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Courts of Limited Jurisdiction in a Post-Transition Cuba

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Courts of Limited Jurisdiction in a Post-Transition Cuba

Matias F. Travieso-Diaz*
Armando A. Musa**

ABSTRACT

Cuba's eventual transition to a free-market society will likely be accompanied by a flood of litigation in areas such as property rights, privatization of state-owned enterprises, and human rights violation claims. Courts of limited jurisdiction should be established to hear these specialized matters and alleviate the burden on regular courts. As the transition unfolds, there will also be a need to create specialized tribunals to handle disputes in areas such as taxation, bankruptcy, and intellectual property. The creation of the various courts of limited jurisdiction will have to be supported by creative strategies for retraining existing judges, training new ones, and supplementing the bench through the appropriate use of non-judicial personnel.

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I. INTRODUCTION

Courts in the judicial system of a modern state have different levels of authority. Legal disputes are originally presented to “lower courts”; “higher courts” provide a means for reviewing the lower courts’ decisions. Courts are also distinguished by their jurisdiction—that is, the subjects that a court may hear and decide or the parties who are subject to the court’s power. A court’s power to hear a case is dependent on whether it has both subject-matter and personal jurisdiction. Courts are classified as having one of two types of subject-matter jurisdiction: (1) general jurisdiction, which confers upon courts the power to hear all types of controversies or (2) special, or limited, jurisdiction, which confers upon courts the power to hear only certain types of cases.¹

1. Sometimes the term “special courts” is used to refer to courts of limited jurisdiction. “Special courts” has unfortunate connotations, however, because the designation is often given by totalitarian governments to tribunals set up to persecute

Judicial institutions may also exist within executive departments and other administrative agencies. Administrative tribunals and boards enforce proposed actions by the agencies against private parties and hear petitions by private parties seeking redress for such actions. In many legal systems, those seeking to appeal from actions by a governmental agency or department are required to pursue all available remedies within the agency before bringing an action in a court of general or limited jurisdiction or an appellate court.

Courts of limited jurisdiction exist in virtually all modern nations.² In the United States, for instance, the federal court system includes several important courts of limited jurisdiction, including the U.S. Tax Court, the U.S. Court of Federal Claims, the U.S. Court of International Trade, and the U.S. Court of Military Appeals.³ Courts of limited jurisdiction exist in Spain⁴ and in many Latin American countries, such as Mexico,⁵ Chile,⁶ Venezuela,⁷ and Brazil.⁸

Cuba currently has a unified judicial system consisting of three levels of courts.⁹ At the highest level is the People's Supreme Court,

government opponents or otherwise help commit human rights abuses. See, e.g., Sudan: The Legal System, <http://countrystudies.us/sudan/65.htm>. Therefore, this Article will not use the "special courts" terminology.

2. See generally The American Bar Association Central and East European Law Initiative (CEELI), Concept Paper on Specialized Courts [hereinafter CEELI], <http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/spc.html> (providing an overview of specialized courts throughout the world).

The concept of limited jurisdiction courts is hardly new. In his description of the legal system of eighteenth-century England, for example, William Blackstone devoted an entire chapter to the "courts of a special jurisdiction," which included "forest courts," "commissioners of sewers," the "court of policies of assurance" (insurance), and half a dozen others. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 6 (1765–69), available at <http://www.lonang.com/exlibris/blackstone/bla-306.htm>.

3. See Gretchen Feltes, *Update to A Guide to the U.S. Federal Legal System: Web-Based Publicly Accessible Sources* (2003), http://www.llrx.com/features/us_fed2.htm. There are also administrative tribunals within a number of federal and state government agencies.

4. See Maria Elisa Escolà, *New Bankruptcy Act in Spain*, THE BULLET "ILN" NEWSLETTER, Dec. 29, 2004, http://www.imninc.com/iln/new_bankruptcy_act_spain.pdf (discussing the creation of bankruptcy courts in Spain under this Act).

5. See Mexican Legal System Overview, <http://www.mexonline.com/lawreview.htm>.

6. See JURIST Chile: Chilean Law, Legal Research, Human Rights, <http://jurist.law.pitt.edu/world/chile.htm>.

7. See Venezuela: The Judiciary, http://www.photius.com/countries/venezuela/government/venezuela_government_the_judiciary.html.

8. See Brazil: The Judiciary, <http://www.country-studies.com/brazil/the-judiciary.html>.

9. See Ley de Organización del Poder Judicial No. 1250, June 23, 1973. This law was amended first by the Ley de Organización del Sistema Judicial, Law No. 4, published August 25, 1977, and subsequently by the Ley Sobre los Tribunales Populares, Law No. 70, published July 24, 1990. The economic chambers of the

which is divided into six different chambers: (1) criminal, (2) civil and administrative, (3) labor, (4) state security, (5) military, and (6) economic.¹⁰ The People's Supreme Court (*Tribunal Supremo Popular*) oversees the operation of the entire court system, but it lacks the power to review the actions of the executive and legislative branches.¹¹ The next level of courts is the People's Provincial Courts (*Tribunales Provinciales Populares*); one such court is located in each of the fourteen provinces.¹² The provincial courts have initial jurisdiction over major crimes and serve as courts of appeal for the third and lowest level of courts: the People's Municipal Courts (*Tribunales Municipales Populares*).¹³ The 169 municipal courts are the principal trial courts in the Cuban judicial system and have initial jurisdiction over civil and minor criminal matters.¹⁴

Other than the chambers into which the People's Supreme Court is divided, Cuba has no permanent courts of limited jurisdiction. The Cuban government, however, has established at various times (particularly in the first decade of the Revolution) ad hoc "people's courts" and "revolutionary tribunals," largely intended to replace regular courts and provide summary handling of certain matters, especially criminal proceedings against opponents of the regime.¹⁵

Setting up courts of limited jurisdiction will be a virtual necessity during the transition period in Cuba. Many lawsuits can be expected to be initiated during that period. Indeed, Cuba could experience a surge in litigation similar to those that occurred in other countries transitioning from socialism.¹⁶ Unless measures are taken to expedite judicial proceedings, there could be lengthy delays in the adjudication of cases.

The growing caseload will likely require that temporary courts and other judicial institutions having limited jurisdiction be established during the early phase of the transition to handle some of

Supreme Court and the Provincial Courts were established by Legislative Decree 129, De Extinción del Sistema de Arbitraje Estatal, published August 19, 1991. Law 82 on the Popular Courts, promulgated in 1997, modified Law 70.

10. See Ley de Organización del Poder Judicial No. 1250, June 23, 1973.

11. Luis P. Salas, *The Maintenance of Internal Order in Cuba: The Administration of Justice During the Special Period*, in TRANSITION IN CUBA: NEW CHALLENGES FOR U.S. POLICY 251 (Lisandro Perez ed., 1993); Laura Patallo Sánchez, *The Role of the Judiciary In A Post-Castro Cuba: Recommendations For Change*, 7–8 (2003), http://ctp.iccas.miami.edu/Research_Studies/LPatalloJudiciary.pdf.

12. Patallo Sánchez, *supra* note 11, at 9.

13. *Id.* at 9–10.

14. *Id.* at 9.

15. *See id.*

16. For example, in 1991 alone 700,000 new lawsuits were filed in Hungary and 121,000 in Czechoslovakia. Cheryl W. Gray et al., *Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe*, 209 World Bank Discussion Papers 58, 86 (1993).

the more frequently litigated matters (e.g., disputes involving property ownership issues). Courts of limited jurisdiction of a more permanent nature will also need to be created to hear cases where the subject matter is of a specialized nature (e.g., tax cases).

This Article seeks to identify some of the most important courts and quasi-judicial tribunals that will need to be established during Cuba's transition to a free market democracy. This Article does not intend to provide a comprehensive examination of judicial administration needs in a post-transition era. Rather, this Article seeks to illustrate the challenges that a transition government will face in providing an adequate legal infrastructure.¹⁷

II. COURTS OF LIMITED JURISDICTION AND LIMITED DURATION

A. *Introduction*

The transition period in Cuba will witness profound changes to the country's political, social, and economic structures.¹⁸ Some of those changes—for example, the privatization of state-owned enterprises (SOE)—will be “one time only” initiatives that will be accomplished over a relatively short period of time, whereas others will be permanent modifications requiring the establishment of enduring structures for their implementation.

This Part discusses those courts and quasi-judicial tribunals whose function will be to support the short term needs of the transition. Such courts and tribunals will of necessity have limited jurisdiction and will be disbanded once the special need requiring their institution has been accomplished.

17. For a more detailed discussion of the changes that will need to be made to Cuba's legal infrastructure during a free-market transition, see MATIAS TRAVIESO-DIAZ, THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA: A PROSPECTUS FOR BUSINESS ch. 3 (1997) [hereinafter THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA].

18. The political, social, and economic changes that will need to take place in a transition period in Cuba have been thoroughly analyzed by a number of experts over the last fifteen years and are reflected in, for example, the papers presented at the annual meetings of the Association for the Study of the Cuban Economy (ASCE). See Association For the Study of the Cuban Economy (ASCE), ASCE Annual Proceedings, <http://lanic.utexas.edu/project/asce/publications/proceedings/>.

A seminal assessment of the economic changes that must take place during the transition was provided by the late Felipe Pazos in 1990. Felipe Pazos, *Problemas Económicos de Cuba en el Periodo de Transición*, Dec. 28, 1990, <http://lanic.utexas.edu/la/cb/cuba/asce/cuba1/pazos2.html>.

B. Property Right Adjudication Courts

As is well known, during the early years of its Revolution, 1959–1963, Cuba expropriated the assets of foreign nationals in the country.¹⁹ While Cuba has settled over time the expropriation claims of the nationals of several countries,²⁰ the most significant claims—those of corporations and individuals who were U.S. nationals at the time of the property seizures—remain outstanding and represent a very large potential liability for the state. Applying a six percent simple interest rate to the \$1.8 billion principal in certified claims yields a present value for the expropriation claims by U.S. nationals of approximately \$6.7 billion as of July 2005.²¹

Resolution of the U.S. claims issue may not be practicable while the current socialist regime is in power in Cuba. Cuban officials have periodically expressed a willingness to discuss settlement of the claims issue with the United States;²² however, such willingness is usually expressed in the context of setting off those claims against Cuba's alleged right to recover from the United States hundreds of billions of dollars in damages due to the U.S. trade embargo and other alleged acts of aggression against Cuba.²³ To date, the Cuban

19. MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF PROPERTY RIGHTS IN CUBA ch. 3 (1975) (describing in detail the history of the Cuban expropriation process). For a more detailed discussion of the expropriation claims issue, see TRAVIESO-DIAZ, *supra* note 17, ch. 4.

