated based on the declared tax value of the property taken.²⁰ This worked to the government's advantage because the value of the land was based on the owners' own prior assessment for tax purposes.²¹ The declared values were thus very low, and the amount calculated for the bonds did not create a burden on the public budget. In 1964, the U.S. Congress created the

¹⁶ Timothy Ashby, *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms*, 40 U. MIAMI INTER-AM. L. REV. 413, 413 (2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 415.

²⁰ *Id.* at 416.

²¹ *Id.*

Cuban Claims Program, which authorized the Foreign Claims Settlement Commission to consider claims of U.S. nationals against the Cuban government.²² The Commission received 8,816 claims, of which 87% were from individual Cuban immigrants and non-Cuban American owners.²³ The Cuban Claims Program certified 5,911 of these claims, totaling \$1.8 billion.²⁴ In order to get claims certified, the claimant had to submit documentary evidence regarding the confiscated property so as to prove value. Any and all findings by the Commission were certified to the Secretary of State for use in possible future negotiations.²⁵

The Cuban government has never repudiated the U.S. claims, but it has consistently stated that it does not recognize the property claims of Cuban exiles in the United States.²⁶ Since the nationalization of property owned by one's own citizens is permitted, Cuba only recognizes its obligation to provide compensation to U.S. nationals under international law. It does refuse to recognize, however, the

²² Cuban Claims, <http://www.certifiedcubanclaims.org/faqs.htm> (last visited Feb. 15, 2016).

²³ *Id.*

²⁴ *Id.*

²⁵ Timothy Ashby, *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms*, 40 U. MIAMI INTER-AM. L. REV. 413, 417 (2009).

²⁶ *Id.* at 418.

valuation or the interest allowance set by the Commission.²⁷ The Cuban government believes that the nationalization it carried out after 1959 is not considered confiscation because it considers nationalization to be an act stemming from an economic claim that the property is needed for public utility, popular benefit, and is to be accompanied by appropriate compensation under the Cuban Constitution.²⁸

III. SURVEY OF RESTORATION SCHEMES

This section will analyze countries of Eastern Europe in order to study and evaluate schemes used for restoration by post-socialist and post-communist countries.

A. EAST GERMANY

In 1989, Germany took down the Berlin Wall, ousted communist leaders, and ended the German Democratic Republic.²⁹ These events led to the Unification Treaty that ended the post-war division imposed on Germany by the Allies as retribution.³⁰ Unified Germany emerged as a dominant actor in Europe because of West Germany's

²⁷ *Id.*

²⁸ *Id.*

²⁹ Nicolas J. Guiterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 125 (1995).

³⁰ *Id.*

economic and legal infrastructure, which facilitated successful filing of claims for restitution or compensation by owners deprived of their property.³¹

Even though there were many successful filing of claims, some former owners were affected by the Joint Declaration, which is the basis for statutory guidelines regarding property restitution and compensation claims. The Joint Declaration stated that confiscations that were carried out as a result of the Soviet occupation law were no longer reversible and the authority to compensate was reserved to the Parliament.³² According to the Property Law in Germany, any property of which a former owner has been deprived by state acts, which include transferring property to state ownership or transferring ownership to a third party with insufficient compensation to the owner, is to be returned to the owner or is successors.³³ This law applies to real estate, chattels, claims for payment of money, equity interests, and ownership in branches of companies outside of the German Democratic Republic.³⁴ Under the Property

³¹ *Id.*

³² *Id.* at 126.

³³ M. Gruson & G. Thoma, *Investments in the Territory of the Former German Democratic Republic*, 14 *FORDHAM INT'L L.J.* 540, 544 (1990).

³⁴ *Id.*

Law, German companies and foreign owners are also allowed to file claims for restitution and/or compensation.³⁵

Former owners may opt to relinquish claims and demand compensation; however, the Property Law does not dictate how the compensation will be computed and how the compensation fund would be created.³⁶ In cases where the owner requested that the property be reconveyed, proving ownership was often complicated due to lost and war time destruction.³⁷ However, where reconveyance was successful, owners were compensated for any decreases in the value of property, and in some cases, owners were given compensation payments or substitute property and are barred from demanding reconveyance.³⁸

East Germany preferred to follow a compensation model, when possible, in order to satisfy claims from former property owners. Absent a few exceptions where properties were repurposed for the public good or properties were repurchased in good faith from other actors, East Germany made attempts to right the old property wrongs created by both the Nazi regime and Soviet-era nationalization. In 1994,

³⁵ *Id.*

³⁶ Nicolas J. Guiterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 127-128 (1995).

