



EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA: TWO VIEWS

Property Rights in the Post-Castro Cuban Constitution

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This paper and its companion piece, "Outline of a Program for the Restoration of Property Rights by a Democratic Cuban Government," included here as an appendix, are updated and expanded versions of papers published in the 1995 volume of the University of Miami Yearbook of International Law. The authors thank the Institute for Cuban and Cuban-American Studies of the University of Miami for inviting them to update the 1995 papers as part of the Institute's Cuba Transition Project. The authors gratefully acknowledge the assistance and suggestions of Elizabeth A. Snodgrass and Raymond Atkins for updating the papers and reiterate their thanks for the comments and suggestions made by Brice M. Clagett, Philip R. Stansbury, William H. Allen, and Michael P. Socarras in respect of the originally published work.

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I. Introduction

When the Castro regime comes to an end, the Cuban people will face the monumental task of building a new political and economic system out of the remnants of the old. If the recent history of the Western Hemisphere serves as a guide, they will reject Castro's totalitarian legacy and embrace instead the ideas of democracy, free-market economics, and the rule of law. The development of a new political and economic system based on these ideas will require a new constitution, which will lay the foundation for a resurgent Cuba.

Among the principles of that new constitution, none will be more critical to the success of the rebuilding enterprise than the protection of private property rights. The constitutional protection of private property rights is a matter not only of principle, but also of economic necessity. As a matter of principle, a system of private property rights adequately protected by law and free of excessive restrictions is a necessary condition to the development of free-market democracy.¹ Such a system will also be needed as a matter of economic reality for Cuba to have any hope of attracting sufficient investment capital to rebuild its economy. No capital will flow to Cuba in the amounts that Cuba needs, absent strong and credible guarantees that private property and enterprise will enjoy at least as much protection in Cuba as in the competing capital-importing nations of the hemisphere. Strong legal protections for property rights will also foster the growth of the Cuban economy by creating the incentive to use property efficiently.²

We submit in this article a modest proposal concerning how and how much private property rights ought to be protected in a post-Castro Cuban constitution. It is a modest proposal because we address it, in a spirit of cooperation and deference, to those who will have the historic function of creating a new political and economic system for Cuba. We put forth our proposal almodestly, because we are well aware that the making of a constitution is a matter not only of principle and good sense, but also of the interplay of political forces and the forging of political compromises. We hope that our ideas will serve as a principled foundation for the debate that will surely take place upon the ending of the Castro regime.

In the body of this article, we discuss the protection of private property rights in a new Cuban constitution, using as a starting point the property-related clauses of Cuba's 1940 constitution. In the context of those

provisions, we suggest aspects that need revision, or at least reevaluation, to bring constitutional property protections in line with current political and economic experience and thought. In the appendix we set forth, as a proposal to be adopted by a democratic post-Castro government, a program for the Restoration of Property Rights in Cuba. The proposed program is intended to complement and reinforce the property-protection clauses of the new constitution. The Castro regime collectivized the Cuban economy not by orderly takings followed by payment of just compensation, but by outright destruction of the fabric of private property rights. It will be the new government's responsibility to restore those property rights by providing the dispossessed owners, Cuban and foreign, with adequate economic redress, whether in the form of restitution, compensation, or compensation-in-kind.

The restoration of property rights is an imperative of fundamental fairness. It is also a goal supported by sound political and economic reasons. Politically, a property-restoration program will legitimize the new government in the eyes of the former owners and will show to the international investment community that the protection of property rights in the new constitution is not an empty promise. Economically, the program will provide a means of resolving claims on confiscated property and privatizing enterprises and assets still held by the Cuban state. An orderly and predictable program to resolve conflicting claims to property should encourage capital investment by foreign and exiled entrepreneurs. Rapid privatization of state-owned property, especially by means of restitution to dispossessed owners, should promote efficient use of the property, greater productivity, and economic growth. In sum, we view the redress of the wrongs suffered by the dispossessed owners at the hands of the Castro regime as an essential component of the system of property rights to be defined and protected in the new constitution.

II. The 1940 Constitution

The 1940 Cuban constitution was adopted against the background of four decades of internal political turmoil, a legacy of American overlordship, and frequent military interventions. The constitution of 1901, which was the first constitution of an independent Cuba following the Spanish-American War, incorporated what became known as the Platt Amendment, a series of provisions first enacted into United States law as part of the Military Appropriations Act of 1901. The Platt Amendment proclaimed the right of the United States to intervene on Cuba's behalf to protect Cuban independence and to ensure the maintenance of a government adequate to protect "life, property and individual liberty."³ The Platt Amendment remained in effect until 1934.

During the period in which the Platt Amendment was in effect, the United States frequently intervened in Cuban domestic affairs, often to restore order in the aftermath of a presidential succession. Political instability continued after the U.S. interventions ended. A civilian-military revolution in 1933 was followed by a succession of interim civilian governments, which were gradually eclipsed by the rising power of Colonel Fulgencio Batista and the army.⁴

In 1940, a Constitutional Convention was called to write a new constitution in preparation for a return to representative democracy. The convention, which included among its members representatives of all sectors of Cuban political opinion, undertook to settle all outstanding political disputes by crafting elaborate and detailed compromises and incorporating them in the constitutional text.⁵ The resulting charter, adopted as the Constitution of 1940, is a remarkably lengthy and casuistic document. More like a code than a constitution, it comprises a host of provisions that owe more to history and the peculiar circumstances of the time than to a coherent political doctrine. In the area of property rights, for example, the 1940 constitution contained one of the strongest guarantees found anywhere against expropriation of property without full compensation, but it also contained other clauses that paid obeisance to the "social function" conception of property, prohibited the acquisition of large estates, and restricted the property rights of foreigners and the alienability of property owned by the State.

The 1940 constitution came into force on 8 July 1940, and remained

in effect until 1952. On 4 April 1952, Fulgencio Batista, who had seized power by overthrowing the elected government, replaced the 1940 constitution with a new Constitutional Act designed to serve as the instrument of governance until new elections were held. The elections were won by Batista, the sole candidate who stood, and the 1940 constitution was reinstated on 24 February 1955. Less than two years later, on 2 December 1956, Batista issued a decree suspending the constitutional guarantees in several provinces for 45 days.⁶ That decree was renewed, with two brief respites, every 45 days until 17 May 1958. On that date, a Special Act was passed declaring a state of national emergency, which was still in effect when Batista fled Cuba on 1 January 1959.

When Fidel Castro came to power on 1 January 1959, the 1940 constitution was once again proclaimed the law of the land. Nevertheless, in the three weeks between 13 January and 7 February 1959, the constitution was amended, by revolutionary fiat, no fewer than five times. The amendments primarily had the effect of concentrating power in the hands of Castro, revoking constitutional guarantees against retroactive criminal statutes, and allowing confiscation of property owned by those individuals who were branded as accomplices of the Batista regime. On 7 February 1959, only five weeks after taking power, Castro abandoned all pretenses and discarded the 1940 constitution in favor of a new Fundamental Law.

The 1940 constitution has a strong symbolic value in the eyes of many Cubans, for it is generally regarded as the sole Cuban constitution that was created under a true representative mandate and without undue foreign influence. It was used by Castro as a mantle during the events leading up to the overthrow of Batista in 1959 – only to be cast away as soon as it was no longer needed. The 1940 constitution is still regarded by many Cuban exiles as the last source of political legitimacy in Cuba and the legal foundation of their claims. In dissident circles, the view that the 1940 constitution should form the basis for the first free constitution of a post-Castro Cuba appears to be widely held.

With due regard for these sentiments, we suggest that the provisions of the 1940 constitution ought not to be accepted uncritically. The political, social, and economic circumstances of post-Castro Cuba and of the world into which the new constitution will be brought are very different from those that existed in 1940. In these circumstances, many of the polit-

ical compromises reflected in the 1940 constitution are no longer relevant and may be inappropriate to post-Castro Cuba. Accordingly, the property provisions contained in the 1940 constitution should be reexamined to assess whether they will comport with the values and needs of Cubans in the post-Castro era.

III. The Protection of Private Property Rights in the 1940 Constitution

The clauses of the 1940 constitution that are more or less directly related to the protection of property rights can be classified, for the purpose of analysis, in two categories: (i) the *core* provisions, which determine the basic extent of the property rights protected by the constitution and the nature of the protection, and (ii) the *non-core* provisions, which further specify or limit the scope of certain property rights in particular circumstances.

The core provisions are:

- Article 24, which prohibits confiscations and lays down the requirements for the constitutional validity of expropriations;
- Article 87, which recognizes the legitimacy of private property and refers to the boundaries of the concept;
- Article 23, which prohibits retroactive laws affecting civil obligations; and
- Article 92, which provides for the protection of intellectual-property rights.

The non-core provisions related to the protection of property rights are the following:

- Article 33, which authorizes the seizure of books, records, motion pictures, or other publications that attack the honor of persons, social order, or public peace;
- Article 43, which guarantees the right of married women to control their own property;
- Article 88, which excludes the subsoil from private ownership and requires that certain assets and businesses be put to economic use in a manner that promotes the general welfare;
- Article 89, which gives the State a preemption right in every forced sale of real estate or securities representing real estate;
- Article 90, which proscribes latifundia and authorizes restrictions on the ownership of land by foreigners;
- Article 91, which allows farmers to set aside certain plots of agricultural land as “family property” (homestead) and restricts

- the alienability of such land;
- Article 93, which prohibits perpetual encumbrances on property for the benefit of private persons;
 - Article 252, which restricts the alienability of property owned by the State;
 - Article 273, which provides that the State is entitled to a portion of any increase, resulting solely from State action, in the value of real estate;
 - Article 274, which regulates leases and other contracts related to agricultural land;
 - Article 275, which authorizes restrictions on the vertical integration of the sugar industry; and
 - Article 276, which proscribes laws and regulations that create or have the effect of creating private monopolies.

In the following sections, we offer a brief analysis and a critical appraisal of the core and non-core provisions listed above.

A. The Core Provisions

1. Article 24

The cornerstone of the system of protection of property rights established by the 1940 constitution is Article 24. This provision, which is included in Title IV of the constitution, under the heading “Fundamental Rights,” reads as follows:

“Confiscation of property is prohibited. No one shall be deprived of his property except by a competent judicial authority, for a justified cause of public utility or social interest, and after payment of the respective indemnification, fixed judicially, in cash. Non-compliance with these requirements shall give rise to the right of the person who has been expropriated to be protected by the courts and, if the case calls for it, to receive restitution of his property.

