RESOLVING LEGAL CLAIMS BETWEEN THE UNITED STATES AND CUBA:
APPLYING INTERNATIONAL LAW WHERE DIPLOMACY ALONE FALLS SHORT*

Joyce Rodriguez, Esq.**

INTRODUCTION

At the heart of the nearly sixty-year-old conflict between the United States and the Republic of Cuba lies the $1.9 billion U.S. claim against Cuba for the mass expropriation of American-owned property and assets in Cuba during the early years of the Cuban revolution.\(^1\) Cuba’s socialist revolution and uncompensated expropriation of U.S.

* Please note that this article was written without direct knowledge of the content of the current bi-lateral negotiations between the American and Cuban delegates. The insights and other recommendations in this article arise from publicly available information, including statements made through media outlets, published works of experts and scholars, as well as my own personal experience as a Cuban-American born to Cuban political exiles.

** Joyce Rodriguez, Esquire obtained her J.D. from the Levin School of Law, University of Florida and L.L.M. in International Law from the Fletcher School of Law and Diplomacy, Tufts University. Ms. Rodriguez would like to thank her LL.M. capstone advisor, distinguished Professor Jeswald W. Salacuse, for his exceptional insight and guidance throughout the writing process.

property initiated a series of events that have defined the decades-old stalemate between the countries. The passage of time, however, has inevitably witnessed incremental but definitive changes to U.S.-Cuba relations. Many of these changes have come to fruition in the past ten years alone with former President Barrack Obama’s pledge to restore diplomatic relations with Cuba and the subsequent loosening of U.S. economic sanctions against Cuba.² Although the Obama administration’s policy has not been without its critics, this paper will argue that these policy changes, along with the application of international law and the use of arbitration, may be strategically utilized to induce the Cuban government to settle the expropriated property claims.

However, it would be unrealistic to assume that the U.S. will be able to resolve its legal claims against Cuba without also addressing Cuba’s claims against the U.S. Once the U.S. shifts its negotiation strategy with Cuba towards resolving its expropriated-property claims against Cuba, Cuba will raise its own counterclaims against the U.S. arising from the embargo and alleged U.S. covert operations against Cuba.³ This in turn will trigger the U.S. to respond in kind and raise its claims against Cuba for its alleged covert operations against the U.S. and its nationals.⁴ Accordingly, this paper will address the

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⁴ See, e.g., Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1253–54 (S.D. Fla. 1997) (arising from Cuban Government directing Air Force to shoot down two unarmed civilian airplanes over international waters on February 24, 1996, where district court entered judgment for the plaintiffs and awarded them compensatory damages of $49,927,911 against the Cuban Government and Cuban Air Force, as well as punitive damages of $137,700,000 against the Cuban Air Force alone).
resolution of the U.S. expropriated-property claims against Cuba as well as other potential legal claims each country will likely raise against the other in their diplomatic negotiations.

This paper will argue that international law and precedent provide the U.S. and Cuba with valuable tools, as well as a legitimate and fair framework to resolve many of their legal claims against each other. The first section will explore the changing relationship between the U.S. and Cuba, outline internal changes in each country, and argue that the time is ripe for resolution of their legal claims. The next section will examine the measures taken by Cuba to nationalize U.S. property, review the measures taken by the U.S. to enforce the embargo against Cuba, and show that the validity of the measures can be fairly evaluated by applying international law principles. The third section will examine how the U.S. and Cuba have resolved similar claims in the past. The paper will then analyze two of the most comprehensive and creative scholarly proposals for the settlement of the U.S. claims against Cuba to point out their advantages and disadvantages. Finally, the paper will conclude by providing a new forward-looking proposal for the resolution of outstanding legal claims between the U.S. and Cuba that accounts for current political and economic realities.

I.
THE TIME IS RIPE FOR RESOLUTION OF THE LEGAL CLAIMS BETWEEN THE UNITED STATES AND CUBA

The hostile U.S.-Cuba relationship is rooted in the Cold War. On January 8, 1959, Fidel Castro and the 26th of July Movement entered Havana and Castro's revolutionary forces took power in Cuba.5 From 1959–1963, Castro directed the expropriation of nearly all private

property on the island.  These measures are discussed more thoroughly in the next section. However, it is important to note that despite the illusory nature of the compensation schemes set forth in many of the expropriation measures and Cuba’s ultimate failure to pay any compensation for the expropriations, the Cuban government did attempt to negotiate settlement options with the U.S. government as early as September and December 1959. Cuban’s Foreign Minister’s early indication that the new Cuban government was willing to negotiate was rebuffed by the U.S. The U.S. corporations that did engage in settlement discussions with the Cuban government were unable to come to an agreement for fear of losing their future property claims if the Castro government was eventually removed from power. Thus, the futility of settling the U.S. expropriation claims through diplomacy alone was evident as early as 1959.

A. THE HISTORICAL BREAK IN RELATIONS BETWEEN THE UNITED STATES AND CUBA

As Castro’s regime formalized trade relations with the Soviet Union, expropriated U.S.-owned properties, and increased taxes on U.S. imports, the U.S. responded with escalating economic penalties. After the U.S. significantly decreased Cuban sugar imports, “[o]n January 1, 1961, Cuba ordered all U.S. diplomatic” staff

9 See Ashby, supra note 7, at 420.
to leave the island.\textsuperscript{11} Two days later, the United States announced the formal breaking of diplomatic relations with the Cuban government.\textsuperscript{12}

A few months later, on April 15, a U.S. aircraft bombed three airports in Cuba.\textsuperscript{13} Cuban mercenaries armed and trained by the U.S. landed at the Bay of Pigs on April 17 but were defeated by the Cuban army.\textsuperscript{14} This was the catalyst for Castro’s declaration of the socialist revolution.\textsuperscript{15} These events concretized the ensuing stalemate between the countries for decades to follow.

After the fall of the Soviet Union, the international community was shocked to discover the grave economic situation in Cuba.\textsuperscript{16} Economic conditions in Cuba worsened when Cubans were deprived of the basic food and necessities usually imported from the Soviet Union and Eastern Europe.\textsuperscript{17} The U.S. sought to use Cuba’s vulnerable state to increase economic pressure on the Castro government.\textsuperscript{18} Instead of yielding to this pressure, the Cuban government responded to its economic downturn with a series of internal economic changes affecting its property laws in an effort to attract new and much needed foreign investment.\textsuperscript{19} The revival of foreign investment in Cuba was viewed by the United States as a threat to its legal claims to previously-expropriated property.\textsuperscript{20} More stringent requirements for lifting the U.S. embargo came after four Cuban-Americans were killed when a Brothers to the Rescue plane

\begin{itemize}
\item \textsuperscript{11} Gilmore, supra note 6, at 84.
\item \textsuperscript{12} See DOMINGUEZ & PROVOST, supra note 5, at 49.
\item \textsuperscript{13} See id.
\item \textsuperscript{14} See id.
\item \textsuperscript{15} See JONATHON D. ROSEN & HANNA S. KASSAB, U.S. CUBA RELATIONS CHARTING A NEW PATH 61 (2016).
\item \textsuperscript{16} See Andrew Zimbalist, Treading Water: Cuba’s Economic and Political Crisis, in CUBA AND THE FUTURE 7, 7-11 (Donald E. Schulz ed., 1994).
\item \textsuperscript{17} See DOMINGUEZ & PROVOST, supra note 5, at 99.
\item \textsuperscript{18} See id. at 104.
\item \textsuperscript{19} See Zimbalist, supra note 16, at 11.
\item \textsuperscript{20} See DOMINGUEZ & PROVOST supra note 5, at 107.
\end{itemize}
was shot down by Cuban military in 1996.\textsuperscript{21} Determining that Fidel Castro had directly given the order to shoot down the plane, Congress sought to further increase the economic and trade restrictions against Cuba, culminating in the passing of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996.\textsuperscript{22} Among other wide-reaching provisions, the new law called for “full” compensation for expropriated property before the lifting of the embargo and created a cause of action against anyone “trafficking” in expropriated American property in Cuba.\textsuperscript{23} By 2001, the U.S. policy toward Cuba sought to compel a transition to democracy on the island through economic pressure.\textsuperscript{24} President George W. Bush maintained the same policies toward Cuba.\textsuperscript{25} The relationship between the U.S. and Cuba remained unchanged until 2008.

\textbf{B. THE START OF A NEW RELATIONSHIP BETWEEN THE UNITED STATES AND CUBA}

President Barrack Obama’s two terms, 2008–2016, marked a historical shift in U.S.-Cuba policy.\textsuperscript{26} In his first term, President Obama’s administration eased travel restrictions, enabled remittances to Cuba, and allowed people-to-people exchanges.\textsuperscript{27}

\begin{thebibliography}{99}
\bibitem{21} See ROSEN \& KASSAB, supra note 15, at 67.
\bibitem{23} See Helms-Burton Act, supra note 22, at § 6082(a)(1)(A).
\bibitem{25} See ROSEN \& KASSAB, supra note 15, at 67.
\bibitem{27} See DOMINGUEZ \& PROVOST, supra note 5, at 129-50; see also infra Section II.C. (President Clinton had made some on these changes before the
However, it was not until December 2014 that President Obama announced that the U.S. “would restore diplomatic relations with Cuba, reopen the U.S. embassy, and remove Cuba from the list of state sponsors of terrorism.” Obama’s view was as follows:

Neither the American, nor Cuban people are well served by a rigid policy that is rooted in events that took place before most of us were born. Consider that for more than 35 years, we’ve had relations with China – a far larger country also governed by a Communist party. Nearly two decades ago, we reestablished relations with Vietnam, where we fought a war that claimed more Americans than any Cold War confrontation.29

Obama’s policy sought to empower the Cuban people themselves to create democratic change in Cuba, instead of forcing democratic changes through external economic pressure and coercion.

In May 2015, Cuba was removed from the list of state sponsors of terrorism.30 The U.S. embassy in Cuba was reopened in August 2015.31 Before leaving office, Obama also reversed the United States’ long-standing “wet foot dry foot” policy making it more difficult for Cubans fleeing Cuba to legally immigrate to the U.S. and become U.S. citizens.32

C. OTHER RECENT CHANGES

Recently, there have been some changes in leadership in the Cuban government and the Cuban economic model. In November

enactment of the Helms-Burton Act, and President Bush kept some of those changes but reversed some as well).

28 ROSEN & KASSAB, supra note 15, at 72.
29 President Barrack Obama, supra note 2.
30 See ROSEN & KASSAB, supra note 15, at 73.
31 Id. at 74.
2016, Fidel Castro died. President Raul Castro stated that he would step down in 2018 and did so in April.33 Before stepping down, President Raul Castro changed some of the leadership in Cuba, and commenced the process of implementing a new economic reform plan.34 The Cuban government’s rhetoric evidences a move toward liberalization of its economy, including significant changes to its foreign investment laws.35 Some small private businesses are legal in Cuba, although the licensing process remains unpredictable.36 Cuba has entered into forty bilateral investment treaties signaling a respect for the legitimacy of international investment law.37

Public opinion in the U.S. and in Cuba generally supports a change to the U.S.-Cuba relationship.38 Many Americans, including many Cuban-Americans, are ready for a change in U.S.-Cuba relations.39 The younger Cuban-American demographic is especially


34 See COLLIN LAVERTY, CUBA’S NEW RESOLVE ECONOMIC REFORM AND ITS IMPLICATIONS FOR U.S. POLICY, CENTER FOR DEMOCRACY IN THE AMERICAS (2011).


36 See, e.g., Law, 1993, No. 41 (Cuba) (allowing small private businesses to operate in certain occupations and giving approximately 170,000 Cubans licenses to run private businesses). In 1994, Cuba also legalized the use of U.S. dollars, eliminated government grants, and opened the agricultural sector to market forces.

37 See discussion infra Section IV.B.


39 See id.
enthusiastic for positive change and access to the island. However, even hopeful Cuban-Americans remain very concerned with the continuing human rights abuses in Cuba and Cuban policies that affect the exile community’s ability to visit Cuba and Cuban nationals’ ability to visit the U.S..

On the other hand, many Republicans and Cuban-American hardliners in Congress, such as Marco Rubio, Lincoln Diaz-Balart, and Ileana Ros-Lehtinen, strongly opposed all of Obama’s changes to U.S.-Cuba policy. They deemed Obama’s changes as one-sided concessions lacking any credible commitment from Cuba for democratic change on the island.

Meanwhile, congressional Democrats tend to support lifting the embargo. In January 2016, House Democrats introduced a bill to lift the embargo that would repeal the Helms-Burton Act.

President Donald Trump’s official Cuba policy aligns with those of the Republican hardliners, due to his strong relationship with the Cuban-American contingent on the Hill. After the election, Trump has demanded Cuban concessions and described Fidel after his death as a “brutal dictator who oppressed his own people for nearly six

41 See ROSEN & KASSAB, supra note 15, at 118-23.
42 See id. at 99.
44 See id. at 112.
The Helms-Burton Act, supported by the majority of Republicans and hardliners alike, requires resolution of the expropriated property claims as a prerequisite to lifting the embargo. Thus, a shift toward resolution of these claims is in line with the Republicans’ position on Cuba and Helms-Burton Act requirements.

If Trump follows through with hardline tactics that further isolate Cuba, he will garner support from the Cuban-American community and Republican members of Congress, but the tactics will likely roll-back the progress in building trust with Cuba that has been gained under Obama and will undermine the U.S. interest in resolving its claims. In addition to the state of affairs in the U.S., recent events in Cuba and Cuba’s continued support of leftist regimes in the region also serve to exacerbate the breaking down of the relationship between the U.S. and Cuba.

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49 See id.


On the other hand, a Republican-dominated Congress and the Trump administration could utilize Obama’s changes as “carrots” by withholding outright endorsement of those advances to induce Cuba to make the resolution of U.S.’ outstanding legal claims a priority. The promise of a one-party dominated Congress to amend or repeal economic and trade restrictions against Cuba can also be used to induce Cuba to compensate the U.S. for its expropriated property claims and other legal claims it may have against Cuba.