³⁷ *Id.* at 128.

³⁸ *Id.*

the Bundestag approved a property compensation law establishing an "expropriation compensation fund."³⁹ The fund would have a volume of dm 20 billion.⁴⁰ Compensation payments vary from type of asset, and the basis would be the 1935 standard value multiplied by a factor of between 1.5 and 2.0 depending on the asset.⁴¹ The compensation would be in the form of government notes, which would mature in 2004 and be redeemable in five equal annual installments by 2010.⁴²

B. CZECH REPUBLIC AND SLOVAKIA

The Czech Republic and Slovakia have been the most generous when faced with takings issues resulting from the communist era. These nations made it a practice to return confiscated private property to its legitimate former owners.⁴³ Prior to World War II, Czechoslovakia was a thriving capitalistic economy until taken over and pillaged by Nazi Germany. When Czechoslovakia fell under

³⁹ The Lectric Law Library, <http://www.lectlaw.com/files/int08.htm> (last visited April 24, 2016).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Nicolas J. Guiterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 121 (1995).

communist rule after World War II, the communist government nationalized practically all privately held businesses above a certain size or value and made them into state enterprises or cooperatives.⁴⁴

The First Restitution Act in 1990 provided for the return of any property taken by the communist state to their original owners.⁴⁵ The act covered only a small portion of confiscated property, mainly individually-owned businesses in the service sector, and provided for the return of these businesses to their original owners.⁴⁶ Compensation was only implemented where restitution was no longer possible because of property destruction.

The Second Restitution Act in 1991 allowed for the return of, or compensation for, taken property with an aggregate value in excess of \$10.7 billion.⁴⁷ The act authorized the return of private property that was taken during the communist period, which lasted from 1948 to the end of 1989.⁴⁸ Companies and other legal entities were

⁴⁴ *Id.* at 122.

⁴⁵ V. Pechota, *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 VAND.J. OF TRANSNAT'L L. 305, 309-310 (1991).

⁴⁶ Nicolas J. Guitierrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 122 (1995).

⁴⁷ *Id.* at 123.

⁴⁸ *Id.*

excluded from the act. In the event of a dispute, the act provided that the case be sent to a court where if the property could not be returned, there would be cash compensation paid through government-issued bonds.⁴⁹ The amount would be limited to 30,000 Czech crowns in cash with the rest of the amount covered by the bonds.⁵⁰ The monetary valuation of property was typically limited to parcels under 150 hectares for non-agricultural land and 250 hectares for agricultural land.⁵¹ Under the Second Restitution Act, the benefits only applied to resident citizens.⁵²

The Czech Republic and Slovakia have instituted a system where before a state enterprise, legal entities that undertake commercial activities on behalf of the owner government, is privatized, the records of the registry of deeds must be examined in order to ensure that there is no

⁴⁹ *Id.* at 124.

⁵⁰ The Czech and Slovak Law of Restitution, http://www.heinzlegal.com/publik_vortraege/pub_download/speeches/CzechSlovakLaw.pdf (last visited April 24, 2016).

⁵¹ *Id.*

⁵² V. Pechota, Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension, 24 VAND.J. OF TRANSNAT'L L. 305, 311 (1991).

private owner.⁵³ Only if there is no valid claim after six months from the investigation will the privatization of the state enterprise be allowed to continue. Currently, the right to own property is recognized for residents, and foreigners can only hold real property interests indirectly.⁵⁴

C. POLAND

The spark that began the liberation of Central and Eastern Europe began in Poland when the Solidarity trade union organized opposition to communist rule.⁵⁵ Since the return of private capitalism, Poland has been trying to privatize its economy. Poland's President and its parliament sponsored reprivatization legislation that would compensate people whose property was taken with legal compensation by the state.⁵⁶ Former landowners may file lawsuits in order

⁵³ Nicolas J. Guterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT'L L 111, 124 (1995).