The genuineness of the cause of public utility or social interest and the need for the expropriation shall be determined by the courts in the event of a challenge.”⁷

The basic guarantee established by this article is that confiscation of property is forbidden. “Confiscation,” in the sense in which this term was used in the constitutional debates, means “every taking of private property by a governmental authority without payment of the required compensation, whether directly or indirectly, through legal procedures or by force, by way of penalty or otherwise.”⁸ A proposal to provide for progressive land taxes was rejected by the Constitutional Convention after spirited debate on the ground that it would amount to indirect confiscation and lead to the collectivization of property.⁹

Article 24 authorizes non-confiscatory takings of property (expropriations) based on reasons of public utility or social interest and preceded by the payment of due indemnification. Although the initiative for an expropriation may lie with the political organs of the government, it is for the judiciary to determine the indemnification to be paid and to decree the transfer of title once the constitutional requirements are met. It is also for the courts to determine whether the reasons of public utility or social

interest invoked by the government are genuine or a mere pretext and whether the expropriation is necessary to achieve the desired ends. Although the measure of compensation is not made explicit, the term “indemnification” (“*indemnización*”) indicates that compensation must be sufficient to leave the owner *indemne*, that is, free of any harm (*damnum*). The indemnification must be paid, in cash, before the expropriation takes place.

Article 24 is one of the strongest guarantees against uncompensated takings that can be found in any constitution, past or present.¹⁰ There is no question that its basic structure and provisions should be preserved in the new Cuban constitution. Nevertheless, since the new constitution will be interpreted and applied by an untested judiciary, it would be wise to introduce a greater degree of precision in this clause, at least as regards the measure of compensation. It should be made explicit that the required indemnification must be equal to the full fair-market value of the property taken, disregarding any diminution in such value resulting from any announcement or threat of expropriation or any other injurious act against the property or against the owner.

2. Article 87

Article 87, the first provision of Section Two (“Property”) of Title VI, contains a further guarantee of the legitimacy of property rights and a rough characterization of the scope of those rights: “The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and with no limitation other than those established by Law for reasons of public necessity or social interest.”¹¹

The guarantee contained in this clause is framed as the recognition by the State of the existence and legitimacy of private property, to the extent specified in the same provision. This formula is unfortunate, because it seems to imply that private property is guaranteed not as a matter of fundamental right but as a gracious concession by the State.¹² In fact, the apologetic tone of this provision accurately reflects the intensity with which left-wing parties opposed it at the Constitutional Convention.¹³ The constitutional protection of private property rights was not a universally accepted political goal in the Cuba of 1940. In a post-Castro constitution, the legitimacy of private property should be proclaimed in the same

emphatic terms as in the case of other fundamental rights.¹⁴

Article 87 protects private property “in its broadest concept as a social function and with no limitation other than those established by law for reasons of public necessity or social interest.”¹⁵ Leaving aside for the moment the reference to property as a “social function,” this clause has the effect of prohibiting limitations on the scope of private property rights other than those that meet two individually necessary and jointly sufficient conditions: (i) that the limitation be established by law, and (ii) that it be adopted for reasons of public necessity or social interest.

The requirement that limitations be established by law (often referred to as the principle of legality) is a fundamental procedural guarantee against unauthorized or arbitrary limitations. In comparable settings, it has been interpreted as the principle that no limitation on property or other rights is valid unless it is based on a substantive law that is (i) reasonably precise, to enable the citizen to foresee the consequences of a given action, and (ii) reasonably nondiscretionary, to protect the citizen against arbitrary interferences by public officials in the citizen’s exercise of those rights.¹⁶ This principle excludes, for example, limitations that have no legal basis, or are imposed at the whim of public officials, or are adopted by *ad hoc* pronouncements aimed at particular persons or groups, or are created by rules so open-ended that the owner cannot know in advance the limits placed upon the use and enjoyment of his or her property.¹⁷ In addition, since the Cuban legal system once was and almost certainly will again be based on statutory law, the phrase “established by law” should be interpreted to require that limitations be based on laws enacted by the Congress, as distinguished from limitations based merely on administrative regulations or judicial precedent.¹⁸ So understood, this requirement should be retained in the new constitution.

The idea that property rights may be limited for reasons of general interest or general utility (to use concepts that are widely used in politico-philosophical discourse), and only for such reasons, is sound as a principle, though it is often subjected to egregious abuses in its application. Some version of this principle should be included in a post-Castro constitution, but it would be prudent to describe with greater precision the reasons that may legitimately be invoked by the State to justify limitations on property rights. In this respect, the concepts used in Article 87 could stand clarification. “Public necessity” appears to be narrower than

“social interest” and also narrower than “public utility” (a concept that appears in Article 24), but it is not clear whether the first concept is subsumed under any of the other two. Nor is it clear whether the concept of “social interest” is coextensive with, or broader than, the traditional notions of “public interest” or “general interest” that are often found in liberal constitutions – liberal, that is, in the classical sense of the term.

In any case, it would be desirable to specify that, beyond a certain threshold at least, any limitation on private property rights amounts to an expropriation and must be subject to the payment of compensation in accordance with the principles of Article 24. Confiscation of property is no less destructive of economic and personal freedom if it is achieved insidiously through regulation. One of the principal reasons for requiring a government to pay compensation for takings asserted to be in the public interest is to prevent that government from abusing the powers it has.¹⁹ The same principle applies to regulatory takings. Most, if not all, regulations passed by any legislative or administrative body will result in a slight diminution in value of someone’s property. It is well beyond the scope of this article to try to offer a coherent doctrine of when and how a post-Castro government should compensate private parties for regulatory takings. There has always been an “uneasy tension between the right of an individual to be secure in their property and the power of the government to regulate property rights.”²⁰ Nevertheless, the framers of the new constitution should find a formula to make it clear that this tension ought not always to be resolved in favor of the government.

Article 87 recognizes the legitimacy of private property “in its broadest concept as a social function.” The doctrine that private property is (or has) a social function, once fashionable and still common in Latin America, derives from the so-called social doctrine of the Roman Catholic Church. According to this doctrine, private property is legitimate only to the extent that it fulfills a social function, i.e., that it is used and enjoyed in such a way that it furthers the common good.²¹ A critique of this conception from a philosophical perspective would exceed the scope of this paper. Suffice it so say that, even if this doctrine were sound as moral theory, it would be unnecessary and potentially dangerous to incorporate it in the new Cuban constitution.

After the fall of Castro, Cuba will desperately need to strengthen the institution of private property to develop markets and to attract outside

investment. To attain these goals, the new constitution must provide for a robust form of protection for private property rights, subject only to such limitations as are prescribed by law and are based on reasonably precise legitimacy criteria set forth in the constitution itself. In contrast, one critical role of the doctrine of the social function of property is to de-legitimize certain ways in which property may be used and enjoyed and, correspondingly, to legitimize restrictions imposed by the State to curtail such use and enjoyment – all on the basis of criteria that are extraneous to the constitution and open-ended, for they depend on the evolving tenets of the “social function” doctrine. If this doctrine were incorporated in the new constitution, particularly if it became, as in Article 87, a component of the definition of the property rights that the constitution protects, it could easily be used (or misused) to justify limitations on property rights, derived from the nebulous notion of “social function,” beyond those established by law for reasons expressly declared legitimate by the constitution.

None of these observations is meant to deny or to preclude the influence of the “social function” doctrine as a moral theory. The legislators in post-Castro Cuba may resort to this theory, or to any other system of moral or political norms, for inspiration or guidance in the crafting of limitations on property rights. In doing so, however, the legislators should abide by the conditions imposed by the constitution for the legitimacy of such limitations.

3. Article 23

Article 23 protects another form of private property: rights that are the correlatives of civil obligations arising out of contracts or other acts or omissions. The protection takes the form of a nearly absolute bar on retroactive legislation affecting those rights.²²

To understand the scope of Article 23, it is necessary to consider Article 22, which authorizes, under severely restrictive conditions, retroactive non-criminal legislation. Under Article 22, non-criminal laws shall have no retroactive effect, unless the following conditions are met: (i) the law itself must provide for such an effect; (ii) the retroactive effect must be based on reasons of public policy, social utility, or national

necessity expressly stated in the law; (iii) the law must be approved by two-thirds of the total membership of each legislative chamber; (iv) the law must provide for compensation for damages that the holders of rights vested under prior law may suffer as a result of the retroactive effect of the law; and (v) the law ceases to be valid if it produces effects contrary to Article 22, that is, if it has confiscatory consequences. In addition, Article 22 provides that the grounds for the retroactivity of the law may be challenged before the Tribunal of Constitutional Guarantees, which cannot decline to rule on the matter for any reason whatsoever.

Article 23 contains a further restriction on the validity of retroactive legislation. The first sentence of that provision reads as follows: “Obligations of a civil nature that arise out of contracts or other acts or omissions that give rise to them cannot be annulled or altered by the Legislative Branch or the Executive Branch and, consequently, no laws shall have retroactive effects in respect of such obligations.”²³

The remainder of Article 23 sets forth a limited exception to the rule just quoted. Under the exception, the State is permitted to suspend the exercise of legal actions based on such civil obligations, but only in a case of a grave national emergency and only for such time as may be reasonably necessary. Any such suspension would also be subject to the first four requirements set forth in Article 22 and could be challenged by the same procedure established in that provision.

The principles of Articles 22 and 23 constitute reasonable compromises between the interests of those who hold property rights derived from contracts and other civil obligations and the legitimate interests of the public. Those principles should be retained in a post-Castro constitution.

4. Article 92

Article 92 extends constitutional protection to intellectual property. It provides, in its first paragraph, that “[e]very author or inventor shall enjoy the exclusive ownership of his work or invention, subject to the limitations determined by Law regarding time and form.”²⁴ It is clear that this principle should be incorporated in the new Cuban constitution.

In contrast, the second paragraph of Article 92, which provides that trademarks used with an indication that the product is of Cuban origin

shall be null and void if used to cover articles manufactured outside Cuban territory, seems better suited to ordinary legislation.^{XXV} In essence, this provision bars one type of trademark fraud. Whatever the merits of the rule, it hardly appears necessary or advisable to include this level of detail in a post-Castro constitution. A constitution should be the expression of the fundamental values and choices of the nation, not a repository of mundane government regulations. Trademark fraud does not rise to the level of fundamental individual rights, nor is it a component of the basic structure of government. We recommend that this topic be left out of the new constitution.

B. The Non-Core Provisions

1. Article 33

The first paragraph of Article 33 guarantees to every person the right to express his or her thoughts, free of prior censorship, in any form, oral or written, and by any available medium of communication.²⁶ This principle is limited by the second paragraph of Article 33, which authorizes the seizure, by court order, of books, phonograph records, films, newspapers, or other publications that “attack the honor of persons, social order, or public peace.”²⁷ This limitation affects not only the freedom of expression guaranteed by the first paragraph of Article 33, but also the property rights of those who own the books, phonographic records, films, newspapers, or other publications that the government is authorized to seize.

The drafters of a democratic post-Castro constitution would be well advised to be wary of these restrictions. While no one can deny that personal honor, social order, and public peace are worthy of legal protection, such protection should not be so intrusive as to become a pretext for the abrogation of freedom of expression, private property, or other fundamental rights. In this respect, the limitation imposed by the second paragraph of Article 33 is on its face exceedingly broad and open to abuse. A provision allowing the seizure of expressive materials on the ground that they attack a person’s honor could very well be used, for example, to support the seizure of a book or newspaper article that criticizes government officials or other persons who play important roles in the life of the nation. Similarly, allowing the seizure of such materials on grounds of

preserving social order or public peace may well lead to the suppression of political speech. Even the potential for such seizures may inhibit freedom of expression as well as the enjoyment of property rights over means of communication.