The expropriations of the assets of foreign nationals led to the submittal of claims by the affected parties before their respective governments. *See generally* Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations other than the United States*, 5 L. Am. 457 (1973). In the United States, a federal agency known as the Federal Claims Settlement Commission (FCSC) received evidence of, and assessed claims by, thousands of U.S. nationals whose properties in Cuba were confiscated. *See id.* The FCSC certified 5,911 claims with a total value of \$1.8 billion in 1960 dollars. *See id.* Investments by nationals of other countries amounted to \$350 million by Spanish nationals and approximately \$10 million each for nationals of France, Canada, and Switzerland. *See id.*

20. Cuba has entered into settlement agreements with five foreign countries for the expropriation of the assets of their respective nationals in Cuba: France, March 16, 1967; Switzerland, March 2, 1967; United Kingdom, October 18, 1978; Canada, November 7, 1980; and Spain, January 26, 1988. *See* <http://www.cubavsbloqueo.cu>; *see also* Gordon, *The Settlement of Claims*, *supra* note 19.

21. In its examination of the Cuban expropriation claims, the FCSC determined that simple interest at a 6% rate should be included as part of the value of the claims it certified. Gordon, *The Settlement of Claims*, *supra* note 19.

22. *See, e.g.*, Alarcon: Nation 'U.S. Protectorate' With Helms Burton Bill, PRENSA LATINA, Nov. 1, 1995, reprinted in FOREIGN BROADCAST INFORMATION SERVICE, LAT-95-215, Nov. 7, 1995, at 1.

23. This position is expressly set forth in Cuba's Law 80 of 1996, the "Law on the Reaffirmation of Cuban Dignity and Sovereignty," whose Art. 3 reads in relevant part:

government has given no indication that it is prepared to negotiate, without preconditions, a potential settlement of the U.S. expropriation claims with the United States.

For that reason, the expropriation claims of those who were U.S. nationals at the time their properties in Cuba were seized are likely to achieve resolution only after the country makes a transition to a free market society. The expropriation claims of those individuals and corporations who were Cuban nationals at the time their properties were taken also remain outstanding and are likely to greatly exceed the claims of the U.S. nationals in both number and amount.

Many solutions have been proposed to address the pending expropriation claims.²⁴ All of the proposed solutions have in common the likely resort to the courts by, among others, individuals or entities asserting conflicting ownership claims against the same asset, claimants dissatisfied with the disposition given to their claims, and former property owners suing foreign investors who have conducted business utilizing or otherwise involving the expropriated assets during the current regime.²⁵

The claims for compensation for the expropriation of U.S. properties in Cuba nationalized through that legitimate process, validated by Cuban law and international law referred to in the preceding article, may be part of a negotiation process between the Government of the United States and the Government of the Republic of Cuba, on the basis of equality and mutual respect.

The indemnification claims due to the nationalization of said properties shall be examined together with the indemnification to which the Cuban state and the Cuban people are entitled as a result of the damages caused by the economic blockade and the acts of aggression of all nature which are the responsibility of the Government of the United States of America.

Ley de Reafirmación de la Dignidad y Soberanía Cubanas No. 80, Dec. 24, 1996 (English language translation appears at 36 I.L.M. 472 (1997)).

24. Oscar M. Garibaldi & John D. Kirby, *Property Rights in the Post-Castro Cuban Constitution*, in EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA: TWO VIEWS 25 (Institute for Cuban and Cuban-American Studies, University of Miami, 2003); Matias F. Travieso-Diaz, *Alternative Recommendations for Dealing with Confiscated Property in Post-Castro Cuba*, in EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA 77-81(2003) [hereinafter, Travieso-Diaz, *Alternative Recommendations*]; Matias F. Travieso-Diaz, *Alternative Remedies In A Negotiated Settlement Of The U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L. BUS. L. 659 (1996); see Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995).

25. Starting in about 1990, the Cuban government began to promote foreign investment in the island and encouraged the formation of joint ventures between foreign entrepreneurs and the state or government-owned entities. See *Cuba Adds Red Tape for Foreign Investors*, CUBANEWS, Feb. 2005, § 2, at 12. Over four hundred enterprises involving foreign investors were established over the years, although the number of ventures in existence has been falling rapidly since 2002. *Id.* For a description of Cuba's foreign investment program, see Matias F. Travieso-Diaz,

For example, one of the claim resolution mechanisms that commentators have supported is the restitution of the expropriated assets to their former owners.²⁶ Restitution methods have been used in a number of countries making the transition from socialism to a free market society.²⁷ Implementation of a restitution program, however, would almost inevitably lead to controversies among potential claimants to the property,²⁸ between the claimants and other users or occupiers of the property,²⁹ and between the claimants and the state (to the extent that adjustments are made for the increase or diminution in the value of the property during state possession).³⁰

Indeed, the experience of countries that have embraced restitution as the way to solve the property claims issue reveals that implementation of a restitution program leads to thousands of suits being filed.³¹ If ordinary courts are given the task of adjudicating

Alternative Recommendations, *supra* note 24, at 68, and see also Matias F. Travieso-Diaz and Charles P. Trumbull IV, *Foreign Investment In Cuba: Prospects And Perils*, 35 GEO. WASH. INT'L L REV. 903 (2003).

26. See, e.g., Garibaldi & Kirby, *supra* note 24, at 25 (suggesting that the expropriations carried out by the Cuban government in the early days of the Revolution violated the 1940 Constitution and international law and therefore restitution of the assets to the former owners is the required remedy).

27. Restitution has been used as the remedy of choice for expropriations in many countries in central and eastern Europe, including Germany, Czechoslovakia, the Baltic republics, Bulgaria and Romania. See Frances H. Foster, *Post-Soviet Approaches to Restitution: Lessons for Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 93 (JoAnn Klein ed., 1994).

28. Since most of the expropriations took place forty-five or more years ago, it is highly probable that the original owners of the property will be deceased (or, in the case of corporations, will be dissolved, merged or otherwise changed in identity). See Emilio Cueto, Property Claims of Cuban Nationals, Remarks at the Shaw, Pittman, Potts & Trowbridge Workshop on Resolution of Property Claims in Cuba's Transition 4-5 (Jan. 1995) (transcript on file with Authors). For that reason, disputes as to who is the rightful successor in interest to the property are likely to arise as restitution of the confiscated properties is attempted. *See id.*

29. Over the course of their occupation by the state, many properties have been subdivided, conveyed to third parties, or occupied illegally by individuals who may claim title to them by adverse possession. See Travieso-Diaz, *Alternative Recommendations*, *supra* note 24, at 68; Juan C. Consuegra-Barquin, *The Present Status Quo of Property Rights in Cuba*, ASCE 195, 200-05 (1995), <http://lanic.utexas.edu/la/cb/cuba/asce/cuba5/FILE15.PDF> (paper presented at the 5th Annual Meeting of the Association for the Study of the Cuban Economy, Miami, Florida in Aug. 1995); Cueto, *supra* note 28, at 8-9. In addition, many foreign investors have acquired rights to assets in the process of investing in Cuba, and are likely to assert these rights against those of the former owners. See Matias F. Travieso-Diaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, 37 GEO. WASH. INT'L L.R. 885, 895 (2005).

30. TRAVIESO-DIAZ, *supra* note 17, ch. 4; Travieso-Diaz, *Alternative Recommendations*, *supra* note 24, at 69; Cueto, *supra* note 28, at 7.

31. In Romania, for example, restitution of agricultural land led to more than 300,000 court cases. Gray et al., *supra* note 16, at 4.

disputes arising from the restitution program, paralysis of the court system may result.³²

A number of countries have sought to diminish the potential impact of litigation arising from expropriation claims by establishing administrative agencies or boards charged with adjudicating such claims. This has been done, for example, in Germany³³ and the Baltic republics of Latvia,³⁴ Lithuania,³⁵ and Estonia.³⁶ Resorting to administrative bodies (particularly local bodies) has the potential drawback of referring the resolution of sometimes complex legal issues to untrained personnel who may be vulnerable to political pressures and who potentially would have to divide their time and attention between restitution issues and other administrative duties.

Even if other remedies besides restitution are implemented, disputes could arise in the course of their implementation. For example, where compensation is offered, the amount of the compensation (whether in cash, government obligations, or other instruments) is typically tied to the assessed value of the expropriated assets.³⁷ Disputes as to the appropriateness of the value assigned to the property are likely to arise and require adjudication by the courts.³⁸ And, if a negotiated settlement of the claim is reached

32. In the former Czechoslovakia, for example, restitution led to numerous disputes between original owners and current occupants, as well as disputes between competing claimants, resulting in clogged courts. See *id.* at 49; see also Anna Gelpern, *The Laws and Politics of Reparivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L. BUS. L. 315, 324–28 (1993).

33. See Roland Czada, *The Treuhandanstalt and the Transition from Socialism to Capitalism, in A NEW GERMAN PUBLIC SECTOR? REFORM, ADAPTION AND STABILITY* 93–117 (Arther Benz & Klaus H. Goetz eds., 1996), <http://www.politik.unisnabruceck.de/POLSYS/Archive/Treuhandanstact.htm> (discussing the establishment of the *Treuhandanstalt* and its role in transforming Germany from a socialist to market economy, including the restitution of municipal and private properties).

34. See Frances Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 627, 633 (1996) (discussing the use of legislation regarding the resolution of expropriation claims).

35. See William Valetta, *Completing the Transition: Lithuania Nears the End of its Land Restitution and Reform Program*, 11 FAO LEGAL PAPERS ONLINE (2000), <http://www.fao.org/Legal/prs-ol/lpo11.pdf> (describing the legislative basis for Lithuania's land restitution and reform movement).

36. See Alari Pojaru, *The Political Economy of Privatisation in Estonia*, CENTRE FOR ECONOMIC REFORM AND TRANSFORMATION (1996), <http://www.som.hw.ac.uk/cert/wpa/1996/dp9602.htm> (identifying the most important features of the legislation that determined the plan of privatization in Estonia).

37. See, e.g., Gray et al., *supra* note 16, at 70; Travieso-Diaz, *Alternative Recommendations*, *supra* note 24, at 70–71.