D. CONCLUSION

Historically, economically, socially, and legally, the time is ripe to resolve the outstanding expropriation claims. The Trump administration should take steps to ensure that the change in administration is not a barrier to the settlement with Cuba of the outstanding 5,911 certified property claims. Trump’s strategy should provide some continuity to Obama’s policy while at the same time proposing fresh ideas on ways to move forward that take into account U.S. interests in resolving its legal claims against Cuba and addressing human rights violations in Cuba. With the right perspective, a Republican-dominated Congress could provide Trump with congressional approval to shift from Obama’s more singular focus on lessening the trade and economic sanctions to one that balances lifting the embargo with achieving the full array of its political and economic goals in Cuba, beginning with resolving U.S. expropriation claims against Cuba.

It is easy to overestimate President Obama’s policy and its effect on U.S.-Cuba relations. Even a short historical accounting of the relationship between the two nations reveals how fragile it is. A history of mistrust and subversion creates a situation of hypersensitivity; where even minor miscommunications or shifts in policy can prove detrimental to diplomatic progress. Building trust and respect between the Cuban and U.S. administrations is essential. The U.S.’ historical interference and willingness to continue its

interference in Cuban internal affairs in the future is harmful for building trust between the U.S. and Cuba. Similarly, Cuba’s human-rights record, historical anti-American rhetoric and role as a rallying point against the U.S. is problematic for their future relationship. Therefore, continued and dedicated diplomacy should focus on relationship-building and trust-building methods to facilitate negotiations of any kind.  

One such method involves choosing legitimate criteria or standards of fairness to govern the process of the negotiations that are independent of the will of either country’s leadership but that account for their interests. If the U.S. and Cuba would agree that international law governs some of their outstanding legal claims against each other, then they can utilize international law as a fair framework to guide the negotiation process.

II. DIPLOMACY ALONE IS UNLIKELY TO RESOLVE THE COMPLEX LEGAL CLAIMS BETWEEN THE UNITED STATES AND CUBA

A. INTRODUCTION

This section will analyze the measures taken by Cuba to nationalize U.S. property and the measures taken by the U.S. to enforce the embargo against Cuba. Both states have implemented legislation and taken other steps that further complicate their ability to fully restore diplomatic relations. The U.S. legal claims against Cuba largely consist of U.S. nationals’ claims arising from the Cuban government’s “nationalization, expropriation, intervention, or other

taking of, or special measures directed against, [American] property” in Cuba from 1959-1967.\textsuperscript{56} These legal claims may include claims of current U.S. citizens who were Cuban nationals at the time of the taking, claims against foreign investors for “trafficking” in confiscated property to which they held title,\textsuperscript{57} and claims against the Cuban government for confiscation of property deemed “abandoned.”\textsuperscript{58} This section will go through these measures to argue that international law provides a fair framework to determine the validity of the U.S. claims and the appropriate compensation standard.

Similarly, Cuba’s legal claims against the U.S. consist of “human and economic damages,”\textsuperscript{59} from the long-standing U.S. economic sanctions\textsuperscript{60} and personal injury damages sustained by Cubans killed or harmed by alleged U.S. hostilities.\textsuperscript{61} The economic damages sought

\textsuperscript{56} See 22 U.S.C. § 1643(b) (2012).
\textsuperscript{57} See Helms Burton Act, supra note 22, at § 6022(6) (2012).
\textsuperscript{58} See CONSEJO DE ESTADO, Ley No. 989, printed in GACETA OFICIAL Oct. 16, 2012, no 44 (Cuba).
by Cuba stem from the effects of the U.S. embargo on various Cuban industries. Further, the Cuban government claims that U.S. acts of terrorism against Cuba have caused 3,478 deaths and 2,099 disabling injuries. These acts include CIA-activities in Cuba, the Bay of Pigs invasion, the explosion of the French vessel La Coubre, the bombing of Cuban Airlines Flight 455 in 1976, aggressions from the U.S. naval base in Guantanamo, assassination of diplomat Félix García-Rodriguez, and biological warfare. This section will examine those measures to show that customary international law also provides a fair framework to determine the U.S.’ liability and damages. In response to Cuba’s claims for damages arising from the U.S.’ hostilities in Cuba, the U.S. would likely raise claims against Cuba for similar actions taken by Cuba against the U.S.

These use-of-force claims are more politically sensitive and less likely to be successfully submitted for resolution under international law to a third-party neutral. Moreover, the factual information required to analyze these claims under international law is not readily available and is likely classified. Thus, this paper will not directly address these claims here. However, by tackling the economic claims first, agreeing that they are governed by international law, and submitting them to a legal mechanism for resolution, the respective governments will be able to then focus on the more sensitive political matters through diplomatic channels.

See Parrilla supra note 61, at 11-25, 36 (In the 2015 report to the United Nations General Assembly, Cuba asserted that the accumulated economic damages from the U.S. economic sanctions had reached $121 billion.); Feinberg supra note 61, at 13.

See REPUBLIC OF CUBA, Necesidad de poner fin al bloqueo económico, comercial y financiero impuesto por los Estados Unidos de America contra Cuba (July 2014); Feinberg supra note 61, at 13.

See OLGA MIRANDA BRAVO, NACIONALIZACIONES Y BLOQUEO (1996); Feinberg supra note 61, at 14.

See e.g., Alejandre supra note 4.
In light of the longstanding failure of diplomacy alone and the fragility of the relationship between the countries, agreeing that international law governs their compensation and damages claims will provide a certain legitimacy to the negotiation process. In truth, this should not be too hard. Both the U.S. and Cuba have through treaties, domestic legislation, and their respective U.N. voting record exhibited that international law should govern many of their legal claims against the other. Submitting these claims to a third-party neutral mediator, arbitrator, or some other agreed-upon legal process (some of which will be explored in section IV) will help resolve these complex legal claims and allow the parties to focus political capital on more sensitive and pressing issues. The next two sub-sections will explore how the complexity of the claims and the

68 See, e.g., Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV) (Oct. 21, 1954) [Declaration on Friendly Relation].
69 See Richard Bilder, An Overview of International Dispute Settlement, 1 EMORY J. INT’L DISP. RESOL. 1, 25 (1986) (“Mediation is a technique “in which the parties, unable to resolve a dispute by negotiation, request or agree to limited intervention by a third party to help them break the impasse. . . . [T]he mediator usually plays a more active part in facilitating communications and negotiations between the parties, and is sometimes permitted or expected to advance informal and nonbinding proposals of his or her own.”).
70 See id. at 26 (“This method involves the reference of a dispute or series of disputes, by the agreement of the parties, to an ad hoc tribunal for binding decision, usually on the basis of international law.”).
71 See id. at 25 (For example, a “[f]act-finding, inquiry and conciliation. These are methods of settlement in which the parties request or agree to the intervention of a third party, usually on a more formal basis, for the purpose of determining particular facts or otherwise conducting an impartial examination of the dispute and, if the parties so agree, attempting to suggest or define the terms of a mutually acceptable settlement.”).
hardened positions of each country as reflected in their national legislation significantly decreases the likelihood of settlement strictly through diplomatic channels.

B. THE CUBAN EXPROPRIATION OF U.S. PROPERTY

The term “confiscation” is used by many U.S. laws and regulations to describe the Cuban property takings.72 Cuba has insisted that the U.S. properties in Cuba were expropriated, not confiscated. “Nationalization” is another term used, denoting the taking of property—usually an industry or a sector of the economy to be owned by the state—without any implication of compensation to the owner.73 “Expropriation” is often used interchangeably with “nationalization,” but without any suggestion of subsequent operation or ownership solely by the state. Expropriation implies the designation of property for a public purpose unrelated to the owner of the property but subject to compensation to the owner.74 Under international law, the essential feature of expropriation is the taking of property by the

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72 See, e.g., Helms Burton Act, supra note 22, at § 6023(4). “‘Confiscated’ refers to—(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959—(i) without the property having been returned or adequate and effective compensation provided; or (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and (B) the repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay, on or after January 1, 1959—(i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government; (ii) a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or (iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.”

73 See Gordon, supra note 8, at 119 n.24.

74 See id.
For purposes of this paper the term expropriation will be used to describe the takings of U.S. property in Cuba.

**STAGE ONE: CUBAN CONSTITUTIONAL LAWS ON EXPROPRIATION**

Prior to 1959, the Cuban Constitution prohibited the confiscation of property. To that effect, Article 24 of the 1940 Constitution stated:

Confiscation of property is prohibited. No person shall be deprived of their property except by a competent judicial authority and for a justified cause of public utility or social interest and always subject to a cash payment and indemnification, effectuated judicially. The failure to meet these requirements will result in the right of the expropriated to be immune from the Justice Tribunals and the property be returned. In case of a challenge, the justice tribunal will determine the public utility or social interest and the need for expropriation to correspond.76

The framers of Cuba’s 1940 Constitution made the right to property a fundamental right under Articles 24 and 87, guaranteeing to all Cubans the right to own and use property freely.77 Article 24 prohibited the government taking of property without a judicial determination of just cause and public purpose, and it further provided that any government taking of property must be accompanied by indemnification in cash.78 Article 87 recognized the Cuban right to private property to the fullest extent, limited only for public necessity


76 CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 24, 1940.

77 See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 24, amended by Ley Fundamental de La Republica printed in GACETA OFICIAL 1959, no. 5-123.

78 See id.
or social interest as established by law.\textsuperscript{79} Robust amendment requirements also worked to strengthen the property protections.\textsuperscript{80}

Initially, Castro’s re-enactment of the 1940 Constitution through the Fundamental Law of the Republic on February 7, 1959, contained nearly all of the original provisions and protections.\textsuperscript{81} The first amendment was the addition of Article 232.\textsuperscript{82} This amendment in effect gave the newly-designated Council of Ministers (Council) the right to amend the Constitution without deliberation in derogation of the more stringent requirements set forth in the 1940 Constitution.\textsuperscript{83} As part of that first amendment, the Council changed the language of Article 24.\textsuperscript{84} Although not abolishing the right to property completely, the amendment established the Council’s power to punish through the confiscation of property.

On February 13, 1959, a series of laws were enacted by Castro’s Council that would form the basis for major expropriations and confiscations in that year.\textsuperscript{85} Eventually, the language of Article 24 was changed again in 1960 as follows:

No person shall be deprived of their property except by competent authority and for a cause of public utility or social or national interest. The law shall regulate the procedure for expropriation and shall establish legislation and forms of payment and shall determine the competent authority to declare the case to be of

\begin{itemize}
  \item \textsuperscript{79} See id. at art. 87.
  \item \textsuperscript{80} See id. at art. 285-286.
  \item \textsuperscript{81} See Constitución de la República de Cuba, supra note 76, art. 24.
  \item \textsuperscript{82} See id. at art. 23.
  \item \textsuperscript{83} See id.
  \item \textsuperscript{84} Id. at art. 24.
  \item \textsuperscript{85} See, e.g., Ley 78, Feb. 13, 1959, Gaceta Oficial (Cuba); Ley 151, Mar. 17, 1959, Gaceta Oficial (Cuba).
\end{itemize}
public utility or social or national interest and that expropriation is necessary.\textsuperscript{86}

Compensation for expropriated property was no longer a constitutional requirement.

\textsc{Stage Two: The Agrarian Reform Act and the United States’ Initial Response}

The initial Cuban measure resulting in the expropriation of U.S.-owned property was the Agrarian Reform Act of June 3, 1959.\textsuperscript{87} The Act outlined a fundamental change in “the ownership of land, essentially limiting holdings to small and medium-sized farms, [and] co-operatives,” and setting aside some special development acreage for the interests of Cuban economic progress.\textsuperscript{88} The Act converted agricultural estates larger than five hectares into state-owned farms. The Act also provided that all stockholders of companies owning sugar-cane lands would have to be Cuban citizens.\textsuperscript{89} Although it applied generally, “the Agrarian Reform Act entailed substantial taking of U.S. property, since a large percentage of the land expropriated under this legislation was owned by [U.S.] nationals.”\textsuperscript{90}

Article 29 of the Act recognized the constitutional right of landowners affected by this Law to receive an indemnity for the expropriated property.\textsuperscript{91} Accordingly, the Act provided a mechanism for compensation provided in the form of twenty-year government

\textsuperscript{86} Ley de Reforma Constitucional, art. 24, printed in \textsc{Gaceta Oficial} July 5, 1960 (Cuba).
\textsuperscript{87} Amir Rafat, \textit{Legal Aspects of the Cuban Expropriation of American-Owned Property}, 11 \textsc{St. Louis U. L.J.} 45, 46 (1966).
\textsuperscript{88} Gordon, supra note 8, at 75.
\textsuperscript{89} Id.
\textsuperscript{90} Id., supra note 87, at 46.
\textsuperscript{91} Rafat, supra note 87, at 46.
\textsuperscript{91} See Ley de Reforma Agraria, at art. 29 printed in \textsc{Gaceta Oficial} Jun. 3, 1959, No. 7 (Cuba).
bonds with 4.5% interest, payable in non-convertible exchange.\textsuperscript{92} The Act’s compensation mechanism was to be implemented by Law numbers 576 and 588.\textsuperscript{93} Law 576 authorized the issuance of the twenty-year bond in the amount of 100 million pesos (approximately $1 million) to be issued in different denominations with interest payable semi-annually, and compensation of less than 100 pesos was to be paid in cash.\textsuperscript{94} Law 588 determined the valuation of the land for the purpose of compensation by looking to the previous owner’s declared taxable value from October 1958, which could not be challenged in court.\textsuperscript{95} However, the compensation plan was dead on arrival and never implemented nor accepted by the U.S.\textsuperscript{96} Further, the Act was never carried out as enacted.\textsuperscript{97} Instead, the National Institute of Agrarian Reform (INRA) acted arbitrarily with broad powers by physically removing owners from the property without any receipt or

\textsuperscript{92} See id. at art. 31 (This compensation scheme was similar to the one that Mexico had offered the United States in 1938, after it expropriated American-owned oil refineries, which the United States found not to be compliant with international law. See infra note 156 and accompanying text.).
\textsuperscript{93} Ley No. 576, printed in GACETA OFICIAL Sep. 25 1959 (Cuba); Ley No. 588, printed in GACETA OFICIAL Oct. 7, 1959 (Cuba).
\textsuperscript{95} Ley No. 588, supra note 93, at arts. 5 & 13.
\textsuperscript{96} To generate the revenue necessary to pay for the property, Castro proposed that the United States increase its purchase of Cuban sugar from 3 million tons of sugar per year to 8 million tons, something that was impossible to implement. At that time, Cuba’s sugar output was 5.9 million tons and it had never produced more than 7.2 million tons. See U.S. Dep’t of State, U.S. Informs Cuba of Views on Agrarian Reform Law 958, 40 Bull. 1044 (1959) [U.S. Dipl. Note on ARL]; See also John W. Smagula, Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate, 21 N.C. J. INT’L L. & COMP. REG. 65, 71 (1995) (“Assistant Secretary of State Mann stated that cutting the quota may be necessary because it was ‘not realistic or desirable to subsidize a Government engaging in extraordinary acts harmful to American interests.’”).
\textsuperscript{97} See GORDON, supra note 8, at 134.
acknowledgment.\textsuperscript{98} INRA made up the rules for expropriation as it went along.\textsuperscript{99}

The U.S. Department of State expressed its concerns over Cuban treatment of U.S. property in a diplomatic note on June 11, 1959.\textsuperscript{100} In the note, the U.S. agreed that “under international law a state has the right to take property within its jurisdiction for public purposes” and that land reform could contribute to a “higher standard of living, political stability, and social progress.”\textsuperscript{101} However, the U.S. Ambassador included that the right to take property is “coupled with the corresponding obligation to provide prompt, adequate, and effective compensation” at the time of the taking.\textsuperscript{102} As for the compensation provision in the Act, the Ambassador expressed concern about the “adequacy” of compensation.\textsuperscript{103} Further, the Ambassador pointed to Cuba’s 1940 Constitution, which provided similar redress for expropriation.\textsuperscript{104} From the start, the U.S. framed the conflict as one governed by international law.