The difficulties presented by this provision illustrate the intimate relationship between freedom of speech, which is the cornerstone of a democratic system of government, and property rights. In our view, a renascent Cuban democracy should not be burdened with a constitutional provision that broadly constrains both freedom of speech and property rights and in so doing offers to future governments a way back to the totalitarian past.

2. Article 43

Article 43 sets forth basic principles for the legal protection of marriages and the family. It provides, among other things, that every married woman shall have the right to control her own property, including the proceeds of her labor, without her husband's permission.²⁸ This is a special application of the principle, also established in this article, that marriage shall be regulated on a basis of absolute legal equality between the spouses.²⁹

These provisions abolish the ancient disability imposed on married women as regards the management and disposition of their own property. In so doing, they expand the universe of individuals whose property rights enjoy constitutional protection. For reasons of elementary fairness as well as economic efficiency, these principles should unquestionably be retained in a post-Castro constitution.

3. Article 88

The first paragraph of Article 88 provides that all subsoil rights belong to the State, which is authorized to grant concessions for the exploitation of those rights in a manner to be prescribed by law.³⁰ This principle is technically a restriction on the scope of property rights, for it is a departure from the traditional doctrine of vertical property boundaries, under which an owner of land has rights in his property *a coelo usque ad centrum*. But this doctrine has been narrowed in many coun-

tries, especially in the areas of overflight and mineral rights, to the point that private ownership of all subsoil rights may now be the minority rule, particularly in Latin America.³¹ Whether and to what extent subsoil rights in Cuba should belong to the State, as distinguished from the owner of the surface, is a public policy decision that must be made by the Cuban people. If state ownership of subsoil rights is the preferred solution, those rights should be economically exploited by concessions granted to private entities. The constitutional protection of property rights should encompass the rights arising out of such concessions.

The second paragraph of Article 88 sets forth additional restrictions on the use and enjoyment of certain kinds of property. It provides that “[l]and, forests, and concessions for the exploitation of the subsoil, means of transport, and any other public service enterprise shall be exploited in such a manner as to promote the general welfare.”³² To the extent that this mandate exceeds the limitations authorized by Article 87, it is overbroad, because it fails to distinguish cases in which the property or enterprise constitutes a monopoly from cases in which it does not. (Since Article 276 prohibits private monopolies in commerce, industry, and agriculture, the second paragraph of Article 88 may apply only to non-monopoly cases). While it may be sound policy to regulate “natural” monopolies or other permitted monopolies in the name of the general welfare, the control of non-monopolistic enterprises should be left, in principle, to the free market. The framers of the post-Castro constitution should consider discarding this paragraph, relying instead on such limitations as may be adopted under Article 87. Alternatively, the framers should, at least, limit the rule of this paragraph to such monopoly enterprises as they may decide to tolerate notwithstanding the principle of Article 276. Still more useful would be a provision that would require the State to promote competition in the grant of public concessions and in the economy at large.

4. Article 89

Article 89 reserves for the State a preferential right to purchase (*derecho de tanteo*) in any forced sale of real estate or securities representing real estate.³³ The expression *derecho de tanteo* indicates that the State may exercise its preemption right at the same price offered by the highest private bidder in any such sale. This provision amounts to a

restriction on the property rights of both the seller and the frustrated buyer of the property.

The rule of Article 89 was probably aimed at preventing the conclusion of forced sales at artificially low prices resulting from collusion among prospective bidders.³⁴ Whatever the merits of this policy, giving the state preemptive rights would promote public ownership of property at a time when the Cuban State should pursue the opposite goal. Besides, in a noncollusive sale, the existence of the State's right of preemption would tend artificially to depress the price by discouraging potential bidders from participating in the sale. For these reasons, it would be wise to leave this provision out of the new constitution and rely on ordinary legislation to address the problem of collusion in forced sales.

5. Article 90

The first paragraph of Article 90 provides that large estates (*latifundia*) are "proscribed" and that laws shall be passed to break up such estates by specifying the maximum amount of land that a person or entity may hold for each particular type of land use.³⁵ This provision was drafted as a means of combating what was viewed as the excessive accumulation of land in the hand of a few individuals, which had given rise to large landed estates. But while *latifundia* may have been a severe problem in Cuba in 1940, it is neither efficient nor appropriate from the viewpoint of a modern capitalist system to grant the government the ability to exercise such broad control over property ownership. The maximum amount of property that an individual or entity may own for a particular use should be determined by the market return of that use, not by government fiat. Leaving such power in the hands of the government would almost certainly lead to an inefficient use of resources and would retard economic development, something post-Castro Cuba can ill afford.

The second paragraph of Article 90 provides for legislation to restrict the acquisition and possession of land by foreign individuals and companies and to promote reversion to Cuban ownership.³⁶ Given the situation in the years prior to 1940, during which foreign (primarily United States) interests owned or controlled the majority of the land and equipment used in the sugar industry, it is understandable that the drafters of the constitution viewed reacquisition of land from foreign interests as a constitution-

al issue. In post-Castro Cuba, however, such a provision would have the effect of stifling the needed inflow of foreign investment capital.

In sum, the ideas embodied in Article 90 of the 1940 constitution do not seem appropriate for post-Castro Cuba. Economic efficiency, through operation of market forces, should dictate the size of individual land holdings. Foreign investment, as many countries in Latin America discovered after long periods of decline, is not an instrument of economic colonialism (as it was perceived to be in an earlier era), but rather the only available source of much-needed capital to modernize stagnant economies. Cuba, which is geographically closer than any other Latin American country to the United States' large east-coast consumer market, is ideally situated to benefit from foreign investment in manufacturing operations for export to the U.S. market. But to take advantage of this favorable position, potential investors must be assured of equal treatment and freedom from over-regulation of the resources market. For these reasons, neither Article 90 as written nor the ideas it represents should be included in a new Cuban constitution. On the contrary, one of the priorities of a post-Castro government should be to enter into a broad network of bilateral and multilateral treaties for the promotion and protection of foreign investment.³⁷

6. Article 91

Article 91 allows the head of a household who owns a rural property and inhabits, cultivates, and directly exploits such property to designate a portion of it (not exceeding 2,000 pesos in value) as "family property," rendering it exempt from taxes and attachment, but not alienable by him.³⁸ This provision is similar to "homestead" laws adopted in some other countries for the purpose of protecting family farmers and ensuring that they will not be deprived of their means of basic subsistence.

It is important to realize, however, that if this provision applied to land of more than a very modest value, it would become an important barrier to the free alienability of agricultural property, which is critical to the efficient use of land and other resources. At this point in Cuba's history, full utilization of land and a farmer's ability to obtain credit will be of prime importance to Cuba's development. (The possibility of encumbering crops may not be sufficient to obtain financing for capital improve-

ments such as farm machinery.) The drafters of the new Cuban constitution should consider these implications carefully before adopting a “family property” provision that would allow a significant portion of the country’s agricultural land to be withdrawn from the market.

7. Article 93

Article 93 prohibits perpetual encumbrances in the form of *censos*³⁹ or similar restrictions, unless established for the benefit of the State or in favor of public institutions or private charities.⁴⁰ Permanent encumbrances, by their nature, prevent land from being put to its most efficient use. The general prohibition established in this article is therefore sound and should be retained in the post-Castro constitution. As for the exception contemplated in the article, permanent restrictions for the benefit of state entities and private charitable institutions would prevent the most efficient use of property just as much as would do similar restrictions for the benefit of other entities. We perceive of no good reason for such an exception.

8. Article 252

Article 252 contains a set of restrictions on the alienability of State property.⁴¹ It provides that property owned by the State as if it were a private person may not be disposed of or encumbered unless the following conditions are met: (i) The divestiture or encumbrance must be authorized by special act of the Congress, adopted for reasons of social necessity or convenience by a vote of two-thirds of each chamber; (ii) if the divestiture is a sale, it must be carried out by public tender; and (iii) the proceeds of the divestiture must be applied to creating jobs, providing public services, or meeting public needs. As an exception, if the divestiture or encumbrance is carried out pursuant to a national economic plan approved by a special act of the Congress, it may be authorized by ordinary legislation and the requirement of a public tender does not apply.

It is not clear why the drafters of this article sought to put these obstacles in the way of the alienation of State property.⁴² Perhaps this provision reflects a bias toward State ownership or a desire to prevent government corruption. Be that as it may, in a democratic post-Castro Cuba, it

would be perverse to put excessive restrictions on the efforts of the new government to make the most efficient use of the country's resources. In particular, it would be most unwise to obstruct the new government's ability to privatize state enterprises and thus reduce the size of the public sector inherited from the prior regime. With this in mind, it seems a better course to refrain from including a provision such as Article 252 in the new constitution. Instead, the legislature should be expressly authorized to sell or lease State-owned properties through the ordinary legislative process.

9. Article 273

Article 273 provides that an owner of real estate whose property increases in value solely as a result of action by the State, a province, or a municipality must turn over to that entity a portion of that increase as determined by law.⁴³ This article appears to grant to the various levels of government a share of any increment in the value of land resulting from events such as the installation of a water line serving the land, construction or improvement of a nearby public road, or other types of public works directly benefiting the property.

It is uncertain, however, whether Article 273 would apply to increases in value that may be attributable to general infrastructure works, such as a harbor or an airport, which may benefit a region (or the country as a whole), but not necessarily any piece of property in particular. Nor is it clear whether the State could claim a share of increments in land values attributable to its general economic policies. Further, this article leaves open issues such as how the increase in value would be calculated, what the State's share would be, and how it would be paid to the State.

Apart from these uncertainties, the very principle embodied in Article 273 is objectionable. One can imagine a situation in which a municipality may construct a paved road adjacent to the property of several individuals or entities, without the landowners' agreement or even desire for such a road, and then assess them an amount representing the municipality's statutory share of the increment in the property values attributable to the new road. If the properties are subject to property tax and the added values are used to increase the tax base, the owners may end up paying for the added values over and over again.

In sum, the rule of Article 273 is open to substantial abuse. If a piece of property increases in value solely as a result of improvements made by the State, the State should recover the value of the improvements only through taxation, whether in the form of special tax assessments or regular taxes applied to the increased tax base of the property.

10. Articles 274 and 275

Article 274 restricts leasing and farming rights related to rural property.⁴⁴ It does so by providing for the regulation of leases, cane-planting, and sharecropping contracts concerning such properties, and by specifying in considerable detail the matters to be regulated and the nature of the restrictions to be established. Article 275 requires the passage of legislation to regulate planting and grinding of sugar cane by sugar mills, to prevent vertical integration of the sugar industry.⁴⁵

These restrictions reflect the peculiar circumstances existing in Cuba in 1940: the overwhelming role of the cane sugar industry in the Cuban economy, the extent of government intervention in that industry, and the perceived need to protect small lessees and sharecroppers from exploitation by large landowners and sugar mills. Whether or not these provisions were justifiable in 1940, they are now relics of a bygone era. The drafters of the new constitution will have to decide, on the basis of the economic and social conditions left behind by the wreck of the Castro regime, whether small farmers are in need of special protection and whether strict regulation of the sugar industry makes any economic sense. If they so conclude, they may wisely address the problem through ordinary legislation rather than by inflexible constitutional mandate.