38. In Hungary, for example, where compensation in the form of state-issued vouchers was the main mechanism used to address expropriation claims, compensation was handled through local compensation offices, subject to appeal to a Hungarian National Compensation Office and review by the civil courts. See Gelpern, *supra* note 32, at 343, 347–48.

between the claimant and the state, disputes may arise as to whether the state's (or the claimant's) obligations under the settlement agreement have been properly discharged.³⁹

Given the large number and contentious nature of the claims that can be expected to be asserted in Cuba, it would probably be necessary to establish either an independent agency of the Cuban government with jurisdiction over both the determination of the validity of claims to title over confiscated property and the dispensation of remedies or a system of courts whose jurisdiction would be limited to the resolution of property expropriation claims and the adjudication of disputes relating to them.⁴⁰ To deal with potential shortages of judges to staff the courts, the tribunals could include lawyers as well as non-lawyers, as long as the head of the tribunal is a judge or a licensed legal practitioner. Part IV of this Article addresses this subject in greater detail.

The case of Nicaragua represents an instructive yet cautionary example of using courts to adjudicate expropriation claims. After the transition from the socialist Sandinista government to the democratic government of Violeta Chamorro in 1990, owners of land expropriated during the Sandinista rule began to demand restitution of their property or compensation for the takings.⁴¹ Restitution presented a difficult problem in Nicaragua, where about one-fourth of all agricultural land and many urban properties had been seized, and no clear records of ownership were maintained.⁴²

In 1990, Agrarian Commissions were created at the departmental and municipal levels to resolve disputes between individuals claiming rights to the same property.⁴³ Another agency, the National Review Commission, was established to deal with claims of governmental takings of land from original owners and to provide for the restitution of illegally seized lands.⁴⁴ Appeals from the decisions of these agencies were to be heard by the courts.⁴⁵ The volume of claims was enormous: by 1992, about forty percent of the households in Nicaragua were involved in an ownership dispute.⁴⁶ Furthermore, Nicaraguans questioned the legality of the Agrarian

39. See Travieso-Diaz, *Alternative Recommendations*, *supra* note 24, at 64–67.

40. *Id.* at 83.

41. The Carter Center, *Nicaraguan Property Disputes* (April 1995), <http://www.cartercenter.org/documents/1199.pdf>.

42. Brian Trackman et al., *The Reform of Property Registration Systems in Nicaragua: A Status Report*, June 11, 1999, <http://cyber.law.harvard.edu/prs/Nicar.html>.

43. See J. David Stanfield & Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 CAP. U. L. REV. 939, 949 (1993).

44. *Id.*

45. See The Carter Center, *supra* note 41, at 6.

46. *Id.*

Commissions and the National Review Commission.⁴⁷ When claimants were not pleased with administrative decisions, they often took matters into their own hands, bringing the administrative process to a standstill and sparking violent confrontations between conflicting owners.⁴⁸

The judicial system was likewise ill-equipped to deal with this number of disputes.⁴⁹ By 1995, there were an estimated 6,000 present and potential property dispute claims filed in the courts, a number which threatened to create a crisis in the court system.⁵⁰

In 1997, the government of Arnoldo Alemán, successor to Chamorro, established four property tribunals (*salas de propiedad*), to handle expropriation cases.⁵¹ The property tribunals conduct mediations, binding arbitrations, and expedited trials of property cases.⁵² Upon conclusion of the mediation, arbitration, or trial, the tribunals forward their decisions to the regular courts, which issue orders containing the terms of the mediation, arbitration, or trial results.⁵³

The caseload of the property tribunals has included a significant number of claims filed by U.S. citizens. By 2003, the tribunals had received more than 4,600 claims from U.S. citizens, of which 3,700 claims had been settled and over 900 claims remained outstanding.⁵⁴ Currently, there are eighteen U.S. citizens with pending claims before the property tribunal.⁵⁵

47. A year after the establishment of the National Review Commission, the Nicaraguan Supreme Court decided that parts of the decree authorizing the Commission were unconstitutional. Stanfield & Hendrix, *supra* note 43, at 949.

48. *Id.*

49. *See id.* at 960 (stating that the normal court system could take years to decide these cases).

50. *Id.*; *see also* The Carter Center, *supra* note 41, at 6.

51. See CENTER ON HOUSING RIGHTS AND EVICTIONS ET AL., HOUSING RIGHTS IN NICARAGUA: HISTORICAL COMPLEXITIES AND CURRENT CHALLENGES 55 (2004), available at www.cohre.org/downloads/MissionReport-Nicaragua-English.pdf. What was supposed to have been a sixty day period of adjustment during which no new actions could be brought became an almost three-year freeze until, under U.S. government pressure, the courts started accepting cases in July 2000. Personal Communication from Leónidas Henríquez Portillo, Senior Property Assistant, U.S. Embassy, Managua, (July 7, 2005) [hereinafter Henríquez] (on file with Authors).

52. Bureau of Democracy, Human Rights, and Labor, *Nicaragua: Country Reports on Human Rights Practices*, DEPT ST. BULL. § 1(f) (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18339.htm>.

53. *Id.* In November 2002, the Supreme Court consolidated the five tribunals into a single one because of budgetary constraints. *Id.*

54. INDUSTRY CANADA, NICARAGUA COUNTRY COMMERCIAL GUIDE FY 2003 ch. 7 (2003), available at <http://strategis.ic.gc.ca/epic/internet/inimr-ri.nsf/engr110522e.html>. Industry Canada reported that the tribunals consistently rule against the original owners. *Id.*

55. Henríquez, *supra* note 51. New legislation, introduced in November 2004 and going into effect in January 2005, transferred responsibility for land titling,

The Nicaraguan Property Tribunal has some attractive features that could be adopted in Cuba, such as court-supervised referral to alternative dispute resolution and the division of responsibilities between specialized courts that rule on the claims and the regular court system to administer the awards. On the other hand, the tribunals, like other branches of Nicaragua's judicial system, have been criticized for bias and a lack of independence; they are seen as favoring current property holders and as being subject to political manipulation. Such risks may be faced in a transitional Cuba and should be taken into account both in the selection of the members of the tribunals and in the establishment of guidelines to assure the tribunals' fairness and independence.

C. Privatization Program Courts

The term "privatization" can be defined as the transfer or sale of any asset, function, or activity from the public to the private sector.⁵⁶ More narrowly defined, privatization means the conveyance of ownership of all or part of an SOE or its assets from the public sector to private parties.⁵⁷

There is little doubt that, in moving from the current socialist economic structure to an open and free market economy, Cuba will need to privatize many, if not all, of its SOEs.⁵⁸ The emergence of private enterprise will stimulate economic growth and reduce chronic shortages, and the assumption of ownership by private parties over loss-generating enterprises will also ease the strain on the national treasury as well as generate revenues for the country. For those

payment of compensation for confiscations, and administration of public lands, from the Finance Ministry to a National Assembly-appointed Property Institute. See Asemblea Nacional de Nicaragua, <http://www.asamblea.gob.ni>. The law contains a provision that halts for 180 days, while the Institute is established, all ongoing property civil and criminal judicial proceedings as well as the enforcement of judgments in property cases. The last time a similar provision was written in a property law resulted in property cases being deferred for almost three years. Henríquez, *supra* note 51.

56. ERNST & YOUNG, PRIVATIZATION: INVESTING IN STATE-OWNED ENTERPRISES AROUND THE WORLD 4 (1994). This definition encompasses "joint public-private ventures, concession leases, management contracts, as well as some specialized instruments, such as build-own-operate-transfer (BOOT) agreements." *Id.* Outsourcing of government functions and services (e.g., water supply) is also included in this definition. *Id.*

57. Richard M. Phillips & Marian G. Dent, *Privatizing Eastern Europe: A Challenge for the Nineties*, in JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE 448–49 (1991).

58. Few, if any, sectors of the Cuban economy appear to be so sensitive that they should be under the exclusive control of the state, or seem to be better run by the state than by the private sector. See generally TRAVIESO-DIAZ, *supra* note 17, ch. 6.

reasons, a privatization program is likely to be undertaken early in the transition process.⁵⁹

There are many ways in which the privatization of SOEs can be accomplished, and the decision as to the method to be used for a particular enterprise involves economic and policy factors in addition to legal considerations. The choice among privatization methods may also be influenced by which techniques are judged to be most appropriate to attract investors.

The scope of the privatization process may also vary. At one end of the spectrum is the complete transfer of ownership of the SOE to one or more private parties. At the other end, there are varying degrees of limited privatization in which the state retains an ownership interest in the enterprise, but private sector involvement is sought in the operation of all or portions of the company. Methods used in the outright sale of an SOE to private investors include: auction, negotiated sale, tender, stock floatation, stock distribution, voucher or coupon privatization, and management or employee buyout.⁶⁰ Limited privatization methods include joint ventures, build-own-operate-and-transfer agreements, leases, and management contracts.⁶¹

The wide choice of privatization alternatives dictates that a government entity, usually an independent agency, must be responsible for the administration of the privatization program. Almost all the countries making the transition from socialism to a free market economy have established a privatization agency, and it is the actions of such an agency that are subject to judicial review.⁶²

For purposes of this Article, the issue of concern is what form such a review should take. In most countries, the acts of the privatization agency are reviewable—if at all—in the ordinary court system. That raises a administration of justice concern, albeit of a different nature than that posed by the property expropriations. The problem is not the number of cases, but the potential complexity of the issues raised in connection with a privatization decision.

Some of the decisions that a privatization agency needs to make and that are potentially subject to judicial challenge, include the following:

59. *Id.*

60. ERNST & YOUNG, *supra* note 56, at 17.

61. *Id.* at 17–18.

62. See TRAVIESO-DIAZ, *supra* note 17, ch. 6 (discussing the experiences in various countries with the creation of governmental agencies to oversee the privatization process).