⁵⁴ Matias F. Travieso-Diaza and Stephan M. Bleisteiner, *Some Lessons for Cuba From the Legal Changes in Eastern Europe*, 3 U. MIAMI Y.B. INT'L L 173, 189 (1995).

⁵⁵ Nicolas J. Guterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT'L L 111, 125 (1995).

⁵⁶ *Id.* at 135.

to attempt to regain land, but must do so at their own expense.⁵⁷

The Polish government decided to follow a compensation model rather than a restitution model. Poland planned to compensate owners whose land was taken between 1944 and 1960.⁵⁸ Under this model, capital bonds would enable former owners to purchase shares in state enterprises being privatized.⁵⁹ The only method for former owners to regain their property would be to pay the state in cash the market value of real estate. The only properties that would be returned to their former owners would be chemists' shops, forests, and estates.⁶⁰

The reprivatization statute only applies to individuals of Polish nationality or residence. These individuals must be able to prove that they are former owners or descendants of former owners of confiscated industrial or agricultural fixed assets.⁶¹ Poles that are living abroad are eligible for physical

⁵⁷ *Id.*

⁵⁸ G. Douglas Harper, *Restitution of Property in Cuba: Lessons Learned from East Europe*, ASCE 408, 416 (1999), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v09-harper.pdf>.

⁵⁹ Nicolas J. Guiterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 125 (1995).

⁶⁰ *Id.*

⁶¹ *Id.* at 136.

restitution or compensation in the form of bonds only if they adopt Polish citizenship and return to Poland.⁶² In order to eliminate the uncertainty caused by the lack of clear title to property, the Polish legislation intends to lure more foreign investment. The government has claimed that both restitution and compensation must be limited because of Poland's poor cash status and need for foreign investment in order to bring in revenues.⁶³ The government has asked former owners to write off the balance of their claims as a "patriotic donation."⁶⁴

D. HUNGARY

Communist Hungary moved in the direction of property privatization economic liberalization even before 1989, and this background accelerated the transition to a free market economy. This transition included the compensation of former owners of property confiscated by the communist regime. The Hungarian Parliament passed the "Law to Provide Partial Compensation for Unjust Damage Caused by the State to the Property of Citizens."⁶⁵ This was designed to

⁶² Z. Slupinski, *Polish Privatization Law of 1990*, 1990 INT'L BUS. L. 456, 458.

⁶³ Nicolas J. Gutterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 138 (1995).

⁶⁴ *Id.* at 139.

⁶⁵ *Id.* at 130.

partially reestablish private property rights without delaying privatization.

The legislation, however, does not return confiscated property, but it does provide for compensation in the form of interest bearing certificates that may be used to buy state-owned property, businesses, or shares in businesses.⁶⁶ Former owners have priority with this law, but foreigners also have access to these certificates. Foreigners are protected under the Foreign Investment Act of 1988.⁶⁷ The compensation act provides for compensations of up to 200,000 forints or \$2,700 for each small property and compensation is not to exceed 5 million forints or \$67,500 for each large property.⁶⁸

IV. ARGUMENT FOR PRIVILEGED INVESTMENT

Cuba has realized the need for foreign investment in order to help fix the economic void that was created as a result of the collapse of the Soviet Union and the end of subsidies to Cuba.⁶⁹ Foreign investment occurs when “a firm

⁶⁶ *Id.* at 131.

⁶⁷ Matias F. Travieso-Diaza and Stephan M. Bleisteiner, *Some Lessons for Cuba From the Legal Changes in Eastern Europe*, 3 U. MIAMI Y.B. INT'L L 173, 188 (1995).

⁶⁸ Nicolas J. Guiterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT'L L 111, 133 (1995).