11. Article 276

Article 276 renders null and void any statute or other legal provision that creates a private monopoly or that regulates commerce, industry, or agriculture in such a way as to produce the same result.⁴⁶ It also calls for legislation to prevent monopolization of commercial activities in industrial and agricultural establishments.

The principle of competition underlying Article 276 is generally recognized as one of the pillars of a modern capitalist economy. It should

undoubtedly be enshrined in the new Cuban constitution. In drafting an appropriate provision, the framers of the new charter should consider expanding the principle to apply not only to the regulation of commerce, industry, and agriculture, but also to other economic activities such as labor and the professions.⁴⁷

IV. Conclusion

In analyzing how property rights should be protected by a democratic Cuban constitution, it is natural to use as a point of departure the provisions of the 1940 constitution. The 1940 constitution, which is widely regarded as the product of a free and representative political process, still commands respect and enjoys legitimacy among the heirs to the democratic Cuban tradition. For all its legitimacy, however, the 1940 constitution largely reflects the issues, conflicts, ideologies, circumstances, and political compromises of the 1930s. At least in the area of property rights, the 1940 constitution sometimes speaks in accents that, at the dawn of the twenty-first century, are no longer easy to recognize.

That is why we have suggested changes aimed at bringing the provisions of the 1940 constitution into harmony with the democratic, free-market revolution that has swept much of Latin America and Eastern Europe during the last two decades. The regime of Fidel Castro has left Cubans in chains and in tatters. As other Latin American countries have learned, political and economic freedom, not government paternalism, allows individuals and communities to rise from poverty, exercise their creative and entrepreneurial talents, and pursue their own visions of happiness. No political and economic freedom can develop and endure, however, without strong protection for the right to own and to enjoy property under the discipline of the market.

In this light, we suggest that among those provisions of the 1940 constitution related to property rights, what we have called the core provisions (Articles 24, 87, 23, and 97), ought to be incorporated in the new post-Castro constitution subject to a few important changes. The non-core provisions should be approached more selectively. Some of them (Articles 43, 93, and 276), or at least the principles underlying them, are unobjectionable and should be retained. Others (Articles 33, 90, 252, 273,

and the second paragraph of Article 88) are largely inconsistent with the principles of a free market and a free society or with the economic needs of present-day Cuba and should be left out of the new constitution. Still others (Article 91 and the first paragraph of Article 88) may or may not be acceptable, depending on certain basic political decisions to be made by the representatives of the Cuban people. Finally, certain provisions (Articles 89, 274, 275, and the second part of Article 92) should be the subject of ordinary legislation, rather than constitutional mandate.

Deciding what should be recognized as property rights and how much those rights ought to be protected by a post-Castro democratic constitution will involve fundamental political choices which must be made at the appropriate time by the genuine representatives of all Cubans. Those choices will involve not only the application of political and economic theories, but also complex prudential judgments based on the history, traditions, culture, and aspirations of the Cuban people. The authors, as non-Cubans, offer the suggestions contained in this paper in a spirit of modesty and deference to those who will have the monumental task of rebuilding Cuban society and institutions on the rubble left behind by the Castro regime.

Appendix: Outline of a Program for the Restoration of Property Rights by a Democratic Cuban Government

I. Introduction

The collectivization of the Cuban economy was accomplished by the Castro regime primarily through confiscations and forced transfers of private property owned by Cubans and foreigners. Since little or no compensation was paid, a post-Castro government should be prepared for an avalanche of claims from dispossessed owners, Cuban and foreign, for restitution of their properties or payment of just compensation. As long as those claims are left unresolved by the new government, title and other rights to confiscated properties will remain unsettled, and that uncertainty will hinder the development of stable markets and discourage the large-scale investments required for the reconstruction of the Cuban economy.

Therefore, one of the early tasks of a post-Castro government should be to devise a program to resolve, in a definitive manner, the property claims of the dispossessed owners. This paper represents our contribution to that task. We propose, in the form of an outline, a Program for the Restoration of Property Rights to be adopted by a democratic Cuban government. The proposed Program (we shall call it the Program, for short) is *restoration* program, as distinguished from a mere restitution or compensation scheme, because it is designed (i) to provide those who have meritorious claims with a flexible combination of remedies (restitution, compensation, and compensation-in-kind) and (ii) to allow for the possibility of reestablishing, to the extent physically possible and economically feasible, property rights and legal relationships that were destroyed by the Castro regime. The restoration of property rights should be, by its nature, a one-time occurrence. At the completion of the Program, property rights would be finally settled and entitled to full, permanent protection under the new constitution discussed in the first part of this article.

The central purposes of the Program are to return most property to the private sector, to settle contested property rights, and to treat dispossessed owners fairly. We recognize that a simple way of settling contested titles would be to ratify whichever titles exist at the time the Castro regime comes to an end and to give every prior claimant some form of monetary

compensation. Nevertheless, monetary compensation, even that which satisfies the strictest legal requirements, rarely makes a dispossessed owner whole.⁴⁸ Even if the government has sufficient funds to pay fair market value for the property, in some cases (such as a family home or business) that value may be considerably less than the subjective value of that property to the owner.⁴⁹ In those circumstances, monetary compensation alone would be inadequate, in terms of fairness, to compensate those who have been deprived of their property. If a property-settlement program were reduced to a contest between private owners dispossessed by the Castro regime and private owners who took title from the Castro regime (with knowledge or reason to know that the property had been confiscated), we believe that the balance of equities would favor the original owners. The Program does reflect this equitable choice, but as only one element of a complex, balanced scheme.

In devising the Program, we have weighed a multitude of factors such as the principles at stake; the feasibility of restitution; the physical condition, legal status, and current use of the property; the possibility of intervening transfers; the need to foster the productive use of the property; and the financial resources expected to be available to a post-Castro government. We have also considered the experience of other former socialist states in formulating and administering comparable programs.⁵⁰

A primary goal of the Program is to treat Cuban and non-Cuban claimants alike under standards no less favorable than those required for non-Cubans under international law. Under international law, non-Cubans whose properties were taken by the Castro regime without just compensation are entitled to certain standards of protection and certain means of redress, including restitution of the property or, if restitution is not feasible, payment of the fair market value of the property at the time of the taking, with interest at market rates from that time to the time of payment.⁵¹ Cuban claimants whose properties suffered the same fate ought to be entitled, as a matter of fairness and sound policy, to the same standards of protection and means of redress.

The Program is intended to provide a comprehensive legal framework for the orderly restoration of property rights that were confiscated, forcibly transferred, or otherwise taken or seized from the lawful owners by the Castro regime, in violation of the principles of the Cuban constitution of 1940 or those of international law. Within this compass, the

Program would apply to all kinds of property rights, including ownership, other interests in property, contract rights, and intellectual property. The Program would not apply, however, to claims that have been finally settled by international adjudication or agreement between the Cuban State and the State of which the claimant is a national, as long as those settlements have been paid. Nor would it apply to claims for the violation of other rights, such as claims for wrongful death, torture, or imprisonment inflicted by the agents of the Castro regime. These claims raise issues that are not suitable for resolution in a program designed to redress property claims. Compensation for such claims should be provided under a separate program.

The Program is designed to provide a remedy to the dispossessed holders of the covered property rights, regardless of nationality or citizenship. The remedy may be restitution, compensation, or compensation-in-kind. Restitution would be the preferred remedy, unless it is physically impossible, economically impracticable, or injurious to the public interest. (In the case of an occupied residential building or unit, there would be a rebuttable presumption that restitution would not be in the public interest). If restitution were inapplicable, the ordinary substitute remedy would be compensation in an amount equal to the full market value of the property at the time of dispossession, plus interest. As an alternative to restitution or compensation, the authority administering the Program would have the power to offer, subject to the claimant's acceptance, compensation-in-kind. Compensation-in-kind would be another property held by the State, preferably of a kind or value comparable with those of the property in question.

The Program reaffirms the property rights of all beneficiaries, including both original owners who suffered dispossession at the time or in the wake of the revolution and current bona fide holders of property. The former, as primary beneficiaries of the Program, will generally be entitled to restitution of their property. The latter, as secondary beneficiaries, will generally receive compensation. Foreign investors who acquired property from the Castro government in exchange for payment of reasonably equivalent value would be entitled to compensation, a solution that should satisfy Cuba's obligations under any applicable bilateral investment treaty and customary international law.⁵² Individuals and entities that acquired property through exploitation of a position of power or

influence in the Castro regime or that acquired property from the Castro government without paying reasonably equivalent value would be ineligible to claim under the Program.

To prevent the general restoration of property rights from having any adverse impact on the Cuban economy, we have included what we call the Investment Priority Exception as a central feature of the Program. Whenever there is an urgent need to promote the productive use of a piece of property or business subject to the Program, the authority administering the Program would be empowered to sell that property or business to the private sector, by public tender. In such cases, the claimant would have the right to participate in the tender. Should the claim be later adjudicated in his favor, he would be entitled to restitution of the purchase price or to compensation, depending on whether or not he was the successful bidder in the tender.

The Program – indeed any program of its kind – will be workable only if it is provided with an unassailable legal basis, so that its implementation is not tied down in endless legal disputes. Accordingly, it is proposed on the following assumptions:

1. The Program will be adopted by a new post-Castro government as part of a comprehensive process of democratization of the state and liberation of the economy.

2. The Program will be authorized by the new Cuban constitution in such a way that its constitutional validity is unassailable. For example, the constitution could be drafted to include a transitional provision that incorporates the Program by reference, while making sure that no unresolved conflict exists between such transitional provision and the regular provisions of the constitution dealing with property rights.

3. For purposes of implementing the Program, the new constitution will also confirm legal title to property held by the State under the law existing at the time the constitution takes effect, and it will grant to the agency charged with administering the Program the power to take any and all actions required for such implementation, including the power to expropriate, subject only to the remedies provided for in the Program.

4. The Program (and the decisions taken to implement it) will override general legislation, including the provisions of the Civil Code regarding the acquisition of title by acquisitive prescription (adverse possession).

5. The Program (and the decisions taken to implement it) will override any vested rights and any claims of vested rights.

6. The Program will constitute the sole remedy under Cuban law (foreign claimants will always have remedies under international law) in respect of the claims covered thereby.

7. The decisions of the authority charged with administering the Program (which we call the Adjudicatory Commission) will be final, except for the possibility of an expedited appeal to the Cuban Supreme Court.

These assumptions are necessary (but, of course, not sufficient) conditions for the success of the Program. Other requirements are self-evident, such as the need for an administering agency composed of individuals of unimpeachable probity and unencumbered by ritualistic procedures.

While a good deal of flexibility is desired in the fabric of the Program, we readily acknowledge that its success or failure will depend on the resources available to a post-Castro government, as compared with the number and magnitude of the claims expected to be filed. In that respect, the Program (indeed any program of its kind) may have to be adjusted to the conditions existing at the time the new government takes office. Before knowing the constraints of a future reality, we see no reason to depart from the ideal.

II. The Program

A. Rights Subject to the Restoration Program

1. *General Rule.* All property rights that were the subject of wrongful expropriation by the Castro regime shall be subject to the Program.