- (1) Whether the enterprise should be sold, turned over to the workers or managers, returned to former owners, merged with other enterprises, or liquidated.
- (2) If the enterprise is to be sold, whether a negotiated sale, a competitive bidding process, or some other mechanism is to be used.
- (3) The assessed value of the enterprise, taking into account both assets and current and potential liabilities.
- (4) If the enterprise is sold by a negotiated agreement, the terms of the sale, the identity of the purchaser and its connections, if any, to any government official or other party involved in the privatization process.
- (5) If competitive bidding is used, the format of the bidding process (i.e., whether bids are to be opened in public).
- (6) The identities of the parties rejected (especially when the chosen party is a foreigner and the rejected party is a national or an employee group).
- (7) The identity of the selected bidder and any links between the bidder and any government official or other party involved in the privatization process.
- (8) The terms of the agreement (e.g., price, form, terms and conditions for payment of the purchase price, types of concessions, debts devolving on the government itself, conditions of the investment, and the operations the investor agrees to maintain).
- (9) Any formal or substantive irregularities in the process of selecting the purchaser.⁶³

As this list of issues illustrates, a reviewing court faced with a challenge to the privatization of an SOE (by, for example, an unsuccessful bidder) must be capable of delving into highly technical issues and must also rule impartially on allegations of favoritism, lack of transparency, and corruption.⁶⁴ These requirements can best be met by establishing a court or courts of limited jurisdiction having the sole responsibility of providing an independent review of the privatization decisions.⁶⁵

63. V.V. Ramanadham, *The Monitoring and Regulatory Aspects of Privatization*, in *PRIVATIZATION AND AFTER 11* (V.V. Ramanadham ed., 1994).

64. There are many examples of lack of transparency in the privatization process. See *id.* at 10. In Sri Lanka, Pakistan, and Guyana, for example, complaints were lodged over sales of SOEs under terms that were either unfavorable or tainted with allegations of corruption. *Id.*

65. The ability to expertly handle cases requiring specialized expertise is one of the reasons frequently cited in favor of the establishment of courts of special jurisdiction. Other advantages include greater overall court efficiency, uniformity of results, improved case management, elimination of conflicts and forum shopping,

Courts of limited jurisdiction have been set up in Russia and other successor countries to the former Soviet Union to review the actions of the privatization agencies.⁶⁶ The Russian government has allocated authority over privatization disputes to the *arbitrash* courts.⁶⁷ *Arbitrash* courts are part of the judicial system and also hear disputes between commercial entities and between commercial entities and the state.⁶⁸ The *arbitrash* court system comprises district *arbitrash* courts that operate as the trial courts of counties or important cities, regional *arbitrash* courts, that function as appellate courts, and an *arbitrash* court of final jurisdiction.⁶⁹ During Soviet rule, the *arbitrash* courts served as quasi-judicial administrative tribunals unconnected to the court system.⁷⁰ Russian judicial reform in 1992, however, reconstituted the *arbitrash* courts as permanent legitimate courts and granted them jurisdiction to hear commercial disputes and challenges to privatization actions.⁷¹

Despite their grant of jurisdiction, *arbitrash* courts have limited enforcement powers.⁷² They lack the power to impose sanctions or order the sale of property to force compliance with their orders.⁷³ In addition, *arbitrash* courts do not have injunctive powers.⁷⁴ For those reasons, claimants often avoid the *arbitrash* courts, resorting to informal political channels for resolution of their complaints.⁷⁵

The negative experience in Russia with *arbitrash* courts serves to illustrate the requirements of a successful system of limited jurisdiction courts to review an agency's privatization decisions. The

increased flexibility, and the ability to exercise continued oversight of the functions of administrative agencies. See CEELI, *supra* note 2, § I, C.

66. *Id.* § I, B.

67. See Kathryn Hendley, *Symposium: Economic, Legal and Political Dilemmas of Privatization in Russia: The Spillover Effects of Privatization on Russian Legal Culture*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 39, 53 (1995). The *arbitrash* are not arbitration courts, as the false cognate suggests. Eugene Gorchakov, *Resolution of Commercial Disputes in Russia: Choosing the Best Alternative*, Nov. 2000, <http://www.bisnis.doc.gov/bisnis/country/001120rsdisres.htm>.

68. Hendley, *supra* note 67, at 61.

69. Randy M. Wright, *Enforcing Contractual Obligations and Resolving Commercial Disputes in Russia*, <http://www.berrymoorman.com/articles/speech.html>.

70. Peter H. Solomon, Jr., *Courts in Russia: Independence, Power and Accountability* (unnoted draft May 5, 2001), <http://www.ceu.hu/legal/Solomon.htm>.

71. Russia placed administration of the privatization process in the hands of the Russian Federal Property Fund. See Official Website of the Russian Federal Property Fund, <http://www.fpf.ru>. The Fund is a specialized financial institution that, in accordance with Russian legislation, is responsible for selling privatized federal property. *Id.* The Fund has authority to make decisions on property claims and the sale and purchase of confiscated property. *Id.*

72. Hendley, *supra* note 67, at 60–61.

73. *Id.*

74. *Id.* at 61.

75. *Id.* at 60–61.

courts must be granted injunctive powers that allow them to block a prospective privatization, order the conveyance of enterprise property, direct that a negotiated sale be overturned, or reopen a bidding process. The courts must also be staffed with competent, impartial judges, and adequate support staff.

D. Handling of Human Rights Claims

Transition to democracy, whether from a communist or other oppressive regime, has historically been accompanied by a surge of claims against the state and its former officials for violations of human rights.⁷⁶ After half a century of totalitarian rule in Cuba it should be anticipated that, if allowed, a myriad of human rights violation claims would be leveled against the state and against officials of the current socialist government.

This Article takes no position on whether legal claims arising from human rights violations should be permitted in a post-transition Cuba. Should such claims be allowed, however, there is ample international precedent for the setting up of limited jurisdiction courts and agencies to handle the claims. Some examples of the available options follow.

1. Special Agency: The Ethiopian Special Prosecutor's Office

Ethiopia created a Special Prosecutor's Office (SPO) with a mandate to investigate and prosecute atrocities committed by the Dergue, the military council that ruled Ethiopia during 1974–1991—a period known as the “Red Terror.”⁷⁷ Ethiopia administered claims against the state and its former officials through its regular court system. The SPO, created in 1992, has more than four hundred employees with forty-five Ethiopian prosecutors and eight foreign advisors.⁷⁸ Since 1992, the SPO had interviewed 5,000 witnesses and collected more than 300,000 documents.⁷⁹ In 1994, it charged top officials of the Dergue with genocide and crimes against humanity pursuant to the Ethiopian penal and criminal procedure codes.⁸⁰ The SPO brought its claims to the Central High Court, an appellate level

76. See generally M. Cherif Bassiouni, *Introduction to POST-CONFLICT JUSTICE*, at xv–xx (M. Cherif Bassiouni ed., 2002) (analyzing the administration of justice after conflicts in countries such as Cambodia and Sierra Leone).

77. Wondwossen L. Kidane, *The Ethiopian “Red Terror” Trials*, in *POST-CONFLICT JUSTICE*, *supra* note 76, at 667–68.

78. *Id.* at 671–72.

79. *Id.* at 671.

80. *Id.* at 672.

court established by the transitional government in 1991 and later renamed the Federal High Court by the 1995 Federal Constitution.⁸¹

2. Special Agency Plus Limited Jurisdiction Court: Sierra Leone

Sierra Leone endured a violent civil war between 1991 and 2000.⁸² Fighting between the Revolutionary United Front and the Sierra Leone Army killed more than 75,000 people, displaced two-thirds of the country's population, and terrorized thousands of others.⁸³ In 2002, the newly elected government of Sierra Leone, assisted by the United Nations, set up two bodies to administer justice to victims of wartime atrocities: the Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone.⁸⁴

The TRC has the mandate to investigate human rights violations committed during the war, hear the stories of victims of the violations, and create a historical record of the abuses committed.⁸⁵ Although not a court, the TRC has capabilities that make it a quasi-judicial body.⁸⁶ It can request or compel production of reports and records from any source—including domestic and foreign government entities and officials—as part of its information gathering.⁸⁷ It can also conduct confidential interviews of individuals and members of organizations.⁸⁸ The TRC has the power to require that statements be made under oath and to administer such oaths.⁸⁹ It can issue both summons and subpoenas and compel appearance.⁹⁰ It can also visit any location without prior notice to gather information, perform inspections, and obtain copies of documents.⁹¹

The TRC also has contempt powers.⁹² Failure to respond to a summons or subpoena issued by the TRC may lead to trial or punishment by a court.⁹³ A citizen or member of the government who

81. *Id.* at 675–76.

82. See Jennifer L. Poole, *Post Conflict Justice in Sierra Leone*, in POST-CONFLICT JUSTICE, *supra* note 76, at 563.

83. *See id.* at 563–64.

84. *See id.* at 563, 577, 580. The TRC was established as part of the Lomé Peace Agreement of 1999, while the Special Court was established under the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court of Sierra Leone, Jan. 16, 2002. *Id.* at 577, 583–84, n.149. The agreement is available online at <http://sierra-leone.org/Laws/2002-9.pdf>.

85. *Id.* at 577–78.

86. *Id.* at 578.

87. *Id.*

88. *Id.* at 578–79.

89. *Id.* at 579.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

fails to assist the TRC or obstructs its functions faces a fine or up to one year of imprisonment.⁹⁴

Sierra Leone also established a special court as a temporary, independent tribunal of limited jurisdiction.⁹⁵ The Special Court for Sierra Leone has the power to prosecute the perpetrators of serious violations of Sierra Leonean law and international humanitarian law.⁹⁶ The court's chamber is composed of judges from across the world and from Sierra Leone.⁹⁷ Moreover, the Special Court has concurrent jurisdiction with national courts, but enjoys supremacy over them and has the power to issue binding orders to the government of Sierra Leone.⁹⁸

For two reasons, the Special Court has jurisdiction only to punish the most notorious perpetrators. First, the drafters of the court's mandate wanted to ensure that child combatants, who were themselves victims of human rights violations, were not tried before the tribunal.⁹⁹ Second, the Special Court, which is funded by voluntary contributions from the international community, lacks the financial resources to conduct many full-blown trials.¹⁰⁰ The work of the TRC is intended to make up for the Special Court's jurisdictional limitations by investigating less serious abuses of human rights.¹⁰¹ The TRC is also better suited to reintegrate former combatants—including child soldiers—into society, restoring normality.¹⁰² Thus, the TRC and the Special Court play complementary roles.¹⁰³ The Special Court fulfills the need for criminal prosecution in serious cases, while the TRC serves to facilitate reconciliation.¹⁰⁴

3. Truth and Reconciliation Commissions: South Africa

A number of countries (including Argentina, Chile, El Salvador, and Guatemala) have established TRCs following the transition from totalitarian to democratic regimes.¹⁰⁵ Although their charters vary,

94. *Id.*

95. *See id.* at 580, 582.

96. *Id.* at 582.

97. *Id.* at 585.