The Cuban government responded by admitting it had an obligation under the 1940 Constitution to provide prompt and full indemnification but that “the chaotic economic and financial situation into which the overthrown tyranny plunged the country and the marked imbalance of payments between the U.S. and Cuba’ justified departure from the constitutional guarantees.”\textsuperscript{105} The U.S. answered that the expropriating state cannot use domestic problems to excuse its

\textsuperscript{98} See id. at 135.
\textsuperscript{99} See id. at 76.
\textsuperscript{100} U.S. Dipl. Note on ARL, supra note 96, at 958-59 (emphasis added).
\textsuperscript{101} Id. at 958.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 959.
\textsuperscript{104} Id; see also CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, supra note 76.
\textsuperscript{105} Rafat, supra note 87, at 58 (citing Cuban Note of June15, 1959, supplied by the U.S. Department of State, unpublished document on file with Western Reserve University Law Library).
disregard of “accepted principles of international law relating to the payment of prompt, adequate and effective compensation.”\textsuperscript{106}

Thus, while both the U.S. and Cuba recognized Cuba’s duty to pay compensation for the expropriations under the Agrarian Reform Laws, the U.S. framed the duty as governed by international law and Cuba framed it as governed by national law and subject to domestic considerations. The U.S. and Cuba’s positions as to the proper compensation mirrored an on-going debate throughout the 1970s and 1980s on the traditional and partial compensation principle under customary international law, which will be discussed further in the next section.

In response to multiple accusations from Cuba against the U.S. that its demands for payment were obstructive to its land reform efforts, the U.S. stated that it “never demanded payment ‘now, cash on the spot, and what we ask for’” but “only to bring about negotiation of the question of compensation in accordance with accepted principles of international law.”\textsuperscript{107}

STAGE THREE: COMPLETE ELIMINATION OF FOREIGN-PRIVATE INVESTMENT IN CUBA

The Cuban government passed the next and most significant law expropriating American property and assets—Law 851 (Nationalization Law)—on July 6, 1960.\textsuperscript{108} The Nationalization Law authorized the Cuban government to forcefully expropriate all American property interests in defense of Cuban national interest.\textsuperscript{109} The Law’s preamble stated that it was enacted generally in response to

\textsuperscript{106} \textit{Id.} at 58-59 (citing to U.S. Note of Oct. 12, 1959, supplied by the U.S. Dep’t of State, unpublished document on file in Western Reserve University Law Library).


\textsuperscript{109} See \textit{id.} at Preamble.
U.S. political aggression, obligating the Cuban government to adopt such a sweeping expropriation measure. 110

Like the Agrarian Reform Law’s compensation scheme, the Nationalization Law compensation arrangement also relied on ramping up the sugar quota, but would also be impossible since the U.S. had already cut the sugar quota. 111

The U.S.’ official response was directed to the Cuban Minister of Foreign Relations in which Ambassador Bonsal wrote:

The Nationalization Law is both arbitrary and confiscatory in that its provisions for compensation for property seized fail to meet the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation and in its specific prohibition of any form of judicial or administrative appeal from the resolutions of the expropriating authorities. 112

In furtherance of the mandates of the Nationalization Law, Resolution numbers 1, 2, and 3 transferred all American-owned enterprises into state ownership. 113 These resolutions provided for the nationalization of the Cuban Telephone Company, the Cuban Electric Company, the Sinclair Oil companies, the thirty five remaining sugar mills, several other companies, and three U.S. banks. 114 The resolutions also authorized the expropriation of the remaining 166 U.S. companies operating in Cuba. 115

110 See id.
113 See Rafat, supra note 87, at 47.
114 See Resolución No. 1, Aug. 6, 1960, art. XXIII, Leyes del Gobierno Provisional de la Revolución 181 (Cuba). See Gordon, supra note 8, at 101, 102; See also Resolución No. 2, Sep. 17, 1960 art. XXIV, Leyes del Gobierno Provisional de la Revolución 127 (Cuba).
Before Resolution No. 3, on October 13, 1960, the Cuban government passed Law Nos. 890\textsuperscript{116} and 891.\textsuperscript{117} Law Nos. 890 and 891 with the express aim to reorganize Cuba’s economic structure to that of a planned economy\textsuperscript{118} and nationalize 382 major companies and banks.\textsuperscript{119} These laws were part of a larger policy aimed at the complete elimination of foreign-owned private investment in all but minor businesses.\textsuperscript{120} Many Cuban businesses were also expropriated at that time.\textsuperscript{121}

Finally, Cuba passed Law No. 989 of 1961, which authorized the takings of “abandoned” property.\textsuperscript{122} This law was implemented by Resolution 454, which provided that Cubans leaving the country for the U.S. had twenty-nine days to return to Cuba, those traveling elsewhere had sixty days, and those traveling to Europe had ninety days.\textsuperscript{123} Failure to return to Cuba within those time periods was deemed a permanent departure from the country, rendering the person’s property subject to confiscation.\textsuperscript{124} This law remains in effect today.

**CONCLUSION**

The U.S.’ legal position is that Cuba violated international law by failing to provide U.S. companies and citizens with “prompt, adequate


\textsuperscript{117} See Ley 891, \textit{printed in GACETA OFICIAL} 13 Oct. 13, 1960 (Cuba).

\textsuperscript{118} See Rafat, \textit{supra} note 87, at 48.

\textsuperscript{119} See Gordon, \textit{supra} note 8, at 103.

\textsuperscript{120} See \textit{id}.

\textsuperscript{121} See \textit{id.} at 104.

\textsuperscript{122} See Ley No. 989, \textit{printed in GACETA OFICIAL} Dec. 6, 1961 (Cuba).

\textsuperscript{123} See Resolución No. 454, \textit{printed in GACETA OFICIAL} Oct. 9, 1961 (Cuba) (In reality, those wishing to leave Cuba after 1961 were required to turn their assets over to the state before being granted final authorization to depart; their personal property upon departing was also arbitrarily taken by authorities. The author’s parents were subject to this process in 1970 and 1980.).

\textsuperscript{124} See \textit{id}. 
and effective” compensation for the takings of its nationals’ property from 1959-1963. The U.S. claim is two-fold. First, the alleged settlement offers made by Cuba and the compensation schemes provided in each expropriation measure were illusory. Second, even if they were not illusory, the expropriation measures and settlement offers failed to provide for full compensation as required by international law.

Cuba’s legal position is that as required by its own national laws, it was obligated to provide compensation, and its offers to do so were rejected by the U.S. at its own peril. Additionally, even if the U.S. standard of compensation was applicable, the economic situation in Cuba did not allow it to pay “prompt, adequate, and effective” compensation at the time of the takings. Thus, the countries differ on whether international law or national law applies to expropriation of foreign nationals and what standard of compensation is appropriate.

One complicating factor worth mentioning is the mass exodus of Cuban-Americans whose property and assets were confiscated as punishment for leaving the island who have claims against the Cuban government. As noted in section I, this group is a formidable voting bloc for Republicans and has a strong lobby in Washington, DC. Many of them were directly affected by INRA and Castro’s confiscations of personal and real property and have raised claims against the Cuban government arising from human rights violations. Their claims, however, are not recognized by international law, since international investment law and related international claims arise from notions of diplomatic protection of aliens, not nationals, at the time of the expropriation. Yet, any deal with Cuba or normalization of relations with Cuba will need to address these claims. Therefore, in sections IV, V, and VI, this paper explores different ways in which these claims

125 See, e.g., U.S. Dipl. Note ARL, supra note 96, at 959.
126 See, e.g., id. at 959.
can be included as part of a larger bargain with Cuba along with the advantages and disadvantages of doing so.

C. The United States’ Embargo Against Cuba

The U.S. embargo against Cuba also went through several stages. At first, the U.S. embargo was characterized as a countermeasure to Cuba’s uncompensated takings of U.S. property. It was aimed at the enforcement of international law standards of compensation against Cuba.\textsuperscript{128} Then, the embargo was strengthened in response to national security concerns culminating in the Cuban Missile Crisis.\textsuperscript{129} Throughout the 1970s and 1980s, the U.S. embargo was intended to combat communism and the Cuban government’s violation of civil and political rights.\textsuperscript{130} By the end of the 1990s, it served to deter foreign aid to Cuba and foreign investment in Cuba that would undermine the value of the U.S. expropriated property claims against Cuba.\textsuperscript{131}

Stage One: The Embargo as a Countermeasure Against Cuba’s Mass Uncompensated Takings of U.S. Property

On October 13, 1960, President Eisenhower, under the authority of the Export Control Act,\textsuperscript{132} announced a complete ban on U.S. exports to Cuba except for non-subsidized foodstuffs, medicines, and medical supplies.\textsuperscript{133} The Export Act expressly authorized the president to “use export controls to the extent necessary” to “further the foreign policy of the U.S. and to aid in fulfilling its international

\textsuperscript{129} See, e.g., Proclamation No. 3447, 3 C.F.R. 1959-63 (1962).
\textsuperscript{133} See U.S. Dep’t of State, United States Institutes Controls on Exports to Cuba, 958, 43 Bull. 715 (Oct. 19, 1960) [Eisenhower Statement on Embargo].
obligations.” Accordingly, President Eisenhower stated the U.S. had to act to “defend the legitimate economic interests of the people of the [United States] against discriminatory, aggressive, and injurious economic policies of the Castro regime.” In 1961, before the Bay of Pigs invasion but after the official break of diplomatic relations, Congress passed the Foreign Assistance Act. The FAA required that the Cuban government compensate the U.S. for the taking of property in accordance with international law before it could provide Cuba with financial assistance and lift the embargo:

Except as may be deemed necessary by the President. . . no assistance shall be furnished . . . to any government of Cuba, nor shall Cuba be entitled to receive any quota . . . or to receive any other benefits . . . until the President determines that such government . . . according to international law return to the United States citizens . . . or to provide equitable compensation for, property taken from such citizens and entities on or after January 1, 1959, by the government of Cuba.

As evidenced by the language of the FAA and the 1959 U.S. diplomatic note in response to the Agrarian Reform Act, the U.S. framed the embargo against Cuba as a countermeasure to Cuba’s violation of international law.

STAGE TWO: STRENGTHENING THE EMBARGO IS JUSTIFIED BY THE NATIONAL SECURITY THREAT OF THE CUBA-SOVET ALLIANCE

President Kennedy strengthened the embargo in response to the growing Soviet military presence in Cuba. On February 6, 1962,

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134 S. 63, 81st Cong. § 2(b) (1949) (emphasis added).
135 Smagula, supra note 96, at 75.
136 See Foreign Assistance Act, supra note 128, at § 2370.
137 Id. at § 2370(a)(2) (emphasis added).
139 See Proclamation No. 3447, supra note 129.
the President announced a trade embargo that prevented the imports into the U.S. of any goods of Cuban origin, except as permitted by the U.S. Department of Treasury. President Kennedy’s proclamation cited the Inter-American Treaty of Reciprocal Assistance, to urge member states of the Organization of American States (OAS) to “take those steps that they may consider appropriate for their individual and self-defense” because the “Government of Cuba is incompatible with the principles and objectives of the Inter-American system” and in light of Cuba’s alignment with “Sino-Soviet Communism.” The President also confirmed that the Cuban trade restrictions were executed “in accordance with its international obligations” and in order to “take all necessary actions to promote national and hemispheric security.”

In 1963 after the Cuban Missile Crisis, the Treasury Department issued the Cuban Assets Control Regulations (CACR) under the authority of the Trading with the Enemy Act of 1917 (TWEA). TWEA was amended in 1933 to cover peacetime national emergencies and “gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war.” The CACR prohibited all “transactions [that] involve property in which [Cuba], or any national thereof, has . . . any interest of any nature

140 See id.
142 Proclamation No. 3447, supra note 129.
143 Id.
STAGE THREE: STRENGTHENING THE EMBARGO
AIMS TO INDUCE DEMOCRATIC CHANGE IN CUBA AND TOPPLE THE CASTRO GOVERNMENT

U.S. legislation passed in the 1990s significantly expanded the breadth of the embargo against Cuba and demanded democratic and capitalist change in Cuba to lift the embargo. For example, the president was authorized to allow the export of food, medicine, and other humanitarian assistance to Cuba only if he determined that Cuba was undergoing a democratic transition as defined by the Cuban Democracy Act (CDA). To lift the embargo as codified in the CDA, the president had to report to Congress that Cuba made a commitment to hold fair and transparent elections conducted under internationally recognized observers and that it was respecting civil and political rights.