2. *Property Rights.* For the purposes of the Program, the term “property rights” shall comprise patrimonial rights of any kind whatsoever, including ownership and other rights *in rem* in movable or immovable things, intellectual property, rights derived from contracts, and other patrimonial rights *in personam*, but shall not include (i) rights corresponding to claims that have been finally settled by agreement between the Cuban State and the State of which the claimant was a national or citizen

at the time the claim arose (or at the time of the agreement), and (ii) rights corresponding to indemnification claims for personal injury or moral damages resulting from the actions or omissions of the Castro regime, including claims for wrongful death, torture, and unjust imprisonment.

3. *Wrongful Expropriation.*

(a) For the purposes of the Program, a property right shall be deemed to have been the subject of wrongful expropriation if (i) it was the subject of expropriation, confiscation, or nationalization, or was otherwise taken, seized, abolished, or extinguished, in whole or in part, by the Castro regime, in each such case in violation of the principles and guarantees set forth in the constitution of 1940 or in violation of international law; or (ii) such right lapsed or was forfeited, lost, extinguished, or transferred to the State, in whole or in part, as a consequence of acts of political persecution by the Castro regime, or criminal or other proceedings conducted during the Castro regime that were contrary to the rule of law.

(b) In particular, and without prejudice to the generality of the foregoing, a property right shall be deemed to have been the subject of wrongful expropriation in any of the following circumstances:

(i) Whenever the right was the subject of expropriation, confiscation, or nationalization, or was otherwise taken, seized, abolished, or extinguished, in whole or in part, by the Castro regime without payment of compensation or with payment of less compensation than that required by the principles set forth in paragraphs (C)(3)(b)(i) and (C)(3)(b)(ii).

(ii) Whenever the right was the subject of expropriation, confiscation, or nationalization, or was otherwise taken, seized, abolished, or extinguished, in whole or in part, by the Castro regime by reason of the owner's nationality or citizenship or condition of alienage, or as a penalty for a political crime, or as a result of criminal or other proceedings that were contrary to the rule of law or aimed at punishing political crimes, or solely as a consequence of a person having left the country.

(iii) Whenever the right lapsed or was forfeited, lost, or extinguished, in whole or in part, by reason of the owner's nationality or citizenship or condition of alienage, or as a result of imprisonment or other punishment imposed by the Castro regime for a political crime, or

as a result of criminal or other proceedings conducted by the Castro regime that were contrary to the rule of law or aimed at punishing political crimes, or solely as a consequence of a person having left the country.

(iv) Whenever the right was transferred or abandoned by the owner to the State as a condition for the owner or his family obtaining permission to leave the country.

(v) As regards the prior owner, whenever the right was acquired, in whole or in part, during the Castro regime by an individual or an entity (governmental or otherwise) through exploitation (including the use of duress or deception) of a position of power in or influence with the Castro regime.

(c) Notwithstanding paragraphs (A)(3)(a) and (A)(3)(b), a property right shall not be deemed to have been the subject of wrongful expropriation if the owner thereof received compensation from the Cuban State in an amount that is not less than the amount that would have been required by the principles set forth in paragraphs (C)(3)(b)(i) and (C)(3)(b)(ii).

4. *Castro Regime.* For the purposes of the Program, the Castro regime shall be understood to be the regime that held power in Cuba between January 1, 1959, and [the date on which the democratic government takes office] and any official or unofficial instrumentality thereof.

B. Beneficiaries of the Restoration Program

1. *Beneficiaries.* The beneficiaries of the Program shall be of two kinds: (i) primary beneficiaries and (ii) secondary beneficiaries.

(a) *Primary Beneficiaries.* The primary beneficiaries of the Program shall be, in respect of each property right subject to the Program, (i) those individuals or entities (other than ineligible parties), regardless of nationality or citizenship, that held, immediately prior to the wrongful expropriation, title to the property right, in whole or in part, and (ii) the successors of such individuals or entities.

(b) *Secondary Beneficiaries.* Any individual or entity (other than an ineligible party), regardless of nationality or citizenship, that is deprived of a property right as a result of the application of the Program, but is entitled to compensation or compensation-in-kind thereunder by

reason of such deprivation, shall be deemed to be a secondary beneficiary of the Program only for the purposes of such compensation or compensation-in-kind.

(c) *Ineligible Parties.* For the purposes of the Program, the following shall be considered ineligible parties: (i) the Cuban State, (ii) any Cuban governmental entity, (iii) any individual or entity that acquired the property right at issue through exploitation (including use of duress or deception) of a position of power in or influence with the Castro regime, and (iv) any individual or entity that acquired the property right at issue from any other ineligible party without giving, in exchange, value (in cash or in kind) that was reasonably equivalent to the value of such property right at the time of the acquisition.

2. *Claims.* Any beneficiary is entitled to make a claim under the Program. In cases of property rights held jointly by more than one individual or entity, before granting the appropriate remedy under the Program to those beneficiaries who have made a claim, the Adjudicatory Commission (hereinafter defined) shall give to other beneficiaries reasonable notice and opportunity to come forward. The same rule shall apply in respect of property rights encumbered by or subject to other property rights held by other beneficiaries.

3. *Priority of Claims.* Other than in the case of property rights held jointly, if two or more primary beneficiaries make claims under the Program with respect to the same property right, the claimant in the chain of title who suffered the earliest wrongful expropriation shall have priority for the purpose of restitution of such right. The other claimants shall receive compensation or compensation-in-kind in accordance with the Program.

4. *Successors.*

(a) For the purposes of the Program, the term “successor” of a beneficiary shall mean any individual or entity to whom the property right at issue, or a claim related thereto, has been transferred, directly or through one or more intermediate transferors, by an act of the beneficiary or by operation of the law, and shall include heirs, legatees, donees, purchasers, assignees, and other transferees *inter vivos* or *mortis causa*. Any such transfer shall be deemed valid and effective if (i) it is valid and effective under Cuban law as it existed prior to the advent of the Castro regime or would have been valid and effective under such law had such law

remained in effect throughout the Castro regime, or (ii) it is valid and effective under Cuban law as it existed under the Castro regime (but without prejudice to the provisions of paragraph (B)(1)(c) regarding ineligible parties), or (iii) it is valid and effective under the law of any country where the transfer took place or the transferor or the transferee was organized or had its domicile or residence or conducted business.

(b) If the beneficiary is a business organization that is no longer in existence and no successor to such organization can be determined under the rule of paragraph (B)(4)(a), a claim under the Program may be brought by those who held at least fifty per centum of the equity of such organization (or their respective successors). In such case, the claimants shall be regarded as successors to the beneficiary for the purposes of the Program. To this end, reasonable notice and opportunity to come forward shall be given to other individuals or entities that held equity in the organization.

C. Remedies

1. *General.* The available remedies under the Program shall be (i) restitution, (ii) compensation, and (iii) compensation-in-kind. Restitution shall be the preferred remedy, except in the cases contemplated in paragraph (C)(5), in which restitution is unfeasible, and the cases contemplated in paragraph (C)(6), which are subject to the investment-priority exception. Whenever restitution is not applicable, the ordinary substitute remedy shall be compensation. In all cases, however, the Adjudicatory Commission may offer to the beneficiary and the beneficiary may accept, in lieu of restitution or compensation, compensation-in-kind.

2. Restitution.

(a) *General rule.* Except as set forth in paragraphs (C)(5) and (C)(6), a primary beneficiary under the Program shall be entitled to restitution in full of the property right that was the subject of a wrongful expropriation (or, in the case of a wrongful expropriation regarding part of a property right, the part that was the subject of such wrongful expropriation), whether such right is currently held by the State or by a third party. To this end, the Adjudicatory Commission shall segregate and/or reconstitute such rights, to the extent possible, and shall transfer them to

the beneficiary. Except as provided in paragraph (C)(2)(b), such property rights shall be transferred free and clear of all encumbrances other than any encumbrances that existed at the time of the wrongful expropriation and (i) are still in existence at the time of the restitution or (ii) are reinstated under the Program. Encumbrances that existed at the time of the wrongful expropriation, but are no longer in existence at the time of the restitution, shall be reinstated (i) in favor of any primary beneficiary that is entitled under the Program to restitution of the corresponding property rights, or (ii) in favor of the State, subject to further application of the Program.

(b) *Restitution of Business Enterprises.* If the property rights that are subject to restitution comprise a business enterprise that is conducting business as a going concern at the time of the restitution, as a general rule (i) those property rights shall be transferred to the primary beneficiary that is entitled to restitution thereof subject to all existing encumbrances and (ii) such primary beneficiary shall assume, as a condition of the restitution, all existing obligations and liabilities of the enterprise, including all existing labor contracts and other contracts that call for further performance. In exceptional circumstances, to encourage the prompt return of the business enterprise to the private sector as a viable concern or otherwise when the interests of the enterprise and the national economy so require, the Adjudicatory Commission shall have the power to cancel such encumbrances, obligations, or liabilities, in whole or in part, and to order the restitution of the enterprise in the resulting condition. In all cases contemplated in this paragraph, the primary beneficiary shall be entitled to additional compensation as provided in paragraph (C)(3)(e), but the amount of such compensation shall be determined by taking into account the benefit to such primary beneficiary arising from any cancelled encumbrance, obligation, or liability. Any party (other than an ineligible party) that was entitled to the benefit of any such cancelled encumbrance, obligation, or liability, shall have the rights specified in paragraph (C)(3)(f).

(c) *Restitution of Property Rights Not Comprising Business Enterprises.* In the case of property rights other than those referred to in paragraph (C)(2)(b), any encumbrance on such property rights that did not exist at the time of the wrongful expropriation shall be cancelled. The primary beneficiary that obtains restitution of such property rights shall

be entitled to additional compensation to the extent provided in paragraph (C)(3)(e). Any party (other than an ineligible party) that was entitled to the benefit of any such cancelled encumbrance shall have the rights specified in paragraph (C)(3)(f).

3. *Compensation.*

(a) *Exclusive Source of Compensation.* A beneficiary entitled to compensation under the Program shall receive compensation from the Compensation Fund, as provided in the Program, to the exclusion of compensation from any other source.

(b) *Measure of Compensation.* Whenever compensation is required under the Program, such compensation shall consist of a principal amount and interest thereon, calculated as follows:

(i) *Business Enterprises.* In the case of property rights in any business enterprise that was conducting business as a going concern at the time of the wrongful expropriation, the principal amount of compensation shall be equal to the going-concern value of such enterprise immediately prior to such expropriation, as measured by the fair market value of such enterprise, or, in the absence of an observable, genuine market for such enterprise, by the discounted-cash-flow method. Such value shall not be deemed to have been reduced by the threat of expropriation or any other action of the Castro regime that was inconsistent with the guarantees provided by the constitution of 1940 or directed against such business enterprise or the owner or owners thereof.

(ii) *Other Property Rights.* In the case of any property right other than those related to the business enterprises referred to in paragraph (C)(3)(b)(i), the principal amount of compensation shall be equal to the fair market value of such right immediately prior to the wrongful expropriation. Such value shall not be deemed to have been reduced by the threat of expropriation or any other action of the Castro regime that was inconsistent with the guarantees provided by the constitution of 1940 or was directed against such property rights or the owner or owners thereof.