98. *Id.* at 584–85.

99. *Id.* at 590.

100. *Id.*

101. *Id.* at 590–91.

102. *Id.*

103. *Id.* at 591.

104. *Id.*

105. *See* Anurima Bhargava, Note, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304, 1307 (2002). *See also* Strategic Choices in the Design of Truth Commissions, Design Factors, <http://www.truthcommission.org/factor.php?fid=2&mode=m&lang=en> (providing a table of mandate dimensions of various TRCs).

TRCs are usually set up to investigate and expose human rights abuses that occurred under a totalitarian regime that is no longer in power.

The South African TRC is the most cited and probably most successful example of such an investigative body. That TRC was established by the Promotion of National Unity and Reconciliation Act of 1995 after the end of apartheid and was charged with compiling a historical record of the causes, nature, and extent of human rights violations during the apartheid regime.¹⁰⁶ The South African TRC was divided into three branches: an Amnesty Committee, which heard amnesty applications; a Human Rights Committee, which provided a forum for the victims of human rights abuses to tell their stories; and a Rehabilitation and Reparations Committee, which put forward recommendations regarding the transformation of civil institutions and the grant of reparations to the victims.¹⁰⁷

The South African TRC differed from others in that it possessed quasi-judicial powers, such as the power to subpoena witnesses and conduct searches and seizures.¹⁰⁸ The TRC was to follow procedures established by the National Unity and Reconciliation Act with its findings and other acts being subject to review by the courts. The activities of the TRC were thereby endowed with the legitimacy enjoyed by judicial institutions.¹⁰⁹ Most importantly, where there was sufficient evidence, the TRC attributed direct criminal responsibility to a number of individuals, something that was not done by other TRCs such as the one set up in Chile.¹¹⁰

4. Lessons for Cuba

If some form of relief for human rights violations is allowed in a post-transition Cuba, it will be necessary to create an agency or court (or both, as was done in Sierra Leone) to adjudicate the claims and administer appropriate remedies. The personnel in such an agency or court will need relatively little expertise, but must function with fairness and independence, particularly if the agency or court (or

106. Promotion of National Unity and Reconciliation Act 34 of 1995, pml., available at <http://www.doj.gov.za/trc/legal/act9534.htm>.

107. Bhargava, *supra* note 105, at 1306.

108. *Id.* at 1308–09.

109. *Id.* at 1309.

110. See Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, in POST-CONFLICT JUSTICE, *supra* note 76, at 750.

both) is established while elements friendly to the current government are still in positions of power in Cuba.¹¹¹

In addition, and perhaps independently of whether such agency or court is established, the merits of establishing a TRC should be carefully investigated. The South African TRC served as an effective means of providing catharsis, closure, and redress to the many unacknowledged abuses during apartheid. The same purpose could be served in Cuba, and for that reason the establishment of a TRC after the transition has been recommended by some experts.¹¹²

III. PERMANENT COURTS OF LIMITED JURISDICTION

A. *Introduction*

The discussion thus far has focused primarily on temporary courts of limited jurisdiction. As noted above, these temporary and specialized courts are designed to address particular problems expected to arise during the initial stages of the transition to a free market economy, such as resolution of property expropriation claims and privatization of SOEs. But the shift to a free market economy is likely to bring about enduring changes that will call for the application of areas of law and concepts that have not been significantly developed in Cuba; even if such features exist in pre-

111. The limited jurisdiction court established in Cambodia to redress the human rights violations committed during the Khmer Rouge regime (1975–1979) provides an example of a special court that failed its essential mission. See Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, in *POST-CONFLICT JUSTICE*, *supra* note 76, at 613. In 2001, under pressure from the United Nations, the government passed a law allowing the creation of a hybrid tribunal (composed of U.N.- and Cambodian-appointed judges) that would oversee the prosecution of former Khmer Rouge leaders. *Id.* at 616. The law provided for a majority of Cambodian judges (three of five) but required that all decisions be based on a supermajority, reflecting the U.N.’s concern about the lack of judicial independence. *Id.* In practice, since the government in power in Cambodia was still sympathetic to the Khmer Rouge, the three government-appointed Cambodian judges would vote at the orders of Cambodian prime minister, while the U.N.-appointed judges would vote to the contrary, causing gridlock on every vote. Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, in *POST-CONFLICT JUSTICE*, *supra* note 76, at 650. Ultimately, convinced that the hybrid tribunal would not be independent, impartial or objective, the United Nations withdrew from the program in February 2002. *Id.* at 652.

112. E.g., Rolando Castañeda & George P. Montalván, *Nunca Más: Propuesta Para Establecer la Comisión Cubana de la Verdad y la Reconciliación Nacional*, in 13 CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 204 (Ass’n for the Study of Cuban Econ. 2003), available at <http://lanic.utexas.edu/project/asce/pdfs/volume13/castanedamontalvan.pdf>.

transition Cuba, the nation's centrally planned economy has inhibited their growth.

Some examples of these legal areas include: (1) tax laws, (2) bankruptcy laws, and (3) intellectual property laws. First, Cuba's current dearth of private economic activity has not permitted tax law to develop much during the past four decades.¹¹³ Second, although bankruptcy law is usually necessary in a free market system to stimulate risk-taking economic activity and cushion the blow of business failure, Cuba has not had much need for these laws given its general prohibition of the kind of private enterprise such laws are indirectly designed to encourage.¹¹⁴ Finally, although Cuba does have trademark, copyright, and patent laws,¹¹⁵ these areas of the law have not developed through the usual method of litigation over conflicting rights because, among other reasons, private ownership of intellectual property is generally not allowed in Cuba.

B. Tax Courts

Although Cuba currently has a tax law and taxes certain activities, Cuba lacked a system of direct income taxation until recently.¹¹⁶ Some have also noted that Cuba does not have a taxpaying culture.¹¹⁷ Nevertheless, in 1994, Cuba introduced a system of direct income taxation.¹¹⁸ The system was designed

113. See Archibald R. M. Ritter & J.A. Turvey, *The Tax Regime for Micro-Enterprise in Cuba* 26 (Carleton Econ. Papers, Working Paper No. 99-04, 2000), available at <http://www.carleton.ca/economics/cep/cep99-04.pdf>.

114. See Ernesto Hernández-Catá, *Long-Term Objectives and Transitional Policies: A Reflection on Pazos' "Economic Problems of Cuba,"* in 1 CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE CUBAN ECONOMY 36–57 (Latin Am. & Caribbean Ctr., Fla. Int'l Univ. 1992), available at <http://lanic.utexas.edu/a/cb/cuba/asce/cuba1/ehcata.html>.

115. Jesús Sanchelima, *Selected Aspects of Cuba's Intellectual Property Laws*, in 12 CUBA IN TRANSITION: PAPERS AND PROCEEDINGS OF THE TWELFTH ANNUAL MEETING OF THE CUBAN ECONOMY 213 (Ass'n for the Study of Cuban Econ. 2002), available at <http://lanic.utexas.edu/project/asce/pdfs/volume12/sanchelima.pdf>.

116. See UNITED STATES INTERNATIONAL TRADE COMMISSION, THE ECONOMIC IMPACT OF U.S. SANCTIONS WITH RESPECT TO CUBA 3–16 (Feb. 2001) <http://hotdocs.usitc.gov/docs/pubs/332/pub3398.pdf> (noting, among other things, that Cuba basically lacked a taxation regime from 1967 to 1994).

117. Ritter & Turvey, *supra* note 113, at 26.

118. Cristian Oliver Lucas-Mas, *The Cuban Tax System Through History*, <http://www.tax.org/thp/Articles/cuba.htm>. Cuba's basic taxation framework consists of Law 73—The Tax Systems Law, Gaceta Official (August 1994), and Decree-Law 169 (January 1997). See Matias F. Travieso-Díaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, *supra* note 29, n. 102. Decree-Law 169 granted primary taxation authority to the Ministry of Finance, and created the National Office of Tax Administration (ONAT). *Id.*

primarily to tap into the sources of revenue being generated at the time by newly legalized forms of self-employment.¹¹⁹

The ability to raise revenues through the taxation of income is limited by Cuba's centrally planned economy and the insolvency of many SOEs.¹²⁰ As a result, the lack of free enterprise has diminished the government's tax base and has precluded the development of a sophisticated taxation system.

Once Cuba moves to a free market economic system, however, the tax base is expected to broaden, and the Cuban government will be able to derive increased revenue from the wider range of revenue-generating activities likely to multiply within its borders. At the same time, and for the same reasons, tax laws are expected to evolve in order to capture the revenue that might otherwise be lost to the tax avoidance schemes¹²¹ likely to be devised in response to the advent of more prevalent taxation.

As the tax laws multiply in number and complexity,¹²² it is inevitable that the government's quest to maximize tax revenues combined with individuals' efforts to minimize the incidence of taxes will spark disputes between the government and taxpayers.¹²³ These disputes are likely to involve differing interpretations of the tax laws

119. See Ritter & Turvey, *supra* note 113, at 3. The legalized economic activities were primarily in the areas of transportation, housing services, and family and personal services. See *id.* Decree-Law 141 limited self-employment to a subset of the population, namely retirees, housewives, and laid-off workers. See *id.*

120. See Matias Travieso-Diaz, *Cuba's Perfeccionamiento Empresarial Law: A Step Towards Privatization?*, 23 U. PA. J. INT'L. ECON. L. 119, 123 (2002).

121. In the U.S., for example, it is estimated that the federal government loses an average of \$30 billion every year of identified taxes due to under- or non-payment of taxes as well as to various tax avoidance schemes. Leonard E. Burman, Senior Fellow, the Urban Inst. Codirector., the Tax Policy Ctr. Research Professor, Georgetown Pub. Policy Inst., Remarks before The Committee on Ways and Means, United States House of Representative, On Waste, Fraud, and Abuse 2 (July 17, 2003) (transcript available online at <http://www.urban.org/UploadedPDF/900644.pdf>). Also, many professional service firms, both in the fields of law and accounting, have been known to peddle sophisticated tax shelters that allow individuals to avoid payment of taxes that would otherwise be due. See, e.g., Tom Herman, *Tax Report: IRS Revises Rules for Advisors in Shelter Crackdown*, WALL ST.J., May 25, 2005, at D3; David Cay Johnston, *Big Accounting Firm's Tax Plans Help the Wealthy Conceal Income*, N.Y. TIMES, June 20, 2002, at A1; David Cay Johnston, *I.R.S. Closes Loophole that Let Rich Hide Income*, N.Y. TIMES, Sept. 26, 2002, at C1; David Cay Johnston, *U.S. Proposes Regulations to Restrict Some Tax Shelters for High Income People*, N.Y. TIMES, Oct. 18, 2002, at C1.