In support of the CDA, Congress made the following findings:

The government of Fidel Castro has demonstrated consistent disregard for internationally accepted standards of human rights and for democratic values. It restricts the Cuban people’s exercise of freedom of speech, press, assembly, and other rights recognized by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948. It has refused to admit into Cuba the

149 Id. at (b)(1).
150 See Cuban Democracy Act, supra note 130; Helms-Burton Act, supra note 22.
151 See Cuban Democracy Act, supra note 130, at § 6006.
152 See id. at § 6007.
representative of the United Nations Human Rights Commission appointed to investigate human rights violations on the island.\textsuperscript{153}

The U.S. policy under the CDA can be summarized as “the careful application of sanctions directed at the Castro government and support for the Cuban people”\textsuperscript{154} in an effort “to continue vigorously to oppose the human rights violations of the Castro regime.”\textsuperscript{155}

Four years later, Congress passed the Helms-Burton Act, which codified the embargo with the express aim of destabilizing the Cuban government.\textsuperscript{156} The Helms-Burton Act went significantly further than the CDA in limiting the president’s authority to lift the embargo, negotiate compensation for nationalized property, and normalize relations with Cuba.\textsuperscript{157} This Act remains in effect today.\textsuperscript{158}

Title I of the Act prohibits the indirect financing of Cuban interests,\textsuperscript{159} opposes Cuba’s membership in international financial institutions,\textsuperscript{160} and reduces financial support to countries and institutions that provide loans or other assistance to Cuba.\textsuperscript{161} Title I also conditioned the reinstitution of family remittances and travel to Cuba by U.S. nationals with family in Cuba on changes in Cuba’s internal economy.\textsuperscript{162}

Title II purports to induce democratic change in Cuba through certain stringent ultimatums.\textsuperscript{163} Title II sets forth guidelines for U.S. assistance that is limited to a free and independent Cuba and permits

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\textsuperscript{153} Id. at § 6001(1).
\textsuperscript{154} Id. at § 6002(1).
\textsuperscript{155} Id. at § 6002(5).
\textsuperscript{156} See Helms-Burton Act, supra note 22.
\textsuperscript{157} See id. at §§ 6031-46.
\textsuperscript{158} See id.
\textsuperscript{159} See id. at § 6033(a).
\textsuperscript{160} See id. at § 6034(a).
\textsuperscript{161} See id. at § 6034(b).
\textsuperscript{162} See id. at § 6042.
\textsuperscript{163} See id. at §§ 6061-67.
\end{flushright}
the president to provide aid to Cuba only after a “transitional” or “democratically elected” government comes to power. Further, Title II authorizes lifting the embargo only when the president determines that the Cuban government is democratically elected according to a long and specific list of requirements. Title II’s approach to the expropriated-property issue requires a new Cuban government to commit to returning all expropriated property to the U.S. or to provide full compensation for the properties in order to be recognized by the U.S. as a democratically elected government eligible for lifting the embargo.

Title III’s aim is to protect U.S. property interests in Cuba and deter foreign investment in Cuba. Under section 6082, any person who traffic in confiscated property which once belonged to a U.S. national is liable to that U.S. national for damages in U.S. federal courts. The term “traffic” is defined broadly by the Act. Any person is deemed to traffic in confiscated property if that person “knowingly and intentionally . . . engages in commercial activity using or otherwise benefitting from confiscated property.” Although this Title has been suspended by each consecutive U.S. president, its potential consequences are vast.

Notably, the right to sue for damages is extended to individuals who were not U.S. nationals at the time of the confiscation but who subsequently became U.S. nationals. This means that all Cuban nationals that fled Cuba since the Revolution, became U.S. citizens,

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164 See id. at § 6062(a).
165 See id. at § 6064-65 (1996).
166 See id. at § 6065.
167 See id. at § 6022.
169 Id. § 6023(13)(A)(ii).
171 See Helms-Burton Act, supra note 22, at § 6023(15).
and can prove ownership of expropriated property or assets in Cuba, can sue an alleged trafficker for damages. As of 2004, there were over 1.4 million Cuban U.S. citizens living in the U.S. who may be eligible under Helms-Burton Act to sue a foreign investor for trafficking in previously owned Cuban property.¹⁷²

In support of the Helms-Burton Act, Congress made twenty-eight findings,¹⁷³ many of which referred to Cuba’s violations of international obligations.¹⁷⁴ One of the findings is that the U.S. has a “moral obligation, to promote and protect human rights and fundamental freedoms as expressed in the Charter of the United Nations and in the Universal Declaration of Human Rights.”¹⁷⁵ The other relevant findings cite the Cuban government’s “wrongful confiscations of or taking of property belonging to United States nationals [and] exploitation of this property [undermining] comity of nations.”¹⁷⁶

Finally, the Act points to Cuba’s refusal to implement the four United Nations General Assembly Resolutions¹⁷⁷ “condemning violations of human rights and fundamental freedoms in Cuba”¹⁷⁸ citing to the following:

Article 39 of Chapter VII of the United Nations Charter which, provides that the United Nations Security Council ‘shall


¹⁷³ See Helms-Burton Act supra note 22, at § 6021(1)-(28).

¹⁷⁴ See id.

¹⁷⁵ Id. at § 6021(9).

¹⁷⁶ Id. at § 6081(2)

¹⁷⁷ See id. at § 6021(22) (“The United Nations General Assembly passed Resolution 47-139 on December 18, 1992, Resolution 48-142 on December 20, 1993, and Resolution 49-200 on December 23, 1994.”).

¹⁷⁸ Id.
determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . , to maintain or restore international peace and security.’ The United Nations has determined that massive and systematic violations of human rights may constitute a “threat to peace” under Article 39 and has imposed sanctions due to such violations of human rights in the cases of Rhodesia, South Africa, Iraq, and the former Yugoslavia.\textsuperscript{179}

After comparing Cuba to Haiti,\textsuperscript{180} the Act points out that:

United Nations Security Council Resolution 940 of July 31, 1994, subsequently authorized the use of ‘all necessary means’ to restore the ‘democratically elected government of Haiti,’ and the democratically elected government of Haiti was restored to power on October 15, 1994. The Cuban people deserve to be assisted in a decisive manner to end the tyranny that has oppressed them for 36 years, and the continued failure to do so constitutes ethically improper conduct by the international community. For the past 36 years, the Cuban Government has posed and continues to pose a national security threat to the United States.\textsuperscript{181}

The U.S. Congress has continued to frame the embargo and its policy toward Cuba as a response to the Cuban government’s illegal conduct in the face of accepted international legal standards.\textsuperscript{182}

The Helms-Burton Act resulted in a serious limitation on U.S. presidential and executive power to conduct foreign affairs with Cuba.\textsuperscript{183} In response, President Clinton’s administration fought for and received the Title III waiver, which Clinton immediately put to

\textsuperscript{179} \textit{Id.} at § 6021(23)-(24).
\textsuperscript{180} \textit{See id.} at § 6021(25).
\textsuperscript{181} \textit{Id.} at § 6021(26)-(28).
\textsuperscript{182} \textit{See id.} at § 6021.
\textsuperscript{183} \textit{See CUBA STUDY GROUP, supra} note 26, at 1.
use.  

President George W. Bush and President Obama would eventually follow suit and continue to implement the waiver. In response to the Presidents’ use of the waiver and other attempts to bypass elements of the Act, Congress passed the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), which allowed U.S. entities to sell agricultural products directly to the Cuban government but banned all travel to Cuba beyond previously prescribed categories of travel.

At the direction of President Bush, the Treasury Department amended the 1963 CACR to expand general license visits to close relatives in Cuba, increase carry-on remittances for travelers to Cuba, and facilitate humanitarian transactions with groups in Cuba dedicated to “rapid, peaceful transition to democracy.” The humanitarian assistance provision was criticized as illusory since it was clear that the Cuban government would not permit assistance to aid its opposition.

In 2003, President Bush laid out plans for creating a Commission for Assistance to a Free Cuba (CAFC). The CAFC’s first report,

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185 See U.S.-CUBA TRADE AND ECON. COUNCIL, INC., supra note 170.


190 See U.S. Dep’t of State, Commission for Assistance to a Free Cuba, Report to the President (2004) [CAFC I]; see also Remarks by the President on Cuba, The WHITE HOUSE ARCHIVES, (October 10, 2003),
like the Helms-Burton Act, aimed at ousting Fidel Castro and his loyalists and detailed the U.S.’ role in a post-Castro Cuba.\footnote{See generally CAFC I, \textit{supra} note 190 (detailing the U.S.’ interactions with Cuba post-Castro regime).} To oust the Castros, CAFC’s recommendations included funding opposition groups in Cuba,\footnote{See \textit{id.} at 15-25.} deploying communications aircraft to increase range of TV and radio transmissions to Cuba,\footnote{See \textit{id.} at 27-28.} limiting family visits,\footnote{See 31 C.F.R. § 515.561(a) (2007) (implementing recommendations of CAFC I); see also CAFC I, \textit{supra} note 190, at 41.} reducing remittances,\footnote{See 31 C.F.R. § 515.570(a) (2007) (implementing recommendations of CAFC I); see also CAFC I, \textit{supra} note 190, at 39-40.} and limiting financial aid.\footnote{See CAFC I, \textit{supra} note 190, at 44-50.} The U.S.’s role in post-Castro Cuba would then include providing humanitarian aid,\footnote{See \textit{id.} at 97-98, 102-03.} changing the education system to incorporate non-communist curriculums,\footnote{See \textit{id.} at 161-71, 175-81, 190-92, 196-98.} promoting the rule of law,\footnote{See \textit{id.} at 214-17, 229-34, 273-315, 317, 345.} and converting Cuba to a free-market economy.\footnote{See \textit{id.} at 224.} Importantly, these reforms would include the settlement of all compensation claims based on land expropriations.\footnote{See U.S. Dep’t of State, Commission for Assistance to a Free Cuba, \textit{Report to the President}, 32-33, 53-55 (2006), available at http://www.cafc.gov/documents/organization/68166.pdf [CAFC II].} In 2006, CACF issued a second report which called for the release of political prisoners in Cuba, the disruption of the Cuban flow of currency, and the initiation of vast domestic legal reforms.\footnote{See \textit{U.S. Dep’t of State, Commission for Assistance to a Free Cuba, \textit{Report to the President}, 32-33, 53-55 (2006), available at http://www.cafc.gov/documents/organization/68166.pdf [CAFC II].}
By the end of the Bush administration, it seemed that the embargo was even more severe than it had been even in the 1960s when Soviet missiles on Cuban soil were aimed at the U.S.

STAGE FOUR: MOVEMENT TO RESTORE DIPLOMATIC RELATIONS WITH CUBA AND LOOSENING THE EMBARGO

As noted previously, Obama eased travel restrictions and enabled remittances to Cuba and people-to-people exchanges.\textsuperscript{203} In December 2014, Obama announced the U.S. would restore diplomatic relations with Cuba by reopening the U.S. embassy and removing Cuba from the list of state sponsors of terrorism.\textsuperscript{204} In May 2015, Cuba was removed from the list of state sponsors of terrorism\textsuperscript{205} and the U.S. embassy in Cuba was re-opened in August 2015.\textsuperscript{206} Yet none of these liberalizations overcome the most significant barrier to opening economic relations: The Helms-Burton Act.

Most recently, President Trump has expanded certain restrictions on financial transactions with Cuban officials and on travel to Cuba.\textsuperscript{207} But, there have not been many substantive changes to the current regulations in place.\textsuperscript{208}

\textsuperscript{203} DOMINGUEZ & PROVOST, supra note 5, at 129-50. (President Clinton made some changes before the enactment of the Helms-Burton Act, and President Bush kept some of those changes, but reversed some as well.).

\textsuperscript{204} See ROSEN & KASSAB, supra note 15, at 72.

\textsuperscript{205} Id. at 73.

\textsuperscript{206} Id. at 74.


\textsuperscript{208} Id.
In 1964, Congress added Title V—the Cuban Claims Act\textsuperscript{209} to the International Claims Settlement Act\textsuperscript{210} to specifically address U.S. citizens’ claims against Cuba.\textsuperscript{211} After World War II, Congress enacted the International Claims Settlement Act to establish the Foreign Claims Settlement Commission (hereinafter “the Commission”).\textsuperscript{212} The Commission was established to administer and disburse funds to U.S. citizens who lost their property in specified foreign countries.\textsuperscript{213} The Cuban Claims Act established a procedural mechanism for adjudicating and quantifying claims, but did not authorize the appropriation of any funds for claim payments.\textsuperscript{214}

In general, under the International Claims Settlement Act, Congress directed the Commission to apply “principles of international law, justice, and equity.”\textsuperscript{215} To determine the value of the claim,

\textit{under international law}, the Commission shall award the fair market value of the property as of the time of the taking by the foreign government involved (without regard to any action or event that occurs after the taking), except that the value of the claim shall not reflect any diminution in value attributable to actions which are carried out, or threats of action which are made, by the foreign government with respect to the property before the taking. Fair market value shall be ascertained in accordance with the method most appropriate to the property taken and equitable to the claimant, including – (i) market value of outstanding equity

\textsuperscript{209} Cuban Claims Act, \textit{supra} note 67. (In 1966, Chapter V was also amended to extend the applicability of its provisions to Communist China.).
\textsuperscript{211} Cuban Claims Act, \textit{supra} note 67.
\textsuperscript{212} \textit{Id.}; 22 U.S.C. § 1643b (referring to the FSCS as “the Commission.”)
\textsuperscript{214} Cuban Claims Act, \textit{supra} note 67.
securities; (ii) replacement value; (iii) going-concern value (which includes consideration of an enterprise's profitability); and (iv) book value.216

The Commission is independent in its findings, and its awards are final; there is no appeal from the Commission’s determination.217 As to the property claims against the Cuban government, the Commission was directed to:

determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba...arising since January 1, 1959... for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States... In making the determination with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to: (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement.218

As to personal injury or disability claims against the Cuban government, the Commission was directed to:

determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba... arising since January 1, 1959... for disability or death resulting

216 Id. (emphasis added).
218 22 U.S.C. § 1643b(a) (emphasis added).
from actions taken by or under the authority of the Government of Cuba.\textsuperscript{219}

In addition, the Act provides that the Commission must determine the claimant’s title\textsuperscript{220} to the expropriated property and any offsets to the award.\textsuperscript{221} It is important to note that the Commission was only authorized to consider claims of U.S. nationals who had title to the expropriated property at the time of the taking and held it continuously until filing their claim with the Commission.\textsuperscript{222} The Commission did not have jurisdiction to review any claims to expropriated property for property owners who were Cuban nationals at the time of the taking.\textsuperscript{223}

The Commission was set up to apply standards of international law and determine the validity of the expropriation claims and the value of the compensation due.\textsuperscript{224} The Final Report of the Commission’s Cuba Claims Program,\textsuperscript{225} in referring to the language of the Cuban Claims Act, states that its “phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property. It is designated to strengthen that standard by giving specific bases of valuation that the Commission shall consider.”\textsuperscript{226}

\textsuperscript{219} Id. § 1643b(b) (emphasis added).