⁶⁹ *Id.*

invests directly in facilities to produce and/or market a product in a foreign country."⁷⁰ Investors make this type of investment with an "equitable profit motive."⁷¹

When dealing with the transfer of money from foreign direct investments, the state must adopt a regulatory scheme, which can be considered in three categories: the classical theory, the dependency theory, and the middle path.⁷² The classical theory states that "foreign investment is wholly beneficial to the host" economy.⁷³ The dependency theory proposes that "foreign investment will not bring meaningful economic development," and it argues that foreign investment creates a dependency on the actors of developing countries.⁷⁴ Lastly, the middle path argues that foreign direct investment brings both positives and negatives.⁷⁵

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 114.

⁷³ M. Sornarajah, *The International Law on Foreign Investment* 48 (Cambridge Univ. Press 1994).

⁷⁴ *Id.* at 53.

⁷⁵ J. Michael Taylor, *The United States' Prohibition on Foreign Direct Investment in Cuba-Enough Already?!*, 8 L. & BUS. REV. AM. 111, 114 (2002).

Looking to the history of foreign direct investment between the United States and Cuba, the Cuban government believed in the dependency theory and, therefore, rejected foreign direct investment.⁷⁶ The problem with Cuba choosing to follow a dependency theory approach to foreign direct investment at the time of the revolution was that the United States was a firm believer of the application of the classical theory for foreign direct investment.⁷⁷ The conflict resulted in the loss of foreign direct investment from the United States, which is estimated to have been about \$774 million, resulting in quite the loss.⁷⁸

The investment relationship between Cuba and the United States changed with the Castro revolution.⁷⁹ Cuba adopted Laws 890 and 891, which led to the nationalization of foreign investments and private enterprises in accordance with socialist principles.⁸⁰ These socialist ideals were directly supported by the Soviet Union; however, when the Soviet Union dissolved, the aid to Cuba ended, and Cuba's

⁷⁶ *Id.* at 115.

⁷⁷ *Id.*

⁷⁸ *Id.* at 116.

⁷⁹ *Id.*

⁸⁰ Venera A. Gallousis, *Cuba's Flirtatious Love Affair with Foreign Investment: the Evolution of Laws 50 and 77*, 5 TEX. HISPANIC J.L. & POL'Y 81, 84 (Spring 2001).

economy was struck hard.⁸¹ Thereafter, Cuba began to court international investment in order to ease the blow of the decline in aid.⁸² Cuba enacted Law 50 in 1982 in order to permit the creation of joint ventures; however, the law proved unsuccessful in attracting foreign investment due to the restrictions on the ownership of private property.⁸³

In response to the lack of aid drawn in by Law 50, Cuba repealed it and enacted Law 77 in 1995, which slightly modified the labor provisions that were enacted in Law 50.⁸⁴ It also bolstered the provisions for foreign investment, including the recognition of private property and permitting 100 percent foreign capital companies.⁸⁵ Under Law 77, foreign investment in Cuba can be made as part of a joint venture or through an entirely foreign capital currency.⁸⁶

⁸¹ J. Michael Taylor, *The United States' Prohibition on Foreign Direct Investment in Cuba-Enough Already?!*, 8 L. & BUS. REV. AM. 111, 117 (2002).

⁸² *Id.*

⁸³ Venera A. Gallousis, *Cuba's Flirtatious Love Affair with Foreign Investment: the Evolution of Laws 50 and 77*, 5 TEX. HISPANIC J.L. & POL'Y 81, 92 (Spring 2001).

⁸⁴ *Id.* at 95.

⁸⁵ *Id.*

⁸⁶ J. Michael Taylor, *The United States' Prohibition on Foreign Direct Investment in Cuba-Enough Already?!*, 8 L. & BUS. REV. AM. 111, 118 (2002).

Investments can only be made if authorized; therefore, control over investment lies in the hands of the Cuban government.⁸⁷ In response to the mass expropriation of property, the United States began its economic embargo against Cuba in 1960, and later codified it in 1992 as the Cuban Democracy Act.⁸⁸ The Act empowered the President to apply limited sanctions to any country assisting the Cuban government, stated that the President should encourage other countries to restrict their trade with Cuba, limited the export of food, medicine, and other medical supplies to Cuba from the United States, and set up foreign relations policies for a potential transition to a free market economy in Cuba.⁸⁹ In 1996, the investment prohibitions were codified and extended by Congress with the passage of the Helms-Burton Act, which introduced a secondary boycott provision to the existing boycott.