122. The U.S. tax code is one example of just how complex tax laws can become. For instance, in an annual report to Congress, a senior tax policy official noted that "Congress has made the tax code so complicated that even the Internal Revenue Service is having trouble coping." David Cay Johnston, *Report Calls for Simpler Taxes*, N.Y. TIMES, Jan. 12, 2005, at C2. Furthermore, the report urges Congress to take up the simplification of the tax code, and notes that the current tax code is so complex and confusing that "taxpayer compliance is on the wane." *Id.*

123. See generally Lucas-Mas, *supra* note 118 (outlining Cuba's tax structure).

and their application to various activities. Given that taxes are a major source of financing for a government's activities, it is essential that these tax disputes be resolved and adjudicated in the most cost-effective and efficient manner.

One way for the government to maximize the efficiency and reduce the cost of adjudicating tax disputes is to create specialized tax courts.¹²⁴ These tax courts should be staffed by judges who have received legal training in the interpretation and application of the tax laws.¹²⁵ In the early stages of the transition, Cuba will probably have to outsource this specialized legal training,¹²⁶ because at that stage Cuba will probably still lack the necessary know-how to conduct such training. With time, however, as those individuals trained abroad return to Cuba armed with such knowledge and begin to apply what they have learned, that specialized legal training could be carried out within the island.

Furthermore, each judge's decision should be published and should serve as precedent for other judges to follow when adjudicating factually and legally similar tax cases. This system of precedent-based adjudication will lead to the development of a more consistent body of tax law, and the level of certainty that such a well-developed body of law might engender could also have the salutary effect of stimulating further economic activity on the island.¹²⁷

124. See David Smith & Su Sun, *Introducing Competition Policy into Developing Economies: A Summary of Lessons Learned*, 2 PERSPECTIVES, Feb. 28, 2001, http://www.oycf.org/Perspectives/10_022801/introducing_competition_policy_i.htm.

125. Some have argued, however, that such judicial specialization could give rise to a host of problems such as judicial tunnel vision, lack of cross-pollination of legal ideas, judicial capture by special interests, and excessive judicial policymaking. See Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1281 (2002). These Authors believe, however, that the benefits of specialization will probably outweigh the costs. See *id.* at 1290–91.

126. For example, Cuba could send these jurists abroad to study tax law in the various tax LL.M. programs available in the United States. Although Cuban tax laws are not expected to mirror U.S. tax laws, the United States provides a well-developed body of tax law to which foreign jurists could apply a comparative law perspective, borrowing only those aspects of the U.S. system that they find appealing.

127. An analogy to this phenomenon exists in the realm of U.S. corporate law. The State of Delaware has dedicated significant resources to attracting corporations to the state. See Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 893 (1990). One of the reasons, if not the chief reason, that corporations choose to incorporate in Delaware is that Delaware has over the years managed to develop a large body of precedent-based corporate law. See *id.* Whereas corporate law might not be as well-developed in other states, Delaware provides corporations with a relatively certain set of legal rules within which corporations are able to operate. See *id.* This core competency, in turn, has created a sort of cottage industry for corporate-related services in Delaware. See *id.*

C. Bankruptcy Courts

Bankruptcy courts have a long history in free market societies. The term "bankruptcy" is derived from the Italian for "broken bench."¹²⁸ In medieval and Renaissance Italy, when a merchant failed to pay his debts, it was common practice for his creditors to get together and break his bench, giving rise to the term *banca rotta*.¹²⁹

Historically, bankruptcy was considered a criminal offense, often subjecting the debtor to various punishments ranging from debtor's prison to the death penalty.¹³⁰ With the passage of time, however, bankruptcy has lost much of its moral stigma and has been decriminalized.¹³¹ But differences remain in how different countries and cultures view and deal with insolvent debtors.¹³² Nevertheless, with the exception of bankruptcies involving fraud or other forms of serious criminal mischief, most countries generally agree that insolvency in and of itself is not an offense for which a person should be severely punished.

Bankruptcy could be divided into two general categories. The first involves individual, or consumer, debtors. The second involves corporate, or business, debtors. Although many of the legal principles are equally applicable to both categories, there are some differences that stem from a recognition that consumers and businesses have different concerns.

Consumer bankruptcy law traditionally allows debtors in financial distress to discharge their debts and obtain a "fresh start."¹³³ In the United States, discharge has usually taken the form

128. See A Brief History of Bankruptcy in the U.S., <http://www.bankruptcydata.com/ch11history.htm> (last visited Oct. 31, 2005).

129. See *id.*; Bankruptcy—What is Bankruptcy?, <http://www.cpfandler.com/bankruptcy-and-credit/bankruptcy--what-is-bankruptcy.html> (last visited Oct. 31, 2005).

130. See Bankruptcy—What is Bankruptcy?, *supra* note 129.

131. See *id.*

132. Generally, the European model of bankruptcy, at least in the context of threatened business insolvencies, concerns itself more with the social welfare of the various affected individuals (*e.g.*, workers, suppliers, etc.). See Why Should Bankruptcy be Addressed on a European Level?, http://europea.eu.int.com/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/why.htm (last visited Oct. 31, 2005). Therefore, under the European model, the government is more likely to intervene when a business is threatened with insolvency in order to stave off an actual bankruptcy and its concomitant negative impact on various stakeholders. See *id.* In contrast, the U.S. model of bankruptcy rarely results in governmental intervention to stave off a business bankruptcy filing. See *id.* Rather, bankruptcy is viewed as a market-based disciplining measure designed to streamline inefficiencies and promote competition. See *id.*

133. See Life After Bankruptcy, <http://www.cpfandler.com/bankruptcy-and-credit/life-after-bankruptcy.html> (last visited Oct. 31, 2005).

of a liquidation bankruptcy.¹³⁴ In a liquidation bankruptcy, all of a debtor's non-exempt assets are sold and the proceeds are distributed pro rata to the debtor's unsecured creditors; the amount by which the debt exceeds the sales proceeds is legally discharged.

Although liquidation is always an option in business bankruptcy, U.S. bankruptcy law focuses on reorganizing and rehabilitating the debtor.¹³⁵ In doing so, the goal is to provide some breathing space for the debtor to reorder its affairs and maximize its value to its creditors.¹³⁶ In the business context, a liquidation is usually seen as "leaving money on the table," where income-producing assets are sold at fire-sale prices rather than used to pay-off creditors, as in a reorganization.¹³⁷

In both cases, bankruptcy is a legal tool utilized both to protect a debtor from aggressive creditors and to protect creditors from each other.¹³⁸ Although the debtor-protection rationale is generally well-understood, the creditor-protection rationale is less understood. The creditor-protection rationale stems from the view that bankruptcy is also a collective remedy for creditors.¹³⁹ In the absence of such a collective remedy, each creditor is pitted against the others as each fights for the limited pool of assets held by the debtor.¹⁴⁰ In the absence of a bankruptcy law, the rule is that "the first creditor to the courthouse wins."¹⁴¹ In other words, the first creditor to obtain a legal judgment against the debtor is then able to levy against the debtor's assets to satisfy the debt owed to that particular creditor. Of course, this procedure leaves other creditors at a disadvantage and without any source of repayment. Furthermore, the harsh consequences of such a system serve only to intensify creditor aggressiveness as each creditor seeks simultaneously and individually to obtain repayment from the debtor's assets. Such a system is not conducive to economic growth and prosperity.

On the other hand, the collective remedy of bankruptcy immediately stops all unilateral creditor attempts to collect on their

134. This is known in the United States as a Chapter 7 bankruptcy. See Chapter 7 Bankruptcy, <http://www.cpafinder.com/bankruptcy-and-credit/chapter-7-bankruptcy.html> (last visited Oct. 31, 2005).

135. See Nicholas L. Georgakopoulos, *Bankruptcy Law For Productivity*, 37 WAKE FOREST L. REV. 51, 67 (2002).

136. See *id.* (noting the productivity-reviving function of bankruptcy).

137. *Id.* at 67–68.

138. See generally ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS (4th ed. 2001).

139. *Id.*

140. Georgakopoulos, *supra* note 135, at 69 (noting that each creditor's incentive to grab assets results in an overall destruction of value).

141. See Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 AM. BANKR. INST. L. REV. 179, 191 (2003).

debts in favor of a court-supervised method whereby each unsecured¹⁴² creditor is to be treated equally and fairly.¹⁴³

In the United States, Congress has set up a system of bankruptcy courts staffed by specialized judges equipped to handle the volume and complexity of bankruptcy cases.¹⁴⁴ That Congress has chosen to set up such a separate system demonstrates the importance that the bankruptcy laws have in a free market economy.¹⁴⁵

As Cuba starts to develop a free market economy, it should enact a bankruptcy code¹⁴⁶ that will encourage individuals and emerging companies to take potentially rewarding business risks without the fear of an insurmountable amount of debt resulting from business failure. For example, it is well-known that the bankruptcy laws in the United States have been credited to some degree with the nation's robust economic growth and prosperity.

In connection with the passage of a uniform bankruptcy law, Cuba should create specialized bankruptcy courts to ensure the most efficient and cost-effective administration of bankruptcy cases. Staffed with a group of capable, independent bankruptcy judges, bankruptcy courts would be conducive to a well-functioning

142. Secured creditors are those who have taken certain steps, prescribed by law, to secure their claims by designating specified assets of the debtor as collateral. See Shu-Yi Oei, *Rethinking the Jurisdiction of Bankruptcy Courts Over Post-Confirmation Federal Tax Liabilities: Towards a New Jurisprudence* of 11 U.S.L. 505, 19 AKRON TAX J. 49, 64 (2004). Secured creditors are treated differently than unsecured creditors in bankruptcy. *See id.* To the extent that a secured creditor has perfected its security interest in collateral consisting of some of a debtor's assets, the secured creditor will be allowed to take the "first bite at the apple" with regard to those assets. *See id.* In other words, unsecured creditors are entitled to distributions only if there remain any unencumbered assets after a properly perfected secured creditor has been paid up to the value of its collateral. *See id.*

143. *See* Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do not Go Far Enough*, 69 AM. BANKR. L. J. 515, 520 (1995) (noting that "equality is equity" is one of the principles underlying the U.S. bankruptcy laws).