\textsuperscript{220} Id. § 1643c (2012) (emphasis added) (stating “[a] claim shall not be considered...unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss.”).

\textsuperscript{221} Id. § 1643e.

\textsuperscript{222} Id. § 1643c.

\textsuperscript{223} Id.; see 22 U.S.C. 1643(a), (b) (2012) (stating “‘national of the United States’ means (A) a natural person who is a citizen of the United States, or (B) a corporation or other legal entity which is organized under the laws of the United States.”).


\textsuperscript{225} See FCSC Cuban Report, supra note 1.

\textsuperscript{226} Id. at 137, 142 (stating the specific bases of determining valuation are “fair market value, book value, going concern value, or cost of replacement.”).
The Commission adjudicated a total of 8,816 claims, of which, 5,911 were found to be compensable. The total principal value of adjudicated claims was $1,851,057,358.00. Thereafter, on July 15, 2005, Secretary of State Condoleezza Rice requested the Commission conduct a Second Cuban Claims Program to adjudicate and certify claims that arose after May 1, 1967, which were not adjudicated by the original Cuban Claims Program. The Commission received a total of five claims and denied three. Two claims were certified as valid in principal amounts of $51,128,926.95 and $16,000.00.

E. CONCLUSION

Throughout the years, the U.S. has adamantly defended the longstanding embargo against Cuba on various grounds: Cuba’s violations of international law, including the uncompensated takings of $1.9 billion in American property from 1950-1963, threat of use of force, and human rights violations. All of these grounds invoke international law principles.

The Helms-Burton Act’s extraterritorial effects and targeting of third countries’ foreign investments in Cuba has rallied international favor for Cuba’s claim that the U.S. embargo violates international law. The next section discusses whether the U.S. embargo against Cuba violates or is justified by international law.

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227 See FCSC Cuban Report, supra note 1.
228 Id.
229 Letter from Condoleezza Rice, Secretary of State, to Mr. Tamargo, (July 15, 2005).
230 Id.
231 FCSC Cuban Report, supra note 1.
232 Id.
III. INTERNATIONAL LAW PROVIDES A FAIR FRAMEWORK TO RESOLVE THE LEGAL CLAIMS BETWEEN THE UNITED STATES AND CUBA

A. INTRODUCTION

The economic claims between the U.S. and Cuba are best addressed and resolved through established sources of international law. The sources of international law include international agreements, international customs, and “general principles common to the major legal systems.”\(^{234}\) The primary sources of international law are international agreements and customary international law.\(^{235}\) An international agreement’s obligations are binding among the parties to the agreement.\(^{236}\) Additionally, “[g]eneral principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”\(^{237}\)

“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”\(^{238}\) This sense of legal obligation is generally referred to as *opinio juris*.\(^{239}\) Over time, international agreements evidencing a

\(^{234}\) Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060 33 U.N.T.S. art. 38 (1945) [hereinafter ICJ Statute]. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 101, 102(1)(a)-(c) (1987) (“International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.”).

\(^{235}\) ICJ Statute, supra note 234, at art. 38.

\(^{236}\) Cf. RESTATEMENT, supra note 234, at § 102 cmt. f; See also COLLINS, supra note 127, at 28.

\(^{237}\) Cf. RESTATEMENT, supra note 234, at § 102(4).

\(^{238}\) Id. at § 102(2).

\(^{239}\) Id. at § 102 cmt. c.
widespread pattern of behavior by countries based on the belief the provisions involved are obligatory may become customary international law.\textsuperscript{240} Thus, some multilateral agreements can create binding law for “non-parties that do not actively dissent.”\textsuperscript{241} This occurs where “a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states.”\textsuperscript{242} Similarly, a “wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.”\textsuperscript{243} Customary international law also arises from tribunal decisions, since they are applying requirements of international law.\textsuperscript{244} Under international law:

If a state by its act or omission breaches an international obligation, it incurs “international responsibility.” If the consequence of the breach is an injury to another state, the delinquent state is responsible to make reparation for the breach to the injured state. Thus, when an internationally wrongful act occurs, it creates new legal relations between the states concerned. A state injured by a violation may seek redress by claims made through diplomatic channels or through a procedure of dispute settlement to which the states concerned have agreed. Under some circumstances, the injured state may take measures of self-help or countermeasures not involving the use of force.\textsuperscript{245}

International law provides a useful framework to resolve the U.S. claims against Cuba for uncompensated expropriation of American

\textsuperscript{240} Id. at § 102 cmt. j. \textit{See also} COLLINS, supra note 127, at 28.
\textsuperscript{241} Id. at § 102 cmt. i.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
property."246 The framework derives from the state’s responsibility under international law “for injury to property and other economic interests of private persons and entities who are foreign nationals.”247 There is general agreement among many countries that a “state is responsible under international law for injury resulting: from a taking by the state of property of a national of another state that is not for a public purpose, or is discriminatory, or is not accompanied by provision for just compensation.”248 International law defines just compensation to be “in the absence of exceptional circumstances. . . an amount equivalent to the value of the property taken and be paid at the time of the taking, or within a reasonable time thereafter with interest from the date of the taking, and in form economically usable by the foreign national.”249 The principle of “just” compensation is used interchangeably with “full” compensation.250

International law also provides a framework for Cuba’s claims against the U.S. that the embargo is an illegal act of economic coercion.251 The U.S. and Cuba are both signatories to or have ratified international instruments that uphold the international norms on the prohibition of use of force,252 the prohibition on intervention into

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246  See, e.g., RESTATEMENT, supra note 234, at § 712(1), cmt. a (“This section sets forth the responsibility of a state under customary international law for certain economic injury to foreign nationals. . . . A state is responsible under this section for injury to property and other economic interests of private persons who are foreign nationals.”).

247  Id.

248  RESTATEMENT, supra note 234, at § 712(1).

249  Id.

250  See id. at § 712 cmt. d.


252  U.N. Charter art. 2, para. 4.
domestic affairs of another state,\textsuperscript{253} as well as on the promotion of development\textsuperscript{254} and self-determination.\textsuperscript{255} Whether or not economic coercion is prohibited under the international legal principle of non-intervention can be determined by evaluating the Organization of American States (OAS) Charter,\textsuperscript{256} the General Assembly’s 1970 Declaration on Friendly Relations,\textsuperscript{257} and other related U.N. General Assembly resolutions.\textsuperscript{258}

Customary international law provides that each state is responsible to other states for breach of its duties under international law or agreement and must pay compensation for any damages arising therefrom.\textsuperscript{259} Reparations are an “indispensable complement of a

\textsuperscript{253} See, \textit{e.g.}, \textit{id.} at para. 7; Organization of American States, Convention on the Rights and Duties of States, Dec. 26, 1933, O.A.S.T.S. No. 37, art. 8. [OAS Charter].

\textsuperscript{254} See, \textit{e.g.}, U.N. Charter art. 55-56; G.A. Res. 217A, Universal Declaration of Human Rights (Dec. 12, 1948); G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986) [Declaration on Development].

\textsuperscript{255} International Covenant on Civil and Political Rights, G.A. Res. 2200[B] (XXI), at 52, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [ICCPR], art. 1 (however, Cuba is not a party); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200[A] (XXI), at 49, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [ICESCR], , art. 1 (however, the U.S. is not a party). Even though the U.S. and Cuba are not concurrent parties to both the ICCPR and the ICESCR, it shows that they both generally find international law as legitimate as they have entered into their respective international agreements.

\textsuperscript{256} OAS Charter, \textit{supra} note 253, at art. 19.

\textsuperscript{257} See Declaration on Friendly Relations \textit{supra} note 68.


\textsuperscript{259} Corfu Channel (U.K. v. Alb.), Judgement, 1949 I.C.J. 4, 23 (Apr. 9) (The state “is responsible under international law... for the damage and loss of human life which resulted from them, and that there is a duty... to pay
failure to apply a convention, and there is no necessity for this to be stated in the convention itself.”

B. INTERNATIONAL LAW FRAMEWORK FOR UNITED STATES’ LEGAL CLAIMS AGAINST CUBA

As noted, a “state is responsible under international law for injury resulting from: a taking by the state of the property of a national of another state that is not for a public purpose, or is discriminatory, or is not accompanied by provision for just compensation.” The U.S. has claimed that at least some of Cuba’s confiscations of U.S. property were arbitrary and discriminatory. An unreasonable distinction in the expropriation measure suggests the measure is arbitrary and discriminatory. The public purpose requirement, although repeated throughout all formulations of international law on expropriation of alien property, is difficult to apply due to its overbreadth.

Banco Nacional de Cuba v. Sabbatino, though later overturned, reflects an instance in which the U.S. argues nationalism is discriminatory. In determining whether or not Cuba’s Law No. 851 authorizing the nationalization of all U.S. property violated international law, a U.S. District Court held in part that:

[T]he present nationalization measure is contrary to the standards of international law because of its discriminatory nature. The act

compensation” to the victim state.). See also RESTATEMENT, supra note 234, at § 206 cmt. e.


261 RESTATEMENT, supra note 234, at § 712(1).

262 U.S. Dep’t of State supra note 112 (“The Nationalization Law is discriminatory in that it is specifically limited in its application to the seizure of property owned by nationals of the United States.”).

263 RESTATEMENT, supra note 234, at § 712 cmt. f.

264 Id. at § 712 cmt. e.

classifies United States nationals separately from all other nationals and provides no reasonable basis for such classification. The decree does not justify the classification on the basis of conduct of the owners in managing and exploiting their properties or on the basis of the importance to the security of the state where ownership of the property resides. The justification is simply reprisal against another Government.\footnote{266}

The Second Circuit Court of Appeals affirmed the district court decision adding:

\[\text{[T]he United States did not breach a rule of international law in deciding, for whatever reason she deemed sufficient, the sources from which she would buy sugar. We cannot find any established principles of international jurisprudence that requires a nation to continue buying commodities from an unfriendly source. Accordingly it follows that the amendment to the Sugar Act of 1948 did not excuse Cuba’s prima facie breach of international law.}\footnote{267}

The U.S. district and appellate courts concluded that Cuba’s Law No. 851 likely violated international law because it was discriminatory and not justified by the U.S.’ repeal of its Cuban sugar quota.\footnote{268} The U.S. Supreme Court overturned the lower courts, “holding that the validity under international law of a foreign expropriation is beyond the reach of the U.S. courts.”\footnote{269} However, these lower court decisions remain “of interest as they represent the only cases in which U.S. courts passed on legal questions raised by expropriation of alien property.”\footnote{270} On the other hand, scholars have argued that the subsequent Cuban expropriation measures no longer targeting

\begin{footnotes}
\footnote{266} Id. at 385.
\footnote{267} Banco Nacional de Cuba, 307 F.2d 845, 866 (2d Cir. 1962).
\footnote{268} Id.
\footnote{269} Rafat, supra note 87, at 50.
\footnote{270} Id.
\end{footnotes}
American properties and expropriating all foreign-owned property undermined the U.S.’ discrimination claim against Cuba.  

It is debatable whether the claims have been undermined, but it is undisputed that the Cuban expropriations of U.S. property were never compensated. Thus, the U.S. and Cuba will eventually have to agree on the appropriate standard of compensation that is due. The International Settlement Act, the Cuban Claims Act, and the Helms-Burton Act express that full compensation is the applicable international compensation standard used by the U.S.

The traditional international law principles on just compensation for expropriation of alien property date back to European traditions from the mid-nineteenth century to Word War I, when a majority of states had constitutions and treaties that permitted direct expropriation only with compensation. In 1928, the Permanent Court of International Justice confirmed that just compensation for expropriation was a customary international law principle in The Factory at Chorzow case. Chorzow involved Poland’s expropriation of German-owned industrial property. The Court held that immunity from confiscation is a principle of international law and that an uncompensated taking of property is illegal. There the Court famously articulated the appropriate remedy for a taking:

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe-out all the

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271 See, e.g., Rafat, supra note 87, at 51-52; Gordon, supra note 8.
272 See supra Section II.B.
274 Chorzow, supra note 260, at 21.
275 Id. at 5.
276 Id.
consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.\textsuperscript{277}

This passage is important because the Court recognized that the principle of compensation for expropriation was established by international state practice and prior decisions of international arbitral tribunals.\textsuperscript{278} This text constitutes dicta, however, since the issue before the Court concerned the interpretation of a treaty and not of customary international law.\textsuperscript{279} \textit{Chorzow} is commonly cited for the proposition that under customary international law, the expropriating state is obligated to provide the alien owner of property full compensation.\textsuperscript{280} Numerous decisions handed down between World Wars I and II followed the \textit{Chorzow} opinion.\textsuperscript{281}

The U.S.S.R. and various Latin American governments challenged the international law principle obligating the expropriating

\begin{footnotes}
\item[277] Id. at 47 (emphasis added) (This passage is dicta because the expropriation in this case fell within the context of a treaty. Nonetheless, the principle of just compensation for an illegal taking, with the object of making the aggrieved owner whole, remains a fundamental principle.).
\item[278] Id.
\item[279] Id. at 21 (relating to the Convention Concerning Upper Silesia entered into Poland and Germany).
\item[280] Id. “[P]ayment of a sum corresponding to the value which a restitution in kind would bear.”
\end{footnotes}
state to provide full compensation.\footnote{282} For example, in 1938, there was a famous exchange between the Mexican Minister of Foreign Relations and the United States Secretary of State Hull, in which the U.S. demanded that Mexico adhere to the international requirement that the expropriating state provide “prompt, adequate and effective compensation.”\footnote{283} This came to be known as the “Hull formula,” which remains the United States’ formulation of the full compensation standard.\footnote{284} In response, the Mexican government asserted that international law merely required that foreign nationals not be treated less favorably than its own nationals, at least where the expropriations are general in character, such as “for the purpose of redistribution of land.”\footnote{285}

Widespread opposition to the Hull formula emerged with the rise of developing and emerging economies after the World War II. \footnote{286} Before the war, the opposition was initiated by the U.S.S.R., which claimed that an alien in the territory of another state acquires property

\footnote{282}{\textsc{Restatement}, supra note 234, at § 712 rep. n.1.}
\footnote{283}{\textit{Id}.}
\footnote{284}{\textit{See}, e.g., 2012 Model Bilateral Investment Treaty, “Treaty Between The Government Of The United States Of America And The Government Of [Country] Concerning The Encouragement And Reciprocal Protection Of Investment”, art. 6: “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; (emphasis added) and (d) in accordance with due process of law”; and Article 5: “The compensation referred to in paragraph 11 shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable.”}
\footnote{285}{\textsc{Restatement}, supra note 234, at § 712 rep. n.1 (citing 3 \textsc{Hackworth}, \textsc{Digest Of International Law}, 655-61 (1942)).}
\footnote{286}{\textit{Id}.}
solely subject to local law. Accordingly, non-capital exporting countries argued that compensation should be subject to the interpretation by the expropriating state and that an obligation to provide “appropriate” compensation did not necessarily require “full” compensation or “prompt, adequate and effective” compensation. Despite the contemporaneous emergence of the rights to self-determination and the right to dispose of national resources, the United Nations General Assembly proclaimed that, even in relation to natural resources,

Expropriation . . . shall be based on grounds of reasons of public utility, security or the national interest. . . In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

U.N. Resolution 1803 affirmed the customary international law principle that a state has a duty to compensate a foreign national for expropriated property “in accordance with international law,” not solely according to national law. However, the use of the words “appropriate compensation” as opposed to “full compensation” (as well as the prominence of the Hull formula) continued to divide states on the proper standard of compensation required by international law.