(iii) *Currency of Calculation.* To the extent feasible, the principal amount of compensation shall in all cases be calculated in Cuban pesos and shall be converted into United States dollars at the “buy” free-market rate of exchange in effect on the date of the wrongful expropriation. Otherwise, such principal amount shall be calculated in United

States dollars.

(iv) *Interest.* In all cases, the principal amount of compensation shall be augmented by interest thereon from the date of the wrongful expropriation to the date of payment of compensation under the Program. Such interest shall be calculated at such free-market rates for dollar obligations as shall be adequate fairly to compensate the beneficiary for having been deprived of the use and enjoyment of the principal amount during such period.

(c) *Form of Compensation.*

(i) Compensation under the Program shall be paid in the form of cash or debt obligations of the Cuban Treasury, or a combination thereof, as determined by the Adjudicatory Commission taking into account the availability of cash in the Compensation Fund, the compensation awards to be paid, and other appropriate factors.

(ii) Compensation in the form of cash shall consist of United States dollars or the equivalent thereof in Cuban currency at the “buy” free-market rate of exchange in effect on the date of the payment, except that those beneficiaries that are not Cuban citizens shall not be obligated to accept Cuban currency if the currency is not freely convertible into United States dollars at the same rate of exchange.

(iii) In the case of compensation in the form of debt obligations of the Cuban Treasury, the obligations shall be issued at par, shall be denominated in United States dollars, shall bear interest at a fair market rate, shall be freely transferable, and shall be payable in as short a term and under such conditions and with such security or guarantees, as shall be compatible with the financial condition of the Cuban State. The holder of any such debt security shall have the option of applying it, at par, towards payment of the purchase price of any asset of the State that is privatized, whether pursuant to paragraph (C)(6) or otherwise.

(d) *Compensation in Lieu of Restitution.* Any primary beneficiary that is entitled to compensation in lieu of restitution pursuant to paragraph (C)(5) or (C)(6)(c), or whose claim does not have priority pursuant to paragraph (C)(3), shall receive compensation as provided in the preceding paragraphs.

(e) *Additional Compensation in Cases of Restitution.* Any primary beneficiary that obtains restitution of property rights shall be entitled to additional compensation: (i) in an amount that shall approximate

as much as possible the amount (if any) by which the value of such property rights at the time of the wrongful expropriation exceeds the value of such rights at the time of the restitution, and (ii) in an amount, to be equitably determined by the Adjudicatory Commission, designed to compensate the beneficiary for having been deprived of the use and enjoyment of such property rights between the time of dispossession and the time of restitution. For the purposes of clause (i), the value of the property rights at such times shall be determined by applying the appropriate provisions of paragraph (C)(3)(b), *mutatis mutandis*.

(f) *Compensation to Eligible Third Parties.*

(i) Any third party (other than an ineligible party) that is the beneficiary of any encumbrance, obligation, or liability that is cancelled as provided in paragraph (C)(2)(b) shall be deemed to be a secondary beneficiary under the Program and entitled to compensation if such party demonstrates that such encumbrance, obligation, or liability was created in good faith, for reasonably equivalent value, and in the ordinary course of business of the enterprise subject to restitution.

(ii) Any third party (other than an ineligible party) that is the beneficiary of any encumbrance, obligation, or liability that is cancelled as provided in paragraph (C)(2)(c) shall be deemed to be a secondary beneficiary under the Program and entitled to compensation if such party demonstrates that such encumbrance, obligation, or liability was created in good faith and for reasonably equivalent value.

(iii) Any third party (other than an ineligible party) that is dispossessed of any property right as a result of the implementation of this Program shall be deemed to be a secondary beneficiary under the Program and entitled to compensation if such third party demonstrates that, at the time it acquired such property right, that party was not aware, and had no reason to be aware, of the wrongful nature of the expropriation and did not know or have reason to know of the existence of a claim to such property right.

(iv) In all cases contemplated in paragraph (C)(3)(f), the compensation shall approximate as much as possible the value of the property right immediately prior to the cancellation or dispossession (as the case may be), as determined by the appropriate provisions of paragraph (C)(3)(b), *mutatis mutandis*.

4. *Compensation-in-Kind.* Whenever a primary or secondary bene-

fiary is entitled to restitution or compensation (as the case may be) under the Program, the Adjudicatory Commission may offer to such beneficiary compensation-in-kind, in lieu of all or part of such restitution or compensation. Compensation-in-kind shall consist in the transfer to the beneficiary of any property right held by the State, preferably one that is comparable in kind or value with the property right of which the beneficiary was deprived. In making an offer of compensation-in-kind, the Adjudicatory Commission shall take into consideration the qualifications of the beneficiary to put the object of the property right being offered to economically productive use within the shortest possible time. The Adjudicatory Commission shall be free to devise the conditions under which the property rights offered as compensation-in-kind would be transferred to the beneficiary. The beneficiary shall not be required to accept the offer of compensation-in-kind. Unless the offer of compensation-in-kind is made and accepted in satisfaction of the beneficiary's entire claim, the beneficiary shall be entitled to additional compensation representing the amount (if any) by which the value of the property right of which he was deprived exceeds the value of the property right received as compensation-in-kind. Such values shall be determined by applying the appropriate provisions of paragraph (C)(3)(b), *mutatis mutandis*.

5. *Unfeasibility of Restitution.* Whenever restitution of wrongfully expropriated property rights is physically impossible, economically impracticable, or injurious to the public interest, it shall be set aside in favor of compensation or, if applicable, compensation-in-kind. Without prejudice to the generality of the foregoing, restitution shall be deemed to be physically impossible, economically impracticable, or injurious to the public interest in the following circumstances:

(a) Whenever the property rights at issue relate to a business enterprise that has ceased to operate and has no reasonable prospect of being restarted.

(b) Whenever the property rights at issue relate to a business enterprise that has been merged into or integrated with a larger business concern and such enterprise cannot be disassociated or disintegrated without serious damage to the business as a whole or the public interest.

(c) Whenever the object of the property rights at issue will be used by the government for a valid public purpose.

(d) Whenever the object of the property rights at issue has been

integrated into a patrimony given over to a business or charitable use and such object cannot be separated without serious damage to such business or charitable use or the public interest.

(e) Whenever the object of the property rights at issue is an occupied residential building or unit, unless the Adjudicatory Commission determines that, taking into account all circumstances of the case, restitution will not be injurious to the public interest. In the case of an occupied residential building or unit, the Adjudicatory Commission may offer, and the primary beneficiary may agree, (i) to postpone restitution until such time as the occupant has vacated the building or unit or for such period as may be designated by [a separate statute addressing the housing problem, hereinafter referred to as “the Housing Law”], during which period the primary beneficiary shall be entitled to compensation for the delay, in an equitable amount determined by the Adjudicatory Commission, or (ii) to make restitution subject to leases granted to the occupant(s) of such building or unit for such term and subject to such conditions as are specified in the Housing Law.

(f) Whenever the object of the property rights at issue has a fair market value, at the time of the inception of the Program, not exceeding [an amount to be specified] in the case of real estate and [an amount to be specified] in the case of other kinds of property.

6. *Investment Priority Exception.*

(a) If, prior to final adjudication of the status of a particular property, business enterprise, or any other property right subject to the Program, the Adjudicatory Commission finds that such property, business enterprise, or other property right is not being put to economically productive use or that the public interest requires immediate transfer of such property, business enterprise, or other property right to the private sector, it may make a public tender for bids to acquire such property, business enterprise, or other property right. Whenever feasible, the public tender shall be conducted in two stages: (i) a qualification stage, at which each bidder shall offer a minimum investment commitment and, in the case of business enterprises, the bidder’s qualifications as an operator of the business; and (ii) a price stage, at which each qualified bidder shall bid on the price. The successful bidder shall enter into an Acquisition and Investment Agreement with the Adjudicatory Commission.

(b) Any individual or entity that has filed a prima facie valid

claim for restitution of the property, business, or other property right subject to the preceding paragraph shall have the right to participate in the public tender, under the same conditions as all other bidders, except that such individual or entity shall be deemed to be fully qualified as an operator of the business. If the successful bidder is the individual or entity that filed the restitution claim and such claim is ultimately resolved in favor of the claimant, the claimant shall be entitled to restitution of the acquisition price.

(c) If the property, business, or other property right is sold to a third party, the beneficiary that would otherwise be entitled to restitution shall receive, in lieu of restitution, compensation pursuant to paragraph (C)(3)(d), or, as applicable, compensation-in-kind pursuant to paragraph (C)(4).

7. *Recoupment by the State.*

(a) The proceeds of the sale of properties, business enterprises, or other property rights under paragraph (C)(6) and any funds recovered by the State pursuant to the following provisions shall be deposited in the Compensation Fund.

(b) If the State is required to pay compensation under the Program by reason of a diminution in the value of any property right, and such diminution was the result of damage to the object of such property right, the State shall be entitled to recover compensation for such damages from any individual or entity (other than an individual or entity entitled to compensation under paragraph (C)(3)(f)) responsible for the damage.

(c) As regards any property right that is the subject of restitution under the Program, if the value at the time of restitution of such property right (or the object of such right) is higher than the corresponding value at the time of the wrongful expropriation, the State shall be entitled to recover from the primary beneficiary that obtained restitution of such property right the portion (if any) of such increase in value that is solely and directly attributable to actions of the State or of any third party that held such property right at any time between the wrongful expropriation and the restitution.

(d) If a primary beneficiary that obtains restitution, compensation, or compensation-in-kind under the Program received partial compensation from the State, by reason of the wrongful expropriation, prior

to the inception of the Program, the State shall be entitled to recover from such beneficiary the amount of such partial compensation, and interest thereon from the date of receipt thereof to the date of recovery, at rates equal to those set forth in subparagraph (C)(3)(b)(iv).

(e) In any case in which the State is entitled, under the Program, to recover monies from an individual or entity that is entitled to compensation (or additional compensation) under the Program, such entitlements and the correlative obligations shall be offset automatically.

(f) The State shall be entitled to the benefit of any encumbrance that (i) is reinstated under the Program, as contemplated in paragraph (C)(2)(a), and (ii) is not transferred to any beneficiary under the Program.

D. Administering Authority and Procedure

A fully developed Program should contain a set of comprehensive rules on the administration of the Program and the procedures to be followed in the course of that administration. For the purposes of this Outline, suffice it to note some of the essential administrative and procedural aspects to be considered:

1. Establishment of the Adjudicatory Commission as the administering authority of the Program.

2. Establishment of the Compensation Fund. The Compensation Fund shall contain (i) monies and financial instruments contributed by the Cuban Treasury, and (ii) the monies referred to in paragraph (C)(7)(a).

3. Established of the procedure for filing and processing of claims, including deadlines for filing claims.

4. Prohibition of transfer or disposal of property rights subject to the Program while a claim is pending, except for dispositions by the Adjudicatory Commission pursuant to paragraph (C)(6) (Investment Priority Exception).