The Helms-Burton Act drew international attention and criticism because it intended to create penalties against

⁸⁷ Venera A. Gallousis, *Cuba's Flirtatious Love Affair with Foreign Investment: the Evolution of Laws 50 and 77*, 5 TEX. HISPANIC J.L. & POL'Y 81, 86 (Spring 2001).

⁸⁸ J. Michael Taylor, *The United States' Prohibition on Foreign Direct Investment in Cuba-Enough Already?!?*, 8 L. & BUS. REV. AM. 111, 119 (2002).

⁸⁹ Cuban Democracy Act of 1992, 22 U.S.C.A §§ 6003(a) (West Supp. 2002).

persons for trafficking in confiscated property.⁹⁰ The stated goals of the Helms-Burton Act are to assist the Cuban people in regaining freedom, to strengthen sanctions against the Castro government, to encourage democratic elections in Cuba, to provide a policy framework for the United States in the event the Cuba transitioned to a free market economy, and to protect United States nationals from confiscatory takings by the Castro government.⁹¹ Title II of the Helms-Burton Act restricts the extension of “loan, credit, or other financing” by the U.S. to any person for the purpose of involving financing transactions of taken property, unless the financing is approved by the U.S. national that owned the property.⁹² Titles III and IV extend regulatory prohibition to investment activities of those outside the United States.⁹³ It allows U.S. nationals to seek damages against any person that traffics in property.⁹⁴ However, the effectiveness of the cause of action has been suspended,

⁹⁰ 22 U.S.C. §§ 6021-6091.

⁹¹ *Id.* § 6022.

⁹² *Id.* § 6033.

⁹³ J. Michael Taylor, *The United States' Prohibition on Foreign Direct Investment in Cuba-Enough Already?!*, 8 L. & BUS. REV. AM. 111, 120 (2002).

⁹⁴ 22 U.S.C. § 6082(a)(1)(I).

therefore, preventing the initiation of lawsuits.⁹⁵ Title IV explicitly states that any foreign nationals that have confiscated or trafficked in confiscated property are denied entry into the United States.⁹⁶ With the Act, Congress intended to chill investment in Cuba by exposing investors to a liability scheme.⁹⁷ Ultimately, the Helms-Burton Act sought to suffocate Cuba by rendering it unable to trade.

V. APPLICATION OF RESTORATION SCHEMES TO CUBA

A. EAST GERMAN MODEL

It was the belief of many that East Germany was the closest example of what a post communist Cuba could look like.⁹⁸ However, there are a number of differences between the two countries that would make the East German Model for Restitution inapplicable to Cuba.

⁹⁵ Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Helms-Burton Law and Its Antidotes: A Classic Standoff?* 7 SW. J.L. & TRADE AM. 95, 105-6 (2000).

⁹⁶ 22 U.S.C. § 6091.

⁹⁷ J. Michael Taylor, *The United States' Prohibition on Foreign Direct Investment in Cuba-Enough Already?!*, 8 L. & BUS. REV. AM. 111, 122 (2002).

⁹⁸ G. Douglas Harper, *Restitution of Property in Cuba: Lessons Learned from East Europe*, ASCE 408, 416 (1999), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v09-harper.pdf>.

When Germany reunited, Germany was an economic superpower, unlike Cuba, which would be in a very poor economic state in the event of a transition away from a statist economy.⁹⁹ The German programs that were implemented to deal with expropriated property were made under the assumption that Germany would be able to absorb the losses associated with the Compensation Model.¹⁰⁰ Cuba is considerably poorer and is not in the same economic position to handle compensation as East Germany did.