287 Id.
288 Id. at § 712 cmt. j.
289 ICCPR, supra note 255, at art.1; ICESCR, supra note 255, at art. 1.
291 Id.
292 RESTATEMENT, supra note 234, at § 712 rep. n. 1, 2.
Moreover, in 1974 the General Assembly adopted the Charter of Economic Rights and Duties of States, which also addressed expropriation, declaring that each state has a right to expropriate, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals [unless otherwise agreed.]

This 1974 Charter did not specifically mention international law or the principle of full compensation for expropriated property. Instead, the formulation mirrored Mexico’s position during the Hull exchange that less than full compensation was appropriate under certain circumstances, and the U.S.S.R.’s position that alien property is subject solely to national law.

Not surprisingly, the U.S. rejected the Charter’s compensation standard. Capital-exporting states continued to promote the full compensation standard as applicable to arrangements made between investors and independent governments negotiated on a commercial basis.

In the 1970s, international tribunals agreed that the Charter and views expressing compensation standards other than the traditional

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295 RESTATEMENT, supra note 234, at § 712 rep. n. 1 (“The United States [was] among the dissenters and the other developed Western states either dissent[ed] or abstain[ed].”).
296 Id. at § 712 cmt. j. See also, Texas Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389, 484-89 (1977) (holding that the traditional rule trumped because the capital exporting states had not assented to its modification).
full compensation standard did not reflect international law. In 1977, the arbitrators in *Texaco Overseas Petroleum Company v. Libya* (TOPC) denied Libya’s efforts to obstruct the international law of expropriation. As to the Charter, the arbitrator found that its adoption showed that “there was no general consensus of the States” since “all of the industrialized countries with market economies” abstained or voted against it, as opposed to U.N. Resolution 1803 which was “supported by a majority of Member States representing all of the various groups.” In other words, the Charter reflected the political will of developing states, but not a change in international law. The TOPC tribunal was not an anomaly. Many international tribunals, albeit with different words describing the compensation standard, also asserted that customary international law requires “full” compensation. Notably, the Iran-United States Claims Tribunal upheld the same standard. The Iran-United States Claims Tribunal in

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297 *Restatement*, *supra* note 234, at § 712 rep. n. 2.
298 *Texaco Overseas Petroleum Co.*, at 468-83.
299 *Id.* at 489.
300 *Id.* at 491.
301 *Id.* at 492-93 (“In the first place, Article 2 of this Charter must be analyzed as political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported by non-industrialized states.” … and “[i]t is therefore clear that the Charter is not a first step to codification and progressive development of international law.”).
302 See *e.g.*, *British Petroleum Exploration Co. v. Libyan Arab Republic*, 53 I.L.R. 297, 329 (1973) (arbitrator held that Libya’s confiscation of BP’s property “violated[d] public international law as it was made for purely extraneous political reasons and was made for purely extraneous political reasons and was arbitrary and discriminatory in character”); Fredric L. Pryor & David L. Schaffer, *Who’s Not Working and Why: Employment, Cognitive Skills, Wages, and the Changing U.S. Labor Market*, 50 I.L.R. 344, 347 (2000) (following a comprehensive analysis of previous arbitral decisions on expropriation, the BPEC tribunal held that *restitutio in integrum* (restitution or restoration to the previous condition) was the appropriate remedy under international law).
American Int'l Group v. Islamic Rep. of Iran, held as “a general principle of public international law” that foreign nationals are entitled to “the value of the property taken” through a determination of “the going concern or fair market value.” However, the claims tribunal confirmed that the standard of compensation was the “full value” of the property taken. In a different case, the same claims tribunal confirmed that “just compensation” is “the full equivalent of the property taken.”

Moreover, before and after the 1974 Charter was adopted, many of the same states that rejected the traditional formulation of full compensation entered into a multitude of bilateral investment treaties (BITs) that provided for compensation for expropriation according to the Hull formulation. BITs are agreements that protect investments of nationals and companies of one contracting state party in the territory of the other party. The proliferation of BITs have been deemed as a “deliberate policy . . . to counteract what some capital-exporting countries considered a continuous erosion of principles of customary international law through United Nations resolutions,”

307 See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, BILATERAL TREATIES FOR INTERNATIONAL INVESTMENT (1977) (listing about 200 treaties as of the 1980s); see RESTATEMENT, supra note 234, at § 712, cmt. c.
308 U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES, 9 (1988), at 7 (stating that “negotiation of [BITs] developed into a deliberate policy . . . to counteract what some capital-exporting countries considered a continuous erosion of principles of
such as the 1974 Charter. Indeed, the strongest supporters of the opposition, Argentina and Mexico entered into treaties with the U.S., which include the Hull formulation of full compensation.

Thus, many countries have agreed on “just compensation” or payment of the full value, usually the fair market value. However, there is no specific formula that provides exactly how the full value of the expropriated property should be determined. In fact, even the United States Supreme Court has been “careful not to reduce the concept of ‘just compensation’ to a formula” and “has never attempted to prescribe a rigid rule for determining just compensation under all circumstances and in all cases.” However, there are sufficient analogous arbitral decisions indicating that the market value


309 See Manuel R. Garcia-Mora, The Calvo Clause in Latin American Constitutions and International Law, 33 MARQ. L. REV. 205, 206 (1950) (stating that the Calvo Doctrine provides that an alien may only seek redress for grievances before local authorities).

310 See Treaty Concerning the Reciprocal Encouragement and Protection of Investment, No. 14, 1991, U.S.-Arg., 31 INT’L LEG. MAT. 124, 131, art. IV(1)(1992) (“Investments shall not be expropriated . . . except . . . upon payment of prompt, adequate and effective compensation”); North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 Int’l Leg. Mat. 289, 605, arts. 1110(1)-(4) (“No Party may . . . expropriate an investment . . . except (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process . . . and (d) on payment of compensation. Compensation shall be equivalent to fair market value . . . be paid without delay and be fully realizable . . . and shall include interest.”).

311 312 RESTATEMENT, supra note 234, at § 712 rep. n. 3.


would include the “‘going concern’ value of the enterprise.”\textsuperscript{315} Likewise, compensation should be in a usable form.\textsuperscript{316} These terms coincide with the standards of compensation used by the Commission.\textsuperscript{317}

According to the Restatement, a state is responsible for a taking without just compensation, “in the absence of exceptional circumstances.”\textsuperscript{318} Thus, under certain exceptional circumstances, deviation from the traditional standard may be appropriate.\textsuperscript{319} The Restatement suggests that this exception may include “expropriation as a part of national program of agricultural land reform.”\textsuperscript{320}

Proponents of such a land reform exception distinguish isolated expropriations from large-scale expropriations, which are carried out in pursuit of social and economic reform programs.\textsuperscript{321} These scholars\textsuperscript{322} maintain that in case of large-scale expropriations, the alien owner of property was only entitled to “partial compensation which would take into account the resources and paying capacity of the taking state.”\textsuperscript{323} The assumption behind this case for partial compensation is that strict compliance with the traditional standard of full compensation would make it impossible for “the most underdeveloped countries to carry out badly needed economic and

\textsuperscript{315} \textit{Restatement}, supra note 234, at § 712, rep. n. 2.
\textsuperscript{316} \textit{Id.}
\textsuperscript{317} \textit{See FCSC Cuban Report, supra note 1.}
\textsuperscript{318} \textit{Restatement, supra note 234, at § 712(1), n.3.}
\textsuperscript{319} \textit{Id.}
\textsuperscript{320} \textit{Id.}
\textsuperscript{321} \textit{See Rafat, supra note 87, at 53-54.}
\textsuperscript{322} \textit{Id. at 54.}
\textsuperscript{323} \textit{Id. See also Gordon, supra note 8, at 114. (“Sir Hirsch Lauterpacht of England wrote that the rule which requires a state to respect the property of aliens is qualified where there have been fundamental changes in the political and economic structures of the state which entailed substantial social reforms interfering with property concepts.” (\textit{citing L. Oppenheim, International Law: A Treatise} 318 (H. Lauterpacht ed. 1948))).}
social reform.”

Thus, it would be likely that in such situations, solutions sought by the expropriating state and the alien property owner’s government would include a partial payment.

Whether or not sweeping agricultural or other land reform initiatives resulting in mass expropriations justify a deviation from the full compensation standard is still a question of international law. However, as dictated by the Restatement, this exception is quite narrow, and is not applicable if:

(i) the property taken had been used in a business enterprise that was specifically authorized or encouraged by the state; (ii) the property was an enterprise taken for operation as a going concern by the state; (iii) the taking program did not apply equally to nationals of the taking state; or (iv) the taking itself was otherwise wrongful under Subsection (1)(a) or (b).

Accordingly, it is not surprising that as of 1987 no international arbitral tribunal has applied this exception.

Arguably, the land reform exception is more of a recognition that in the settlement of certain expropriation claims, partial payments in lieu of full compensation is more likely. For example, in INA Corp. v. Iran, Judge Lagergren, in a separate obiter dictum, endorsed in principle, a lower standard of compensation in “large-scale nationalizations of commercial enterprises of fundamental importance to the nation’s economy.” Lagergren construed this standard as allowing a discount from the full compensation standard by considering the financial burden on the expropriating state’s economy, but not so much as to permit “unjust enrichment.” However, no

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324 Rafat, supra note 87, at 54.  
325 GORDON, supra note 8, at 114.  
326 RESTATEMENT, supra note 234, at § 712 cmt. d.  
327 Id.  
328 Id. at § 712 rep. n. 3.  
330 Id.
international tribunal has actually applied the exception\textsuperscript{331} and no other Iran-U.S. Claims Tribunal decision has followed Judge Lagergren’s dictum.\textsuperscript{332}

There have been numerous lump-sum settlements between expropriating states and the states of alien property owners that have fallen short of full compensation, but these have not been held as supporting any modification of customary international law.\textsuperscript{333} The settlements are usually driven by political and other economic reasons and are not due to any exception to the just compensation standard or other justification under international law.\textsuperscript{334} The International Court of Justice has described these partial compensation settlements as \textit{sui generis} and proving no guidance under general international practice.\textsuperscript{335}

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\textsuperscript{331} \textit{RESTATEMENT}, \textit{supra} note 234, at § 712 rep. n. 3.


\textsuperscript{333} \textit{RESTATEMENT supra} note 234, at § 712 rep. n. 1. \textit{See also} GORDON, \textit{supra} note 8, at 55-56 (‘‘[I]n most cases the gulf between the estimated value and the compensation actually agreed upon is so wide as to warrant the conclusion that the requirement of adequacy was not met.’’ Examples include: U.S.-Mexico settlement of 1942, where Mexico paid $24 million for nationalized oil property valued at $260 million; U.K.-Yugoslavia settlement, where Yugoslavia paid 4.5 million points for nationalized property valued at 25 million pounds; UK-Egypt settlement for 28.3 million pounds for expropriated Suez Canal Company valued at 204 million pounds; U.S.-Rumania settlement of $24.5 million for measures costing $85 million.).

\textsuperscript{334} \textit{RESTATEMENT, supra} note 234, at § 712 rep. n. 1.

\textsuperscript{335} Barcelona Traction, Light and Power Co., Ltd. (Belg. V. Spain), 1970 I.C.J. 3, 40 (February 5). \textit{See also} Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 892 (2d Cir. 1981) (‘‘Partial compensation inheres in the process of negotiation and compromise; we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we look to the results of settlements in ordinary tort cases or contract cases to determine the rules of damages to be applied.’’).
Significantly, since 1995 Cuba has entered into 40 BITs with both developed nations and developing nations throughout the world that remain in force today.\textsuperscript{336} All of Cuba’s BITs contain the Restatement (Third) on Foreign Relations Law’s traditional principles of international law on expropriation and the Hull formulation of “prompt, adequate and effective” compensation.\textsuperscript{337}

The obligations set forth in a BIT only binds the parties to that particular BIT. However, the Cuban BITs are evidence that the Cuban government may be willing to submit the U.S.’ expropriation claims for resolution through the application of international law principles, as it has done with 40 other countries in the past 22 years.\textsuperscript{338} The Cuban BITs also contain most-favored nation clauses (MFN).\textsuperscript{339} The

\textsuperscript{336} United Nations, UNCTAD, Investment Policy Hub/Cuba/BITs, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/52#iaiInnerMenu (The developed nations include: France, Finland, Portugal, Germany, Italy, The Netherlands, Spain, Switzerland, and United Kingdom.).