Notes

¹ See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 140 (Gateway ed. 1972); WALTER LIPPMAN, THE METHOD OF FREEDOM (1934); JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS NO. 68 (Walthoe ed. 1754-1755), reprinted in THE ENGLISH LIBERTARIAN HERITAGE (Jacobson ed. 1965); Stanley N. Katz, Thomas Jefferson & the Right to Property in Revolutionary America, 19 J.L. & ECON. 467 (1976); Charles A. Reich, The New Property, 73 YALE L.J. 733, 734 (1964).

² See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, §3.1, pp. 32-33 (4th ed. 1992).

³ 31 Stat. 897, ch. 803 (1901); RAMON INFIESTA, HISTORIA CONSTITUCIONAL DE CUBA, 318-31 (La Habana, 1942). The Platt Amendment also barred Cuba from entering into any treaty that impaired its independence and from assuming any public debt absent adequate means of repayment. It also required the Cuban government to sell or lease to the United States land necessary for establishing naval stations in Cuba.

⁴ See generally Carlos Márquez Sterling, *Prólogo* to NESTOR CARBONELL CORTINA, EL ESPIRITU DE LA CONSTITUCION CUBANA DE 1940, 11-38 (1974) [The Spirit of the Cuban Constitution] [hereinafter CARBONELL CORTINA].

⁵ See MARIFELI PEREZ-STABLE, THE CUBAN REVOLUTION: ORIGINS, COURSE AND LEGACY (1993); INTERNATIONAL COMMISSION OF JURISTS, CUBA AND THE RULE OF LAW 78-112 (1962).

⁶ INTERNATIONAL COMMISSION OF JURISTS, *supra* note 5, at 78-112. The decree was issued on the same day that Fidel Castro arrived by boat on the shore of the province of Oriente. The provinces affected by the decree were Oriente, Camaguey, Las Villas, and Pinar del Río.

⁷ *"Se prohíbe la confiscación de bienes. Nadie podrá ser privado de su propiedad sino por autoridad judicial competente y por causa justificada de utilidad pública o interés social y siempre previo el pago de la correspondiente indemnización en efectivo, fijada judicialmente. La falta de cumplimiento de estos requisitos determinará el derecho del expropiado a ser amparado por los Tribunales de Justicia, y en su caso, reintegrado en su propiedad. La certeza de la causa de utilidad pública o interés social y la necesidad de la expropiación, corresponderá decidirla a los Tribunales de Justicia en caso de impugnación."* 1940 Constitution, art. 24. All translations are by the authors.

⁸ CONSTITUCION DE CUBA 341 (Andrés M. Lazcano y Mazón ed. 1941) (Statement by Jose M. Cortina)[hereinafter CONVENTION RECORDS]; see also

CARBONELL CORTINA, *supra* note 4, at 159.

⁹ See CONSTITUCION DE CUBA 568-88 (Andrés M. Lazcano y Mazón ed. 1941); *see also* CARBONELL CORTINA, *supra* note 4, at 160.

¹⁰ By way of comparison, the Fifth Amendment of the United States Constitution provides that no person shall be “deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONSTITUTION, Amend. V. It has taken two centuries of jurisprudence to develop this clause into the rich fabric of precedent that today defines the practical contours of property-rights protection in the United States. While the resulting system has been generally adequate, some theories it has developed and particular applications of those theories often leave something to be desired. For example, in the United States, the state and federal governments may take property without compensation if the taking is a lawful exercise of the government’s “police power.” *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (All land use laws and regulations “must find their justification in some aspect of the police power, asserted for the public welfare”). Uncompensated takings are justified under the theory that “all property in [the United States] is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” *Mugler v. Kansas*, 123 U.S. 623, 665 (1887). A leading legal U.S. legal scholar, Justice Oliver Wendell Holmes, is said to have privately confessed that distinguishing between the lawful exercise of police power, on the one hand, and a taking subject to compensation, on the other, was a matter of “determining a line between grabber and grabbee that turns on the feeling of the community.” MARK L. POLLOT, *GRAND THEFT AND PETTY LARCENY: PROPERTY RIGHTS IN AMERICA* 78 (1993). It is to be hoped that, in devising a system of constitutional protection of property rights, the Cuban framers will do better than that.

¹¹ “*El Estado Cubano reconoce la existencia y legitimidad de la propiedad privada en su más amplio concepto de función social y sin más limitación que aquéllas que por motivos de necesidad pública o interés social establezca la Ley.*” 1940 Constitution, art. 87.

¹² This statement is independent of the jurisprudential question (which need not detain us here) whether the fundamental rights proclaimed in a given constitution are natural rights that preexist that constitution and are merely recognized by it, or whether they are, *qua* legal rights (and independently of the existence of any moral counterparts), creatures of the constitution, understood as the foundation of the (positive) legal order. Even those who sympathize with the second position (as do the authors of this article) must readily admit that the form given to the constitutional guarantee of property rights has political significance, and that the politico-rhetorical weight carried by that guarantee may affect the way in which it is interpreted and applied by the courts. If fundamental rights such as freedom of expression, assembly, or religion are proclaimed in emphatic terms, the right of private property deserves no less.

¹³ See CONVENTION RECORDS, *supra* note 9, at 337-64.

¹⁴ Cf. CONST. ARG. art. 17 (property is inviolable), and CONSTITUCION DE LA REPUBLICA DEL PERU art. 70 (right to property is inviolable).

¹⁵ 1940 Constitution, art. 87.

¹⁶ See, e.g., *Olsson Case*, 130 Eur. Ct. H.R.(ser. A) at 61 (1988) (interpreting the phrase “in accordance with the law” in one of the provisions of the European Convention on Human Rights and Fundamental Freedoms). For an analysis of this principle as it appears in human rights instruments, see OSCAR M. GARIBALDI, *THE LIMITATION AND DEROGATION CLAUSES* 128, 132-134 (Hurst Hanum and Dana D. Fischer eds., 1993); Oscar M. Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 17 HARV. INT’L L. J. 503 (1976).

¹⁷ See GARIBALDI, *supra* note 16, at 128, 132-34.

¹⁸ For a similar analysis in the context of the interpretation of Article 30 of the American Convention on Human Rights, see (Inter-Am. Ct. H.R.) San Jose 7 HUM. R. L.J. 231 (1986).

¹⁹ See, e.g., STEVEN J. EAGLE, *REGULATORY TAKINGS*, § 2-8(g), p. 191 (2nd ed. 2001). Where one input is essentially free, the government has an incentive to substitute that input for other inputs that are, from the government’s perspective, more costly. For example, instead of constructing a two-story school on a small lot in an expensive residential area where land is scarce, the new government would have the incentive to seize twice as much property to construct a less expensive one-story school with the same square footage on the larger lot. See William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretation of “Just Compensation” Law*, 17 J. Legal Stud. 269, 288 (1988).

²⁰ STEVEN J. EAGLE, *REGULATORY TAKINGS*, § 1-1, p. 2 (2nd ed. 2001).

²¹ For a recent statement of this doctrine, see JOHN PAUL II, *ENCYCLICAL LETTER SOLLICITUDO REI SOCIALIS*, 30 December 1987, ¶ 42. For earlier statements, see LEO XIII, *ENCYCLICAL LETTER RERUM NOVARUM*, 15 May 1891, ¶ 8; PIUS XI, *ENCYCLICAL LETTER QUADRAGESIMO ANNO*, 15 May 1931, ¶¶ 44-48, 69, 88. See also CARBONELL CORTINA, *supra* note 4, at 157-58.

²² “*Las obligaciones de carácter civil que nazcan de los contratos o de otros actos u omisiones que las produzcan no podrán ser anuladas ni alteradas por el Poder Legislativo ni por el Ejecutivo, y por consiguiente, las leyes no podrán tener efecto retroactivo respecto a dichas obligaciones. El ejercicio de las acciones que de éstas se deriven podrá ser suspendido, en caso de grave crisis nacional, por el tiempo que fuere razonablemente necesario mediante los mismos requisitos y sujeto a la impugnabilidad a que se refiere el párrafo primero del artículo anterior.*” (“Obligations of a civil nature that arise out of contracts or other acts or omissions that give rise to them cannot be annulled or altered by the Legislative Branch or the Executive Branch and, consequently, no laws shall have retroactive effect in respect

of such obligations. The exercise of legal actions derived from such obligations may be suspended, in the event of a grave national crisis, for such time as may be reasonably necessary subject to the same requirements and the same possibility of challenge as stated in the first paragraph of the preceding article.”) 1940 Constitution, art. 23.

²³ See note 22.

²⁴ “*Todo autor o inventor disfrutará de la propiedad exclusiva de su obra o invención, con las limitaciones que señale la Ley en cuanto a tiempo y forma.*” 1940 Constitution, art. 92, 1st paragraph.

²⁵ “*Las concesiones de marcas industriales y comerciales y demás reconocimientos de crédito mercantil con indicaciones de procedencia cubana, serán nulos si se usaren, en cualquier forma, para amparar o cubrir artículos manufacturados fuera del territorio nacional.*” (“Grants of industrial or commercial trademarks and other acknowledgments of commercial credit with indications of Cuban origin shall be void if they are used, in any form, to designate or cover products manufactured outside the national territory.”) 1940 Constitution, art. 92, 2nd paragraph.

²⁶ “*Toda persona podrá, sin sujeción a censura previa, emitir libremente su pensamiento de palabra, por escrito o por cualquier otro medio gráfico u oral de expresión, utilizando para ello cualesquiera o todos los procedimientos de difusión disponibles.*” (“Every person may freely express his thoughts, without subjection to prior censorship, orally, in writing, or through any other graphic or oral means of expression, using therefor any or all available means of dissemination.”) 1940 Constitution, art. 33, 1st paragraph.

²⁷ “*Sólo podrá ser recogida la edición de libros, folletos, discos, películas, periódicos o publicaciones de cualquier índole cuando atente contra la honra de personas, el orden social o la paz pública, previa resolución fundada de autoridad judicial competente y sin perjuicio de las responsabilidades que se deduzcan del hecho delictuoso cometido. En los casos a que se refiere este artículo no se podrá ocupar ni impedir el uso y disfrute de los locales, equipos o instrumentos que utilice el órgano de publicidad de que se trate, salvo por responsabilidad civil.*” (“A printing of books, booklets, records, films, periodicals, or publications of any kind may be seized only if it attacks the honor of persons, social order, or public peace, pursuant to a reasoned decision of a competent judicial authority and without prejudice to any liability resulting from the unlawful act committed. In the cases referred to in this article, it shall not be permitted to occupy or prevent the use or enjoyment of the premises, equipment, or instruments used by the publisher in question, except for reasons of civil liability.”) 1940 Constitution, art. 33, 2nd and 3rd paragraphs.

²⁸ “*La mujer casada disfruta de la plenitud de su capacidad civil, sin que necesite de licencia o autorización marital para regir sus bienes, ejercer libremente el comercio, la industria, profesión, oficio o arte, y disponer del producto de su trabajo.*” (“A married woman enjoys full civil capacity and needs no spousal license or authorization to administer her property, to engage in commerce, industry, a profession, skill,

or art freely, and to dispose of the proceeds of her work.”) 1940 Constitution, art. 43, 4th paragraph.