If the Cuban government were to choose compensation instead of restitution, the government could be overlooking an avenue of economic growth. Many local Cubans will be inevitably laid off from their jobs since expatriate Cubans may lose interest in seeing their companies restored.¹⁰¹ It seems that returning land to former owners and local Cubans would create more of a chance for economic growth and a vested interest in the island and its progress. Expatriate Cubans may restore their companies and create jobs for many local Cubans. In creating more jobs, this could create a boost in the economy and lead to a more prosperous Cuba.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

B. CZECH AND SLOVAKIAN MODEL

The Czechoslovakian plan would only be useful to Cuba to a limited extent.¹⁰² The Cuban government could use the same time limit instituted by the Czechoslovakian model where after the expiration former owners cannot receive either restitution or compensation.¹⁰³ The expiration time set by the Czechoslovakian government was only six months.¹⁰⁴ The Cuban government would be able to offer title of property to foreign investors in that way and encourage investment.¹⁰⁵ Once the expiry time limit has past, the Cuban government would not have to fear former owners trying to claim property. Also, since the Czechoslovakian plan revolved around returning property to former owners rather than compensation, the Cuban government would save money by not having to compensate former owners and rather receive foreign investment money for the property in their possession. They

¹⁰² *Id.* at 419.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 417.

¹⁰⁵ *Id.* at 419.

would be able to put that money toward other ways to promote economic development.¹⁰⁶

The Acts instituted by Czechoslovakia do not discourage redevelopment.¹⁰⁷ The Cuban government can allow former owners living abroad to rebuild on confiscated property, and the money spent could be filtered back into the economy and encourage the development of a middle class.

This model, however, does appear to have a limitation of benefits to individuals.¹⁰⁸ Due to the exclusion of legal entities, such as corporations, from receiving restitution, the Cuban government would have to continue to pay expenses associated with state enterprises.¹⁰⁹ The government would lose a share of the profits from the sale of the enterprise, making it better for the government to get rid of the burden and allow for the restitution to foreign entities.¹¹⁰ Investors could make state enterprises into profit generating and taxable enterprises.¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

C. POLISH MODEL

Applying the Polish model of compensation to Cuba, could prove to be problematic. In the Polish model for compensation, Poles that live abroad are eligible for restitution or compensation in the form of state bonds, but only if they adopt Polish citizenship and return to Poland permanently.¹¹² Therefore, if applied to Cuba that would mean that expatriate Cubans and Cuban-Americans would be forced to adopt Cuban citizenship and return to Cuba permanently in order to receive any kind of compensation or restitution.¹¹³ This part of the Polish model is problematic and would likely have the effect of discouraging investment in Cuba since it is unlikely that expatriate Cubans and Cuban-Americans would be willing to return to Cuba permanently. As for those that would be willing to return to Cuba, they may not be willing to do so immediately.¹¹⁴ Those that are willing to return may choose to wait until there is stability and ready availability of things such as

¹¹² Z. Slupinski, *Polish Privatization Law of 1990*, 1990 INT'L BUS. L. 456, 458.

¹¹³ G. Douglas Harper, *Restitution of Property in Cuba: Lessons Learned from East Europe*, ASCE 408, 420 (1999), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v09-harper.pdf>.

¹¹⁴ *Id.*

electricity, water, and other facilities rather than return to an immediate post-communist Cuba.¹¹⁵ Overall, it seems that limiting restitution and compensation to those willing to come back to Cuba does not seem like a good idea in the long-term for the redevelopment of the island.

Another problem that would come of forcing people to relocate back to Cuba would be a strain on residential property given lack of adequate housing.¹¹⁶ Former residential property owners who are forced to move back will want to recover their own confiscated residential properties.¹¹⁷ However, returning this property would lead to the forced removal of thousands from existing housing. Cuba would be forced to face instant homelessness and an economic meltdown as a result of the policy.¹¹⁸ Finally, because of Cuba's economic situation, the country would not be able to afford to provide a mass compensation to those with confiscated property.

D. HUNGARIAN MODEL

Hungarian law focuses on compensation and did not provide for any form of restitution.¹¹⁹ The compensation

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

takes form of government issued interest-bearing certificates that could be used to buy state owned property, businesses, or shares of business, and there was no restriction on the selling of certificates to foreigners.¹²⁰ This system could prove to be problematic for Cuba because of the poor economic status that post-communist Cuba would face. Many expatriates who thought of returning to reclaim any rural holdings would find that their attempts would be stifled because of this model.¹²¹ This would negatively affect the economy because it is removing the parties that are the most capable and most willing to invest in Cuba.¹²² In isolating expatriates, the result would be a high degree of foreign ownership because the government would sell unclaimed state-owned assets.¹²³

E. PRIVILEGED INVESTMENT

¹²⁰ Nicolas J. Guterrez, *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI. Y.B. INT'L L 111, 131 (1995).