\textsuperscript{337} See, e.g., Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Cuba for the Promotion and Protection of Investments, May 11, 1995, art IV, U.K.-Cuba, T.S.N. 50 (“Contracting Party shall not be . . . expropriated . . . in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.”); Agreement between the Republic of Argentina and the Republic of Cuba for the Promotion and Protection of Investments, Apr. 4, 1997, art. 4, par. 1, Arg.-Cuba, Ley No. 24.770 (“No Contracting Party shall take . . . expropriation measures . . . against investments in its territory belonging to another Contracting Party, unless those measures are taken for public utility, on a non-discriminatory basis and under the law;” “The measures shall be accompanied by payment of prompt, adequate and effective compensation.”).

\textsuperscript{338} See UNCTAD, supra note 336.

\textsuperscript{339} See, e.g., Treaty between the Republic of Germany and the Republic of Cuba, art. 3(1)-(2) Nov. 22, 1998: “(I) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or...
purpose of MFN provisions is to guarantee that countries treat each other at least as well as they have treated third parties with which they have also entered into BITs.\textsuperscript{340} Thus, in the event that the U.S. and Cuba enter into an agreement on the expropriation claims and future investments that also contains an MFN clause, it would bind Cuba to provide the U.S. the same treatment afforded to the other nations.\textsuperscript{341} Accordingly, since Cuba has agreed to the use of MFN clauses which have bound to the just compensation principle, there is reason to believe that Cuba would potentially agree that international law is a fair and useable framework to resolve the U.S.’ expropriation claims against it.

If the Cuban government has any defenses to its failure to compensate the U.S., they would also be found under international law.\textsuperscript{342} For example, the International Law Commission has considered certain circumstances that may preclude wrongfulness in expropriation cases, including consent, legitimate countermeasures, force majeure and fortuitous event, extreme distress, state of necessity, and self-defense.\textsuperscript{343}

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returns of nationals or companies of any third State. (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.”
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\textsuperscript{340} Collins, \textit{supra} note 127, at page 109.


Cuba’s nationalization process was one of the most intricate and comprehensive reforms to ownership and distribution of means of production in history and was the most significant as relates to American investors. The reforms did not seem pre-planned, nor were they communicated prior to the revolution. They were also not undertaken through one official act or plan. Instead, there were numerous and complex steps taken in light of political, social and economic circumstances. Thus, each of the expropriation measures was different. The initial wave was not discriminatory nor retaliatory; while, the second wave was, but the third wave was not. This complexity makes it even more difficult to determine the validity of the expropriations and the appropriate compensation scheme. On the other hand, expropriation claims of foreign nationals have a long history in international relations and there are well-established principles in customary international law that states have often used to resolve their claims. These are exactly the types of claims that the U.S. and Cuba can take off their diplomatic agenda and turn over to a third-party neutral mediator or arbitrator to adjudicate or facilitate a fair settlement.

C. INTERNATIONAL LAW FRAMEWORK FOR CUBA’S LEGAL CLAIMS AGAINST THE UNITED STATES

The next inquiry that the U.S. and Cuba will encounter is whether or not the U.S. embargo, in its various forms, has violated international law. The U.S. initially proclaimed the purpose of the embargo was to pressure Cuba to compensate U.S. citizens for the taking of their property in an amount “equivalent to the full value thereof, as required by international law.”

344 Gordon, supra note 8, at 108.
345 See, e.g., Foreign Assistance Act, supra note 128.
Whether or not the U.S.’ embargo is legal under international law will in turn determine whether it is an act of “retorsion”\(^{346}\) or “repraisal”\(^{347}\) under international law and whether it complies with the doctrines of necessity and proportionality.\(^{348}\) The international legal system allows a large scope of retorsions, non-forcible acts of lawful retaliation, such as the limiting of diplomatic relations.\(^{349}\) Such retorsions are legal and are not subject to limitations of necessity and proportionality.\(^{350}\)

On the other hand, reprisals, commonly referred to as countermeasures, are nonviolent “measures that would otherwise be contrary to the international obligations of an injured state vis-à-vis the responsible state, if they were not taken by the former in response to an internationally wrongful act by the latter.”\(^{351}\) Throughout history

\(^{346}\) BLACK’S LAW DICTIONARY, (10th ed. 2014) “An act of lawful retaliation in kind for another country’s unfriendly or unfair act. Examples of retorsion include suspending diplomatic relations, expelling foreign nationals, and restricting travel rights.”

\(^{347}\) BLACK’S LAW DICTIONARY, (10th ed. 2014) (“‘Reprisals’ is a word with a long history, and modern writers are not agreed on the meaning which should be given to it today. Literally and historically it denotes the seizing of property or persons by way of retaliation. . . Reprisals when they are taken today are taken by a state, but some writers would still limit the word to acts of taking or withholding the property of a foreign state or its nationals, for example by an embargo.”) (quoting J.L. BRIERLY, THE LAW OF NATIONS 321–22 (5th ed. 1955)).

\(^{348}\) See David J. Bederman, Counterintuiting Countermeasures, 96 AM. J. INT’L L. 817, 827 (2002). See also RESTATEMENT, supra note 234 at § 905(1).


\(^{350}\) See David E. Pozen, Self-Help and the Separation of Powers, 124 YALE L.J. 2, 54 (2014) (“Although some have suggested that retorsions are subject to principles of proportionality, necessity, or good faith, the mainstream view is that any such constraints are not legal but political in nature.”).

\(^{351}\) ILC State Responsibility, supra note 349, at 128.
states have relied on countermeasures to enforce international legal obligations. In the last century, countermeasures have been recognized by the International Court of Justice and international arbitral tribunals as legitimate under international law. Further, countermeasures also apply in the realm of treaty law as stated in the Vienna Convention on the Law of Treaties. A material breach of a treaty entitles the injured party “to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”

Under customary international law countermeasures are restricted by the doctrines of necessity, and proportionality. Countermeasures are only allowed in response to a violation of international law and must be necessary to end a violation of international law, to prevent further violation of international law, or to remedy the violation of international law. Unless there is an emergency state of necessity,

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353 See, e.g., Gabcíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7 (Sept. 25).
356 Vienna Convention on the Law of Treaties, art. 60.
359 RESTATEMENT, supra note 234, at § 905(1)(a).
the country imposing a countermeasure must proceed in good faith by notifying the other country of the coming countermeasure, requesting reparations or resumption of its obligations, and offering to negotiate.\footnote{ILC State Responsibility, \textit{supra} note 349.} The countermeasure must be proportional to the “injury suffered” by the imposing country, although limited amounts of escalation may be appropriate.\footnote{ILC State Responsibility, \textit{supra} note 349, at art. 51. \textsc{Restatement}, \textit{supra} note 234, at § 905(1)(b). \textit{See also} Thomas M. Franck, \textit{On Proportionality of Countermeasures in International Law}, 102 Am. Int’l L. 715 (2008) (discussing the central role of proportionality in countermeasures doctrine and related areas of international law). \textit{See also} Bederman, \textit{supra} note 348, at 820.} Finally, countermeasures may not interfere with obligations arising under ongoing dispute settlement procedures, like the World Trade Organization system, nor may they disregard principles of diplomatic protection of foreign nationals; fundamental human rights; the U.N. Charter's restraints on the use of force; or peremptory norms such as the prohibitions on genocide, slavery, and torture.\footnote{ILC State Responsibility, \textit{supra} note 349, at art. 50. \textsc{Restatement} \textit{supra} note 234, at § 905 cmts. a & e, n. 6.} Thus, in order to be deemed a countermeasure, the U.S. embargo against Cuba would have to meet these requirements to be justified under international law.

The U.S. policy shifts will also influence whether it acted legally or not. For example, at first the embargo was a countermeasure to Cuba’s failure to comply with international law principles that obligate it to compensate U.S. nationals for expropriated property but was later justified as a security measure.\footnote{\textit{See} Helms-Burton Act \textit{supra} note 22, at § 6021(14) (finding that Cuba was a threat to “international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence.”).} International law provides a framework for determining whether economic coercion, such as an embargo, is lawful. The classic statement by Emmerich Vattel is that customary international law has
long permitted nations to conduct trade and economic relations in any way they see fit:

[I]t is clear that it is for each Nation to decide whether it will carry on commerce with another or not. If it wishes to allow commerce with a certain Nation, it has the right to impose such conditions as it shall think fit; for in permitting another Nation to trade, it grants the other a right, and everyone is at liberty to attach such conditions as he places to his voluntary concessions.  

This is the traditionalist view. “Traditionalists rely on nations' use of foreign trade to buttress their claims that the exercise of economic and political power has traditionally been a matter of national sovereignty.” The historically frequent state practice of export controls and other economic and trade sanctions by many countries in times of war and peace support Vattel’s statement. Arguably, there is no general rule of international law denying states the power to use export controls for political purposes that could have developed against the overwhelming weight of such consistent state practice.

The first attempts to regulate the use of coercive tactics between countries through international agreements were aimed only at regulating military force. The League of Nations Covenant directed member states to “respect... the territorial integrity and existing

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367 Shiata, supra note 366, at 609-16. See also Smagula, supra note 96.
political independence of all Members.” The Covenant prohibited states from resorting to war under certain instances. However, the Covenant did not mention economic or political force as appropriate measures to resolve international disputes. Additionally, the League founded a number of treaties prohibiting certain forms of aggression but did not include economic and political coercion. Similarly, the Kellogg-Briand Pact of 1928, signed by 63 nations, outlawed all wars, but made no mention of other forms of non-military pressure short of the use of force. The 1933 Conventions for the Definition of Aggression, signed by many nations, including those within the Soviet Union’s sphere of influence, contained a list of conducts presumed as aggressive. The only mention of economic or political

369 Id.
370 Id. arts. 12, 13, & 15.
371 League Covenant, supra note 368, at art. 10.
372 See, e.g., Treaties of Locarno, 54 L.N.T.S. 289 (1925) (The Locarno Treaties consisted of a group of five different agreements: the main Treaty of Mutual Guaranty between Germany, Belgium, France, Great Britain, and Italy and four treaties on arbitration. Id. The Treaty of Mutual Guaranty or “Rhineland Pact” provided that Germany, on the one side, and France and Belgium on the other, mutually undertook that they were not going to attack, invade, or resort to war with each other, except in cases of self-defense.).
374 Id.
376 Id. at art. 2. Article II stated that the aggressor was considered the State which was the first to commit any of the following actions: “Declaration of War upon another State; 2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State; 3) Attack by its land, naval or air forces, without a declaration of war, on the territory, vessels or aircraft of another State; 4) Naval blockade of the coasts or ports of another State; 5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.”
coercion was in Article 3, which stated that no political, military, economic or other consideration may serve as an excuse or justification for the aggression referred to in the Convention.\textsuperscript{377}

By the time of the Nuremberg trials, the Charter of the International Military Tribunal,\textsuperscript{378} named aggression as an international crime.\textsuperscript{379} The Tribunal did not define aggression, but it appears from the context of the Charter that the Tribunal only considered military action.\textsuperscript{380}

The U.S. and Cuba are parties to the U.N. Charter,\textsuperscript{381} which obligates states to:

refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.\textsuperscript{382}

The traditionalist view is that the language of article 2(4), as in predecessor treaties relating to aggression, speaks only of physical or

\textsuperscript{377} Aggression Convention, \textit{supra} note 375, at art 3.
\textsuperscript{379} \textit{See id.} at art. 6. Article 6 of the Nuremberg Charter in the pertinent paragraph states: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or a conspiracy for the accomplishment of any of the foregoing.” “Leaders, organizers, instigators and accomplices participating in the execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”
\textsuperscript{380} \textit{Id.}
\textsuperscript{381} U.N. Charter, art. 2, para. 4.
\textsuperscript{382} \textit{Id.}
armed force and does not include economic or political compulsion.\textsuperscript{383} In support of this view, proponents argue that:

Taking the words in their plain, common-sense meaning, it is clear that, since the prohibition is of the "use or threat of force," they will not apply to economic or political pressure but only to physical, armed force.\textsuperscript{384}

Further, the U.N. Charter's 1945 \textit{travaux preparatoire}\textsuperscript{385} has been used to demonstrate that article 2(4) was not, at the time that it was drafted, intended to apply to economic force.\textsuperscript{386} Similarly, traditionalist support this interpretation with evidence that the drafters of the U.N. Charter considered provisions specifically prohibiting exercises of economic and political force, but rejected them.\textsuperscript{387} Moreover, according to traditionalist scholars, the International Law Commission confirmed the Charter's restriction of the term "force" to armed force by rejecting proposals to expand the definition of aggression in another convention on the grounds that the article 2(4) did not justify it.\textsuperscript{388}

\textsuperscript{384} \textit{Id.} at 102 (quoting D. Bowett, \textit{SELF-DEFENSE IN INTERNATIONAL LAW} 148 (1958)).
\textsuperscript{385} \textit{Travaux preparatoire}s are "the materials constituting the development and negotiation of an agreement." RESTATEMENT, \textit{supra} note 234, at § 325 Comm. e. The \textit{travaux preparatoire}s serve as an aid in interpreting the U.N. Charter. The Charter of the United Nations: A Commentary 37-38 (1994).
\textsuperscript{386} \textit{Id.}; Delanis, \textit{supra} note 383, at 105-07.
\textsuperscript{387} Delanis, \textit{supra} note 383, at 105-06. For example, Brazil and Bolivia, respectively proposed adding a prohibition on the use or threat of use of economic force to article 2(4) and including economic measures to the definition of aggression under article 39. \textit{Id.}
However, in the 1960s and 1970s certain scholars disagreed and proposed that the “threat or use of force” proscribed by article 2(4) should be construed to cover acts of an economic nature by a state when directed against another state's “territorial integrity or political independence.” Most Asian, African, and other developing states agreed as illustrated in the following:

The substantial impairment of goals of the international community as articulated in the Charter through the deliberate use of coercion against other states, not counterbalanced by complementary policies relating to legitimate self-defense or the sanctioning of U.N. decisions, constitutes a violation of Article 2 (4) as well as of other provisions of the Charter.