144. *See* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 832–33 (2000).

145. In fact, the Framers of the U.S. Constitution considered the establishment of a uniform bankruptcy law to be of such vital importance to the national interest that they specifically mentioned bankruptcy as one of the enumerated powers to be given to the federal government of limited powers. U.S. CONST. art. I, § 8, cl. 4 gives Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."

146. As pointed out in THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA, *supra* note 17, Cuba's bankruptcy law should probably incorporate features of both the "liquidation model" and the "reorganization model" of bankruptcy, as both serve useful purposes in different contexts. Cuba could also look to Hungary's experience for further ideas. For example, in 1986, Hungary became the first communist country to enact a bankruptcy law that sought, in part, to induce enterprises to become more profitable and less reliant on government subsidies. *See* Paul H. Rubin, *Growing a Legal System in Post-Communist Economics*, 27 CORNELL INT'L L. J. 1, 16 (1994).

bankruptcy system that is so important for the establishment and maintenance of a vibrant economy.

D. Intellectual Property Courts

The term “intellectual property law” is an umbrella term that refers to the laws of copyrights, patents, and trademarks.¹⁴⁷ Although Cuba currently has intellectual property laws on its books,¹⁴⁸ the laws are not administered by one body, but rather by an amalgam of different government agencies and judicial bodies.¹⁴⁹ Cuba’s intellectual property laws currently do not affect the Cuban people much, given that Cuba outlaws most forms of private property.¹⁵⁰ The transition to a free market economy, however, is likely to liberalize private property rights. In turn, intellectual property rights are likely to play an increasingly important role as Cuba progresses in its transition.

If the situation in the United States is any indication, a successor Cuban government would be well-advised to set up a system of specialized courts to adjudicate intellectual property disputes. In recent years, the United States has witnessed an explosive growth in complex technological and intellectual property cases.¹⁵¹ These cases have often presented novel issues that have strained the adjudicatory ability of generalist judges who possess limited knowledge of these specialized areas.¹⁵²

147. As with bankruptcy law, intellectual property law was deemed important enough to the national interests of the United States that the Framers of the Constitution specifically granted Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Although this constitutional provision deals only with patents and copyrights, Congress has taken steps to federalize trademark law with passage of the Lanham Act. See Rashida Y.U. MacMurray, *Trademarks of Copyrights: Which Intellectual Property Right Affords Its Owner the Greatest Protection of Architectural Ingenuity?*, 3 N.W. J. TECH. & INTELL. PROP. 111, 124 (2005).

148. Cuba’s patent law is codified in Decree-Law 68 of May 14, 1983; its trademark law is codified in Decree-Law 293 of May 2, 2000; and its copyright law is codified in Law No. 14 of Dec. 28, 1977. See Jesus (Jay) Sanchezima, *Selected Aspects of Cuban Intellectual Property Laws*, 15 FLA. J. INT’L L. 377, 378, 380, 383 (2003).

149. See *id.* at 379, 382–83.

150. *Id.* at 382.

151. See LeRoy L. Kondo, *Untangling The Tangled Web: Federal Court Reform Through Specialization For Internet Law And Other High Technology Cases*, 2002 UCLA J.L. & TECH. 1, 1 (2002).

152. *Id.* at 3 (“The ‘tangled web’ of legal and scientific complexity experienced in the aftermath of explosive technological growth in this new millennium may be ‘untangled’, at least in part, through court reform by implementing policies of increased specialization within the judiciary.”).

As mentioned earlier, the U.S. Court of Appeals for the Federal Circuit is a specialized court that deals primarily with intellectual property cases.¹⁵³ The Federal Circuit has been credited by some with significantly advancing the development of patent law doctrine and with building the “major pillars of novel computer software technologies, biotechnology developments, and business methods.”¹⁵⁴ Also, commentators, including the U.S. Supreme Court, have noted the Federal Circuit’s success in achieving the desirable policy goals of providing “uniformity, order and predictability to a complex body of law.”¹⁵⁵ In fact, it has been noted that the Federal Circuit has in essence become the de facto “court of last resort” for intellectual property and, particularly, patent cases, as evidenced by the high rate of Supreme Court denials of certiorari to intellectual property cases resolved by the Federal Circuit.¹⁵⁶

In addition to the United States, several other countries have established some form of specialized intellectual property courts.¹⁵⁷ Approximately eleven countries have developed specialized courts or tribunals that hear only intellectual property cases,¹⁵⁸ and approximately twenty-five countries have courts of general jurisdiction that have specialized divisions that hear intellectual property cases exclusively.¹⁵⁹ Cuba, however, has indicated that it does “not have specialised IP courts, and [is] not currently contemplating the creation of specialised IP courts.”¹⁶⁰ For the reasons stated above, a successor Cuban government would do well in considering the creation of courts of limited jurisdiction to deal with the complex intellectual property issues likely to arise post-transition.

153. *Id.* at 5. The Federal Circuit also hears cases involving the U.S. International Trade Commission, the Federal Tort Claims Act, and the Merit System Protection Board. *Id.* Because the Federal Circuit is an appellate court, however, the intellectual property cases it reviews have first been decided by lower courts (i.e., U.S. district courts) staffed by generalist judges. *See id.*

154. *Id.* at 17.

155. *Id.* at 18.

156. *Id.* at 18–19.

157. See International Bar Association Intellectual Property and Entertainment Committee, *International Survey of Specialised Intellectual Property Courts and Tribunals* 7, http://www.comml-iba.org/attachment/articles/88/Final_International_IP_Survey_edited-clean_28-02-05.pdf (last visited Nov. 2, 2005) [hereinafter Specialized IP Court Survey].

158. *Id.* at 8–9. Examples include Korea, Thailand, Turkey, United Kingdom, Australia, China, Jamaica, Kenya, New Zealand, Singapore, and Zimbabwe. *Id.*

159. *Id.* at 10. Examples include Brazil, Belgium, Canada, Denmark, Finland, France, Germany, Hong Kong, Hungary, India, Iran, Israel, Italy, Japan, Norway, Pakistan, Panama, Romania, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Taiwan, and the Netherlands. *Id.* at 10–12.

160. *Id.* at 29.

IV. STAFFING OF COURTS OF LIMITED JURISDICTION

A. *Introduction*

One of the greatest challenges that will face a transition government in Cuba is to deploy a sufficient number of qualified judges and other personnel to oversee the reform of the legal system while also staffing both the courts of general jurisdiction and newly established specialized courts.¹⁶¹ This challenge will be aggravated if, as some propose, some members of the current judiciary are dismissed or excluded from participation in the post-transition court system due to their association with the current regime.¹⁶²

The judges that will preside over the courts of limited jurisdiction—whose creation this Article advocates—will need to either come from the existing court system (subject to the necessary retraining) or serve as newly appointed jurists. Most likely, both methods will have to be utilized over time.

B. *Training of Existing Judges*

Those among Cuba's current judges who are appointed to specialized courts will have to be trained on the fundamental legal and technical principles applicable to their new specialty. Some form of institutionalized legal education will be most effective in helping judges make this transition. Cuba will probably need both short-term and long-term plans for retraining its judges. A short-term plan would involve the assistance of foreign aid for training in specialized areas, while over the long term Cuba may want to establish a program of continuing legal education for its judges. Models and resources are available to assist the transition government in the implementation of both plans.

1. Short-Term Retraining

Countries making the transition from socialism to a free market economy have instituted crash programs to make their judiciaries better able to address the new issues presented by the changed

161. See generally Patallo Sánchez, *supra* note 12.

162. See, e.g., Mario Diaz-Cruz, III, *Challenges for a Transitional Judiciary in a Post-Castro Cuba*, in 12 CUBA IN TRANSITION 304, 305 (2002), <http://lanic.utexas.edu/project/asce/pdfs/volume12/diazcruz.pdf> (arguing that Cuba should exclude some judges from participating in a post-Castro judiciary). The exclusion of former communists from participation in post-communist governments (lustration) has taken place in some former Eastern Bloc countries, such as the former Czechoslovakia and Poland. *Id.*

economic order.¹⁶³ Judicial training centers (JTCs) have been established in nineteen countries across central and eastern Europe to educate judges about legal changes wrought by a transition to democracy.¹⁶⁴ The JTCs provide short-term training in the form of seminars, workshops, and other structured and unstructured instruction tailored to the needs of the specific judges being trained.¹⁶⁵ This type of training is consistent with current trends in judicial education.¹⁶⁶

It is outside the scope of this Article to discuss in detail the training programs that existing members of the Cuban judiciary should receive in order to be able to serve in courts of limited jurisdiction. But there is a wealth of information available on the appropriate methodology for such training, and general guidelines have been developed for the organization of judicial training programs.¹⁶⁷

There are a number of international organizations that could lend technical and financial support to a JTC program in Cuba. It has also been recommended that the United States include judicial training as one of the elements of an aid package to be made available to a transition government in Cuba.¹⁶⁸

2. Continuing Legal Education

Judges in courts of limited jurisdiction will need continuing training to keep abreast of changes in the law in their areas of specialization (e.g., changes in the tax regime). In establishing some form of continuing legal education, the following considerations must be made: (1) whether the program will be run by the government or a non-government entity, (2) who will teach the judges, and (3) whether the program will be voluntary or mandatory.

163. See American Bar Association, *Judicial Training Center Network*, http://www.abanet.org/ceeli/special_projects/jtc/home.html.

164. See American Bar Association, *Introduction to Legal and Judicial Reform Projects*, <http://www4.worldbank.org/legal/leglr/introduction.html>.

165. See American Bar Association, The Judicial Educational Center of the Council of Court Chairman of the Republic of Armenia, http://www.abanet.org/ceeli/special_projects/jtc/armenia_04schedule.html (showing an example of the training curriculum for a JTC).

166. See LIVINGSTON ARMYTAGE, *JUDGES AS LEARNERS: REFLECTIONS ON PRINCIPLE AND PRACTICE 1* (2004), <http://www.nji.ca/internationalForum/Armytage%201.pdf> [hereinafter ARMYTAGE].

167. See, e.g., *id.* at 15.

168. See COLIN L. POWELL, SECRETARY OF STATE, COMMISSION FOR ASSISTANCE TO A FREE CUBA: REPORT TO THE PRESIDENT 194 (2004), <http://www.state.gov/documents/organization/32334.pdf>.

a. Government versus Non-Government Sponsorship

Continuing legal education (CLE) programs in transitioning countries have varied in institutional structure. Some countries have established a single institution in charge of overseeing all CLE programs, while other countries allow various organizations to run CLE programs.¹⁶⁹ Some countries have both types of CLE programs.