¹²¹ G. Douglas Harper, *Restitution of Property in Cuba: Lessons Learned from East Europe*, ASCE 408, 421 (1999), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v09-harper.pdf>.

¹²² *Id.*

¹²³ *Id.*

After the international debt crisis of the 1980s a trend developed where the debt owed by a developing country was converted into an equity investment in the debtor country.¹²⁴ These programs were initially developed to help Latin American countries reduce debt and increase foreign investment.¹²⁵ In order to convert debt into equity, a third party investor would buy the debt at a discount on the secondary market, and the debtor government would redeem the debt at a negotiated value.¹²⁶ The funds would then be invested in equity.¹²⁷

This sort of investment could serve as an alternate option for settling the U.S. certified property claims in light of progress with the relationship between the U.S. and Cuba.¹²⁸ This option would not only benefit Cuba economically, but also provide Cuba with an influx of foreign investment and capital.¹²⁹ In order for this option to

¹²⁴ Megan Elizabeth Haas, *Tierra Sin Dueños: The Effect of Cuba's Foreign Investment Scheme on United States' Certified Property Claims*, 15 TEX. HISP. J. L. & POL'Y 93, 120 (2009).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 121.

¹²⁹ *Id.*

work Cuba must settle the U.S. claims in one form or another.

In this system, Cuba would determine the value of the individual property claims and convert the debt into an equity interest in a joint venture company.¹³⁰ They could do this the same way as it was done in East Germany where they took standard value of the property at the time of expropriation and then multiplied by a factor depending on the asset.¹³¹ The U.S. company, either representing the U.S. government or private claimants, would avoid taxes on the compensation until the shares are sold for cash, however if the company receives dividends, then it will pay taxes on the compensation.¹³² In this system, Cuba would not have to pay anything in hard currency and the U.S. would receive the equivalent of cash with the potential to recover more in future dividends and sale of its interest.

The downside to this system would be that this might not be the form of compensation that claimants would have wished for.¹³³ Since there is no guaranty that Cuba could become capitalistic, the shareholders would be bound by

¹³⁰ *Id.*

¹³¹ The Lectric Law Library, <http://www.lectlaw.com/files/int08.htm> (last visited April 24, 2016).

¹³² *Id.*

¹³³ *Id.*

Cuban law, which involves more government oversight.¹³⁴ Cuba would also be relinquishing a lot of control over to its foreign investors. Even with its downsides, debt conversions and investment could be what is needed to solve the problems related to compensation and restitution of U.S. property claims in Cuba while increasing foreign investment and helping Cuba's economy.¹³⁵

VI. CONCLUSION

A post-communist Cuba would have to make decisions about how to deal with U.S. certified property claims if there are to be more than mere expectations towards building a relationship between the two countries. When approaching the issue, a post-communist Cuba will have to decide whether it will reconvey property, compensate, or even try the alternative by converting debt into equity and allowing for investment, perhaps privileging the most directly dispossessed.

In examining all models, it seems that restitution would not be a practical option due to the risk of mass homelessness that would face those who have occupied dwellings for decades and an economic meltdown caused by the turmoil. Any attempt at compensation in cash would hardly be feasible and unfair given the impoverished state of Cuba's economy. It seems that the best scenario for a post-

¹³⁴ *Id.*

¹³⁵ *Id.*

communist Cuba therefore would be to convert debt to equity and open its doors to foreign investors.

Investment in Cuba could prove to be extremely attractive as relations between Cuba and the U.S. are repaired. The opportunity for real estate development and tourism-centered projects could make Cuba a very lucrative new investment for foreign investors. The participation of foreign investors would also benefit Cuba, since its economy is weak and in need of capital infusion. Settlement of property claims between the U.S. and Cuba is imperative politically and morally in order for progress to take place. Fostering economic growth through investment could create an opportunity for growth for Cuba and justice and a way forward for property claimants.