²⁹ 1940 Constitution, art. 43, 3rd paragraph.

³⁰ “*El subsuelo pertenece al Estado, que podrá hacer concesiones para su explotación, conforme a lo que establezca la Ley. La propiedad minera concedida y no explotada dentro del término que fije la Ley será declarada nula y reintegrada al Estado.*” (“The subsoil belongs to the State, which may grant concessions for the exploitation thereof, in accordance with what the Law may establish. Mining property granted in concession and not exploited within the term to be determined by the Law shall be declared void [*sic*; this was probably meant to apply to the concession rights] and revert to the State.”) 1940 Constitution, art. 88, 1st paragraph.

³¹ See, e.g., CONSTITUCION DE LA REPUBLICA DEL PERU art. 66 (natural resources, renewable or not, belong to the nation) and arts. 138-139 (mining rights, as well as rights to oil, gas, and other hydrocarbon resources, inalienably vested in the national government); see also Const. art. 27 (Mex.) (nation the legal owner of all oil and mineral rights).

³² “*La tierra, los bosques y las concesiones para explotación del subsuelo, utilización de aguas, medios de transporte y toda otra empresa de servicio público, habrán de ser explotados de manera que propenda al bienestar social.*” (Translation in the text.) 1940 Constitution, art. 88, 2nd paragraph.

³³ “*El Estado tendrá el derecho de tanteo en toda adjudicación o venta forzosa de propiedades inmuebles y de valores representativos de propiedades inmobiliarias.*” (“The State shall have a *pro tanto* preemption right in every forced sale of real estate or securities representing real estate.”) 1940 Constitution, art. 89.

³⁴ Until recently, French law gave the State a similar right of preemption in respect of all sales of real estate, in order to prevent fraudulent understatement of the purchase price and thus evasion of a tax calculated as a percentage of the purchase price. The European Court of Human Rights has held this right of preemption to be in violation of the right of property protected by Article 1 of Protocol No. 1 to the European Convention on Human Rights. *Hentrich v. France*, 23 Eur. Ct. H.R.(ser. A) at 18 (1994).

³⁵ “*Se proscriben el latifundio y a los efectos de su desaparición, la Ley señalará el máximo de extensión de la propiedad que cada persona o entidad pueda poseer para cada tipo de explotación a que la tierra se dedique y tomando en cuenta las respectivas peculiaridades.*” (“Latifundia are proscribed and, to the end that they disappear, the Law shall determine the maximum extension of property that each person or entity may possess for each type of exploitation to which land may be devoted, taking into account the respective peculiarities thereof.”) 1940 Constitution, art. 90, 1st paragraph.

³⁶ “*La Ley limitará restrictivamente la adquisición y posesión de la tierra por personas y compañías extranjeras y adoptará medidas que tiendan a revertir la tierra al*

cubano.” (“The Law shall restrictively limit the acquisition and possession of land by foreign individuals or companies and shall adopt measures tending to have the land revert to Cuban ownership.”) 1940 Constitution, art. 90, 2nd paragraph.

³⁷ In 1993, the Castro regime began negotiating bilateral investment with several States, and at least three such treaties – those with Spain, Italy, and the United Kingdom – have entered into force. See Jorge F. Pérez-López and Matías F. Travieso-Díaz, *The Contribution of BITs to Cuba’s Foreign Investment Program*, 32 Law & Pol’y Int’l Bus. 529, 540 & n. 38 (2001).

³⁸ “*El padre de familia que habite, cultive y explote directamente una finca rústica de su propiedad, siempre que el valor de ésta no exceda de dos mil pesos, podrá declararla con carácter irrevocable como propiedad familiar, en cuanto fuere imprescindible para su vivienda y subsistencia, y quedará exenta de impuestos y será inembargable e inalienable salvo por responsabilidades anteriores a esta Constitución.... A los efectos de que pueda explotarse dicha propiedad su dueño podrá gravar o dar en garantía siembras, plantaciones, frutos y productos de la misma.*” (“A father of a family who directly inhabits, cultivates, and exploits rural land owned by him, the value of which does not exceed 2,000 pesos, may irrevocably declare it to be family property, to the extent necessary to his housing and subsistence, and [such land] shall be exempt from taxes, shall not be subject to attachment, and shall be inalienable except for liabilities predating this Constitution.... So that the land may be exploited, the owner may encumber or transfer in guarantee seedings, plantings, fruits, and products of the land.”) 1940 Constitution, art. 91 (partial transcription).

³⁹ *Censos* are contracts whereby real property is made subject to payment of an annuity in compensation for money advanced. LOUIS ROBB, *DICCIONARIO DE TERMINOS LEGALES* at 23 (1965).

⁴⁰ “*No se podrán imponer gravámenes perpetuos sobre la propiedad del carácter de los censos y otros de naturaleza análoga, y en tal virtud queda prohibido su establecimiento. . . . Quedan exceptuados de lo prescrito en el párrafo anterior, los censos o gravámenes establecidos o que se establezcan a beneficio del Estado, la Provincia o el Municipio, o a favor de instituciones públicas de toda clase o de instituciones privadas de beneficencia.*” (“No perpetual encumbrances on property in the nature of *censos* and others of an analogous nature shall be imposed and accordingly the establishment thereof is prohibited. . . . There shall be exempt from the provisions of the preceding paragraph the *censos* or encumbrances established or that may be established [in the future] for the benefit of the State, a Province, or a Municipality, or in favor of public institutions of any kind or private charitable institutions.”) 1940 Constitution, art. 93 (partial transcription).

⁴¹ “*Los bienes propios o patrimoniales del Estado sólo podrán enajenarse o gravarse con las siguientes condiciones: a) Que el Congreso lo acuerde en Ley extraordinaria, por razón de necesidad o conveniencia social; y siempre por las dos terceras partes de cada Cuerpo Colegislador. b) Que la venta se realice mediante subasta pública. Si se trata de arrendamiento se procederá según disponga la Ley. c) Que se*

destine el producto a crear trabajo, atender servicios o a satisfacer necesidades públicas. Podrá sin embargo, acordarse la enajenación o gravamen en Ley ordinaria y realizarse sin el requisito de subasta pública, cuando se haga para desarrollar un plan económico-nacional aprobado en Ley extraordinaria.” (“Assets owned by the State as its own property or as patrimonial property may not be alienated or encumbered except under the following conditions: a) That Congress so provides by extraordinary Law by reason of necessity or social convenience and by the vote of two-thirds of each Chamber. b) That the sale be effected through public auction. In the case of leasing, it shall be done as may be provided by the Law. c) That the proceeds be destined to creating jobs, providing services, or satisfying public needs. Nevertheless, the sale or encumbrance may be authorized by ordinary legislation and may be carried out without the requirement of a public auction if done pursuant to a national economic plan approved by an extraordinary Law.” 1940 Constitution, art. 252.

⁴² The records of the Constitutional Convention shed no light on this matter. See 3 CONSTITUCION DE CUBA 227-28 (Andrés M. Lazcano y Mazón ed. 1941).

⁴³ *“El incremento del valor de las tierras y de la propiedad inmueble, que se produzca sin esfuerzo del trabajo o del capital privado y únicamente por causa de la acción del Estado, la Provincia o el Municipio, cederá en beneficio de éstos la parte proporcional que determine la Ley.”* (“The increase in the value of land or real estate that is produced without the effort of labor or private capital and only as a result of the action of the State, a Province, or a Municipality shall yield to the benefit of the latter a share to be determined by the Law.”) 1940 Constitution, art. 273.

⁴⁴ *“Serán nulas las estipulaciones de los contratos de arrendamiento, colonato o aparcería de fincas rústicas que impongan la renuncia de derechos reconocidos en la Constitución o en la Ley, y también cualesquiera otros pactos que ésta o los Tribunales declaren abusivos....”* [There follow detailed provisions concerning the regulation of those contracts.] (“Any provisions in contracts of leasing, colonato, or sharecropping on rural land that impose the waiver of rights recognized in the Constitution or the Law, and also any other provisions that the Law or the Courts may declare abusive, shall be void....” 1940 Constitution, art. 274 (partial transcription).

⁴⁵ *“La Ley regulará la siembra y molienda de la caña por administración, reduciéndolas al límite mínimo impuesto por la necesidad económico-social de mantener la industria azucarera sobre la base de la división de los dos grandes factores que concurren a su desarrollo: industriales o productores de azúcar y agricultores o colonos productores de caña.”* (“The Law shall regulate the planting and grinding of sugar cane by administration, restricting them to the minimum limit imposed by the economic-social need to maintain the sugar industry on the basis of the two great factors that contribute to its development: industrialists or producers of sugar and farmers or colonists who produce sugar cane.”) 1940 Constitution, art. 275.

⁴⁶ *“Serán nulas y carecerán de efecto las leyes y disposiciones creadoras de monopolios privados, o que regulen el comercio, la industria y la agricultura en forma tal que produzca ese resultado. La Ley cuidará especialmente de que no sean monopo-*

lizadas en interés particular las actividades comerciales en los centros de trabajo agrícolas e industriales.” (“Any laws and provisions that create private monopolies or regulate commerce, industry, and agriculture in such a way as to produce that result shall be void and of no effect. The Law shall especially take care that commercial activities in agricultural and industrial labor centers not be monopolized in a private interest.”) 1940 Constitution, art. 276.

⁴⁷ An early draft of Article 276 referred to “commerce, industry, labor, and the professions.” 3 CONVENTION RECORDS at 288. The text was changed to “commerce, industry, and agriculture” for the purpose of excluding private monopolies such as the medical association. The drafters of the new constitution will have an opportunity to subject the professions to the discipline of the market.

⁴⁸ See, e.g., STEVEN J. EAGLE, REGULATORY TAKINGS, § 2-8(g)(2), p. 193 (2nd ed. 2001).

⁴⁹ See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (J. Posner) (“Many owners are ‘intramarginal,’ meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., its not ‘for sale’).”).

⁵⁰ The experience of Central and Eastern Europe countries shows that it is possible to return confiscated property to the original owners without unduly discouraging foreign investment. Dr. Cheryl W. Gray, a principal economist at the World Bank policy research department, studied the way domestic legal regimes in those countries have affected foreign direct investment. She wrote:

“It was initially feared that foreign investment might be obstructed by domestic disputes over property rights, as [Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Slovakia] passed laws providing for restitution of property to pre-communist-era owners. *In most cases, this fear has not materialized.* State-led sales of property combined with mass privatizations in some countries are slowly moving to establish a property market and a workable system of property rights, although restrictions ... and uncertainties remain.”

Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience From Central and Eastern Europe*, 33 Colum. J. Transnat'l L. 1, 22 (1995) (footnotes omitted) (emphasis added).

⁵¹ See Brice M. Clagett, *Public International Legal Standards Applicable to Property Expropriation in Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES, 13-19 (JoAnn Klein ed., 1994) (papers presented at the 1994 Annual Meeting of the American Bar Association).

⁵² See, e.g., Agreement on the promotion and reciprocal protection of investments, May 27, 1994, Spain-Cuba, art. 5, 1902 U.N.T.S. I-32428.

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