Single institution CLE programs can be conducted by either government or non-government entities. Mongolia's CLE program is run by a government-owned non-profit organization that operates under the Ministry of Justice.¹⁷⁰ On the other hand, Bulgaria's CLE program, the Bulgarian Magistrate Training Center, was established as a non-governmental, non-profit organization (although it is expected to eventually become a state institution).¹⁷¹ Macedonia carries out its CLE through the Macedonian Center for Continuing Education, which operates under the auspices of the Macedonian Judges Association.¹⁷² Regardless of whether CLE functions as part of the government or as a non-government entity, the program should be organized so as to prevent governmental interference with judicial education.

Where a government-controlled institution oversees the CLE program for judges, the composition of the oversight institution may vary. The most popular governing structure seems to mix government officials, judges, and other legal professionals. For example, the Bulgarian Center's Board of Directors comprises top ranking officials from the executive, legislative, and judicial branches.¹⁷³ A Board of Directors composed of officials from the Ministry of Education and Culture, the Supreme Court, and the National University Law School oversee the CLE program in Uruguay as part of the Centro de Estudios Jurídicos de Uruguay.¹⁷⁴ The Mongolian CLE program's Governing Board is chaired by the State Secretary of the Ministry of Justice and Home Affairs, while the chair of the Judicial Education Subcommittee is a Supreme Court Justice.¹⁷⁵

169. Mary Francis Edwards, *Getting Continuing Legal Education Started in a Developing Country* 1, http://www.nji.ca/internationalForum/02_Getting%20CJE%20_mary%20frances%20edwards.pdf.

170. *See id.*

171. See American Bar Association, Bulgaria Magistrate Training Center, http://www.abanet.org/ceeli/special_projects/jtc/bulgaria.html. Bulgaria also allows for non-profit legal organizations to carry out CLE programs. *See id.*

172. See USAID, USAID's Rule of Law Project, http://www.usaid.org.mk/English/DG/Rule_of_Law_eng.htm.

173. See Bulgaria Magistrate Training Center, *supra* note 171.

174. See Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 709 (2000).

175. Edwards, *supra* note 169, at 1–2.

b. Teachers

While many judicial training programs in transitioning countries have been taught by foreigners, judicial reform strategists recommend that a sustainable CLE program should be taught by local professionals, preferably judges.¹⁷⁶ Successful CLE programs have also utilized lawyers with specialized areas of expertise, as well as non-legal professionals who specialize in other disciplines. Judges, however, prefer to learn from other local judges because of their practical experience and because they have a better understanding of their country's legal context than foreigners. A second reason to have local judges teach is that local judges will remain in the country after foreign assistance has left.

CLE teachers need not dedicate their full efforts to such teaching. Mongolia, for example, hires CLE faculty to work only part-time.¹⁷⁷ Under such an arrangement, faculty members can maintain their careers, but still provide teaching services. Cuba may need to provide flexible programs that maximize the availability of competent CLE teachers.

c. Mandatory versus Non-Mandatory CLE

Not all countries in transition require judges to participate in CLE. Countries often, however, provide incentives for judges to participate in CLE.¹⁷⁸ For example, in Chile, for judges to be considered for promotion, they should take at least one CLE course.¹⁷⁹

It should be anticipated that countries with a more structured CLE program (including compulsory CLE training) will be more successful in sustaining judicial reforms.

176. See, NAT'L ASS'N OF STATE JUDICIAL EDUCATORS, PRINCIPLES & STANDARDS OF CONTINUING JUDICIAL EDUCATION, 21, 12 (1991); see also Kara L. Flanery de Tichoc, *Judicial Reform in the Development Agenda: The Case of Guatemala*, (Center for Latin American Studies, Georgetown Univ. 2003), <http://www.georgetown.edu/sfs/programs/clas/Pubs/entre2003/judicial.html>.

177. See National Center for State Courts, Partnering to Facilitate the Evolution of Justices Worldwide, www.ncsc.org, follow "International" tab.

178. In some countries CLE is compulsory. In Armenia, for example, "[j]udges are obligated to attend mandatory trainings for 36 hours per year." See American Bar Association, The Judicial Educational Center of the Council of Court Chairman of the Republic of Armenia, http://www.abanet.org/ceeli/special_projects/jtc/armenia.html [hereinafter Armenia].

179. See Global Judges Forum, Rio de Janeiro, at 10–11 (2004), http://siteresources.worldbank.org/GILD/Resources/Court_Practices_Report_GJF_2004.doc.

C. Training of New Judges

The two major models of judicial education and training are the civil system and the common law system. In a civil model, law school graduates are appointed as judges for the term of their careers.¹⁸⁰ Students achieve the required level of competence before a judicial appointment.¹⁸¹

In the common law model, judges are selected from a pool of experienced lawyers. Legal education is meant to facilitate a transition to the judicial role and the application of the competencies already developed from practicing as a lawyer.¹⁸²

A civil model would serve the needs of specialized courts because it provides a structured, institutionalized, and predictable framework for the training and appointment of judges. It would be an easy step to include specialized training in the areas of interest to the specialized courts as part of the judicial education curriculum. On the other hand, the common law model has the advantage that the lawyers appointed to the specialized courts would have practical experience and knowledge in the areas of interest from the outset.

Many central and eastern European countries use a combination of the two approaches to obtain new judges.¹⁸³ Judicial qualification and preparation in these countries offer judicial careers for both recent law school graduates and practitioners. In some countries, only the completion of a higher education course of studies, and not necessarily any legal training education, is required to become a judge.¹⁸⁴ Such an approach makes sense in countries transitioning to democracy, where there is a need for a large pool of applicants to draw from to fill newly created (or newly available) positions. This dual approach should also be employed in Cuba.

180. See ARMYTAGE, *supra* note 166, at 16.

181. *See id.*

Alternatively, judges could enter the judicial school after law school, as [is the practice] in Spain. Spanish judicial candidates are trained specifically to serve as judges in particular courts including commercial, civil, or criminal courts. The qualifications to serve on each differ and the candidates receive in depth training and education in both procedural and substantive laws that are regularly addressed in those courts.

SANCHEZ, *supra* note 161, at 29.

182. ARMYTAGE, *supra* note 166, at 16.

183. See, e.g., American Bar Association, Croatia (2002), <http://www.abanet.org/ceeli/countries/croatia/legalinfo.html>.

184. *Id.*

D. Use of Non-Judicial Personnel in Courts of Limited Jurisdiction

Non-judicial personnel (lawyers and non-lawyers) can serve in a judicial capacity in a variety of ways. In specialized courts, non-judges serve as lay judges, conciliators, arbitrators, and justices of the peace.¹⁸⁵ Judicial systems that employ lay judges usually place them on panels alongside professional judges.¹⁸⁶ Staffing courts entirely with non-judges is unlikely to result in adequate administration of justice.¹⁸⁷

Hiring requirements for lay judges range from minimal education to higher education combined with a requisite number of years of legal experience. Not all countries require that lay judges have legal training. For example, to serve in the Constitutional Court in Armenia, one need only have completed some type of higher education and worked ten years in the legal, governmental, or scientific fields.¹⁸⁸

Non-lawyer judges are generally chosen, either by the community or the judiciary, based on their high moral standing in the community and special knowledge or experience. Some countries only require non-lawyer judges to be a certain minimum age and without a criminal record.¹⁸⁹ Other countries require non-lawyer judges to have completed higher education and a certain number of years of professional experience.¹⁹⁰ Lay judges in specialized courts are often

185. Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 966–70 (2004) (noting that Japan uses non-lawyer judges to guide the lowest and highest courts in Japan). Lay judges in Japan hear civil cases in courts of limited jurisdiction. *Id.* at 967. These judges are only required to pass a general civil servant's exam and be employed by the court system or justice ministry for three years. *Id.* Japan also employs lay judges as Supreme Court justices with the intent of maintaining one-third of the bench as non-lawyers. *Id.* Lay judges also act as conciliators. *Id.* at 969.

186. France and Germany are examples of such countries. See *id.* at 974.

187. In an extreme case, the government of Rwanda staffed a brand new judiciary with almost entirely non-lawyers to handle the tremendous caseload resulting from the genocide killings. See Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 381, 387 (2005). The newly elected judges were inadequately trained, spending only six days in judicial training seminars. *Id.* at 386. As would be expected, the work of these judges was considered inadequate. *Id.*

188. See Armenia, *supra* note 178.

189. See Goldstein-Bolocan, *supra* note 187, at 381.

190. See Armenia, *supra* note 178.

required to be experts in a specific area relevant to the jurisdiction of the court.¹⁹¹

Countries have been able to benefit from the selection of judges for courts of limited jurisdiction from among a pool of professionals specialized in specific areas. Specialized professionals seem to work well on panels with professional judges because they contribute subject matter expertise to complement the legal analysis.

Cuba's courts of limited jurisdiction will benefit from, and may require, the inclusion in their ranks of lay personnel—professionals with specialized knowledge if not legal training. Such lay personnel could serve, in a strictly advisory capacity, on panels with judges, and should have such training or experience to add value to the court's deliberations.

V. CONCLUSIONS AND RECOMMENDATIONS

It is beyond dispute that implementation of the necessary changes to Cuba's legal institutions must be at the core of Cuba's market transition. It is also very likely that instituting the required changes to the legal system in a short timeframe may be beyond the transition government's capabilities. In particular, the Cuban judiciary—already small in number and perhaps further thinned out by the implementation of lustration measures—may be unable to cope with the gargantuan task of applying the transition period laws and managing the flood of litigation that may ensue as a result of the country's legal and economic changes. At a minimum, Cuba should consider establishing courts of limited jurisdiction in the areas discussed in this Article as a way to relieve court congestion and provide timely access to justice to the people.

In addition, the Cuban government should work with the governments of interested countries, particularly the United States, and international lending institutions such as the World Bank. From these entities, Cuba should obtain technical assistance in the development of programs to train, qualify, and deploy at least the minimum number of qualified judges and other legal practitioners that would permit the sustained progress of the transition process.

191. See Paul Edward Geller, *Staffing the Judiciary and "Tastes" in Justice: A Commentary on the Papers by Professors Bell and Clark*, 61 S. CAL. L. REV. 1849, 1852 (1988).