In light of the political and economic interdependence of states at that time, there was a legitimate fear that powerful states could “strangle weaker [s]tates with pressures of that kind to the point of threatening their political independence and territorial integrity.” Although western states followed the traditional interpretation of 2(4), they did not exclude the possibility that certain types of economic coercion might constitute an illegal intervention under article 2(7), which states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

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391 Lillich II, supra note 390, at 358-71, 361
392 Id.
393 U.N. Charter, art. 2(7) (emphasis added).
The international legal principle of non-intervention is well-established. In 1933, the U.S. and Cuba ratified the Convention on the Rights and Duties of States, which provides more generally that: “[n]o state has the right to intervene in the internal or external affairs of the other;”395 “[d]ifferences of any nature which arise between them should be settled by recognized pacific methods;”396 and, “the territory of a state is inviolable and may not be the object of . . . measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.”397 Additionally, in 1948, the U.S. and Cuba ratified the OAS Charter,398 which provides that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.399

Whereas earlier U.N. Resolutions supported the traditional interpretation of the use or threat of use of force in the U.N. Charter, subsequent resolutions focusing on the principle of non-intervention supported the legal prohibition of economic and political coercion.401

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394 OAS Charter, supra note 253.
395 Id. at art. 8 (emphasis added).
396 Id. at art. 10.
397 Id. at art. 11 (emphasis added).
398 Id. at art. 15.
399 Id. (emphasis added).
400 See, e.g., G.A. Res. 380 (V), Peace Through Deeds (Nov. 17, 1950); G.A. Res., 378 (V), (Nov. 17, 1950); G.A. Res., 376 (V), (Oct. 7 1950), 5 U.N. GAOR, Supp. (No. 20), U.N. Doc. A/1775 (1950). “[T]he intention of the Authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase [in article 2(4)] ‘or in any other manner’ was designed to insure that there should be no loopholes.” Doc. 885, 1/1/24, 6 U.N.C.I.O. Docs.405 (1945); Doc. 784, 1/1/27, 6 U.N.C.I.O. Doc. 335.
401 See, e.g., G.A. Res. 2131 (XX), (Dec. 21, (1965).
Particularly, three resolutions, adopted in 1965, 1970, and 1974 formed the foundation for the argument that economic coercion is prohibited under the principle of non-intervention. Taken together, the resolutions reflect a consensus on some prohibition on the use of economic and political coercion that is specifically aimed at the subordination of a country’s exercise of its sovereign rights and the securing of advantages.

Finally, in 1974, as a part of the Charter of Economic Rights and Duties of States, the General Assembly reiterated an authoritative condemnation of the use of economic coercion.

Thus, perhaps certain types of economic coercion for illegitimate purposes are illegal, but it is unclear what they are because the terms “exercise of sovereign rights” and “securing advantages” are vague.

402 *Id.* (“No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights, or to secure from it advantages of any kind.”) (emphasis added).


405 *Id.*

406 *Id.* at art. 32 (“No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign right.”).

Likewise, similar language in the U.N. Charter’s article 2(7), the Declaration of the Rights and Duties of Man, and the OAS Charter, is equally vague. Thus, the type of economic coercion that is prohibited by international law, if any, is unclear.

Further, U.N. resolutions are not one of the recognized sources of international law.\textsuperscript{408} General Assembly resolutions were never intended to be binding.\textsuperscript{409} Generally speaking, their weight as evidence of a possible consensus on customary international law is inconclusive.\textsuperscript{410} However, they can contribute to the evolution of customary international law.\textsuperscript{411} The legal effect of a resolution as interpretation of existing or evolving international law is easier to determine when it passes by a majority of states, is supported by state practice, and the form and intent of the resolution indicate that it was meant to interpret or codify existing law.\textsuperscript{412} Arguably, the 1970 Declaration would bear the most weight as evidence of, at a minimum, the progressive development of customary international law.\textsuperscript{413} However, its vague language does not provide much guidance.

\textsuperscript{408} Stat. of I.C.J., supra note 234, at 302, art 37.
\textsuperscript{409} Delanis, supra note 365, at 115.
\textsuperscript{410} Some argue that the General Assembly resolutions are mere recommendations reflecting the political will of the General Assembly and not customary international law; especially since the U.N. Charter only grants the Assembly with the power to recommend. Blaine Sloan, General Assembly Resolutions Revisited (Forty Years Later), 58 BRIT. Y.B. INT’L L. 39, 52-61 (1988); U.N. Charter, art. 14. However, even those who believe that the General Assembly resolutions are declaratory and interpretive of existing international law, agree that the legal effect of the resolutions outside the U.N. are unclear.
\textsuperscript{412} Sloan, supra note 410, at 138.
\textsuperscript{413} The Declaration concludes by stating it “constitute[s] basic principles of international law” and support for its adoption was unanimous.
In *Nicaragua v. United States*, Nicaragua asserted that the United States violated the principle of non-intervention by ending financial aid to Nicaragua, cutting the sugar quota by ninety percent, and imposing a trade embargo.\(^{414}\) The International Court of Justice held on the economic sanctions that it was “unable to regard such action on the economic plane as is here complained of as a break of the customary-law principle of non-intervention.”\(^{415}\) The Court also noted that: “[a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation.”\(^{416}\)

State practice has not supported a widely recognized international legal prohibition on the use of economic coercion.\(^{417}\) Legal commentators have listed numerous instances of the use of economic coercion, both pre-1970 Declaration\(^{418}\) and post-1970 Declaration.\(^{419}\)

Nevertheless, the U.S. and Cuba are parties to the General Agreement on Tariffs and Trade (GATT), which governs the legitimacy of the U.S.’ trade and economic embargo measures. In the 1982 Ministerial Declaration, the original GATT\(^{420}\) contracting parties agreed “to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General


\(^{415}\) *Id.* at para. 275.

\(^{416}\) *Id.* at para. 276.

\(^{417}\) For example, in 1973 when Arab oil embargo was in force, the Assembly did not condemn them but instead affirmed “the right of the Arab States and Peoples whose territories are under foreign occupation to permanent sovereignty over all their natural resources.” Shiata, *supra* note 366, at 619.

\(^{418}\) *Id.* at 609-16.

\(^{419}\) *Id.* at 625-26. *See also* GARY C. HUFBAUER JEFFREY J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED 7 (3d ed. 1985). The United States has used economic sanctions to negotiate compensation for expropriated property nine times since WWII. Eight; eight of the nine–Cuba being the outlier–have resulted in settlements.

\(^{420}\) GATT, *supra* note 66.
The original GATT, was a set of provisional rules under which nations were permitted to act unilaterally to impose trade restrictions and did so with the power to simply block any adverse dispute resolution panel decision that might result from their actions. However, since 1994, under the new WTO framework, unilateral actions in violation of the GATT are subject to its dispute resolution mechanism.

For example, the U.S. is obligated under GATT Article I of GATT to treat imported “like products” from different member countries with equal preference. Further, GATT Article XI provides that, “no prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted . . . by any contracting party on the importation of any product of the territory of any other contracting party.” The U.S. embargo against Cuba, a GATT member state, would violate these two provisions because it affords Cuba less favorable treatment than to other member states and places restrictions on imports of Cuban goods and services. However, Article XX provides a national security exemption that allows contracting parties to suspend their GATT obligations when, “necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations.” Therefore, a contracting party may impose protectionist trade restrictions that would otherwise violate the GATT to preserve its national security. Whether or not the U.S. embargo against Cuba is or was necessary to protect its national security since 1994, is a question of international law. The GATT provides a dispute

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423 Id. at 437.
424 Id. at art. 11.
425 Id. at art. XI.
426 Id. at art. XX.
settlement mechanism that overrides the U.S. or Cuba’s unilateral resort to countermeasures to resolve any dispute under the jurisdiction of the GATT.

Further, the extraterritorial nature of the Helms-Burton Act may violate the international law principle of territoriality. The territoriality principle provides that a state is free to impose laws governing all events within its jurisdiction but cannot reach outside its borders to impose its will on those outside its territory.427 However, a state may enact laws relating to conduct that is outside of its territory when that conduct has a significant effect within the state’s territory.428 The “effect doctrine” is available only to the extent that the effect of the other state’s actions is substantial and when the exercise of jurisdiction is reasonable.429 The reasonableness determination requires limiting the exercise of jurisdiction so as to minimize conflict with other states’ jurisdiction, particularly with the state where the act takes place.430 This is particularly applicable to the far-reaching provisions of the Helms-Burton Act, creating a cause of action against alleged trafficking taking place in Cuba by non-American traffickers.431 Even if the Act is not unreasonable as it relates to Cuba, its application may conflict with the interests of other countries to

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427 OAS Charter, supra note 253, art. 19; See also RESTATEMENT supra note 234, at § 402.
428 RESTATEMENT, supra note 234, at § 402 (“[A] state has jurisdiction to prescribe law with respect to... conduct outside its territory that has or is intended to have substantial effect within its territory.”).
429 Id. at § 403.
430 Id. at 403 § cmt. g.
431 Helms-Burton Act supra note 22, at § 6081.
regulate the trade activities addressed by the Act.432 Many states have expressed their dismay with the Act for these reasons.433

Despite the U.S. embargo legislation’s express aim to alleviate the human rights violations in Cuba,434 the Cuban government and other commentators have argued that its impact435 has exacerbated or directly contributed to human rights violations.436 Accordingly, any

432 Nicholas Davidson, U.S. Secondary Sanctions: The U.K. And EU Response, 27 STET. L. REV. 1426, 1432 (1998) (“The Act has been widely seen by foreign governments as an attempt to extend the United States Cuba embargo to companies and individuals outside U.S. territorial jurisdiction, and as such as an unwelcome and objectionable attempt to substitute the foreign and trade policies of the U.S. Congress for those of foreign sovereign governments.”).


434 Cuban Democracy Act, supra note 130, at § 6002(5); Helms-Burton Act supra note 22, at § 6021(9).


"responsibility to protect" argument that the United States may raise in support of the embargo may be tainted by its counterproductive effect. These Cuban claims of counterproductivity are two-fold. First, the embargo violates Cuba's right to development. Second, it violates the Cuban population's social and economic rights. Both sets of rights are protected by the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. Specifically, these legal instruments evidence that economic and social rights are recognized as customary international law. Further, they also, along with the Declaration on the Right to Development, evidence an emerging right of a nation to

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437 See 22 U.S.C. § 6021(26)-(28) (1996) (Congress cites the "United Nations Security Council Resolution 940 of July 31, 1994, subsequently authorized the use of "all necessary means" to restore the "democratically elected government of Haiti" in support of the embargo against Cuba."). "This new R2P doctrine, "[r]ooted in human rights and international humanitarian law . . . squarely embraces the victims' point of view and interests, rather than questionable State-centred [sic] motivations." In short, the R2P doctrine operates on the following principle: where a state fails to protect its own citizenry from mass atrocity (i.e., genocide, ethnic cleansing, or crimes against humanity), the responsibility to protect that citizenry shifts to the international community. Intervention within this context, thus, is based on a responsibility to protect rather than on a right to intervene." Peter Stockburger, The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking?, 5 INTERCULTURAL HUM. RTS. L. REV. 365, 368-69 (2010) ("Currently, there is no widely recognized exception to the principle of non-intervention for humanitarian purposes without prior authorization from the UNSC.").


440 See generally, ICCRP, supra note 255.

441 See generally, ICESCR, supra note 255 (Although the United States has not ratified the ICESCR, it has signed it and is therefore obligated to not take any action that would defeat the object and purpose of the treaty); Vienna Convention on the Law of Treaties, art.18 (1).

develop beyond the capacity to only provide its population with the bare essentials. As noted, even otherwise necessary and proportional countermeasures may not violate fundamental human rights.

Finally, despite the vagueness of the effect of the 1970 Declaration, the 1986 ICJ decision, and inconsistent state practice, it is difficult to ignore over thirty years of U.N. General Assembly resolutions supported by almost all developing countries pleading for the end of unilateral economic coercion. From 1983 to 2015, the General Assembly has engaged in a consistent pattern of issuing resolutions titled “Economic measures as a means of political and economic coercion against developing countries” re-titled in 1997 as “Unilateral Economic measures as a means of political and economic coercion against developing countries.” Each resolution has cited to the 1970 Declaration, and after 1997, has indicated the following purpose:

[T]o eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the

\[^{(443)}\] U.N. Charter, arts. 55-56; ICCPR, supra note 255, at art. 1; ICESCR supra note 255, at arts.1, 2(1); Declaration on Development, supra note 254, at art. 8.

\[^{(444)}\] RESTATEMENT, supra note 234, at § 905 comm. a.

principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system.\textsuperscript{446}

The most recent resolutions include references to the WTO, suggesting economic coercion violates the GATT.\textsuperscript{447} Ironically, the continued need for such resolutions may support the notion that no such international law prohibition on economic coercion exists. From its initial adoption, the resolution voting patterns show a distinct split between developed and developing countries.\textsuperscript{448}

In response to the Cuban Democracy Act of 1991, Cuba requested that the U.S. embargo against Cuba be placed on the General Assembly’s agenda to have the embargo condemned as illegal economic coercion.\textsuperscript{449} Cuba claimed that the embargo was aimed at “imposing on it the political, social and economic order which the United States authorities consider most fitting.”\textsuperscript{450} The letter focused on the extraterritorial effect of the embargo, Cuban sovereignty and the principle of non-intervention.\textsuperscript{451} Cuba issued a second letter to the Secretary-General\textsuperscript{452} stating that U.S. economic coercion violated

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\textsuperscript{446} See, e.g., G.A. Res. 66/186 at 2 (Before 1997, the resolutions plea was “to eliminate the use by some developed countries of unilateral economic coercive measures against developing countries... as a means of forcibly imposing the will of one state on another.”); See, e.g., G.A. Res. 39/197 at 2.
\textsuperscript{450} Id. at p. 2.
\textsuperscript{451} Id. at pp. 2-4.
\textsuperscript{452} Letter Dated 25 October 1991 from the Charge d’Affairs. of the Permanent Mission of Cuba for the United Nations Addressed to the
norms that are “universally acknowledged to have attained status of binding international law.” The second letter cited to the 1970 Declaration, the GATT and the OAS Charter.

Beginning in 1992, at Cuba’s request, the U.N. General Assembly voted annually on a resolution titled “Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba.” The purpose of the resolution was designed: “to encourage strict compliance [with] the purposes and principles enshrined in the Charter of the United Nations, [re]affirming ... the sovereign equality of states, non-intervention in their internal affairs, and freedom of trade and international navigation . . .” and express concern about “laws . . . [with] extraterritorial effects [that] affect the sovereignty of other states.” The resolution called upon all member states to refrain from applying laws that did not strictly comply with the enunciated principles and to urge states to repeal any laws that conflicted with those principles. The first vote, recorded in November 1992, was fifty-nine in favor, three opposed, and seventy-one abstentions (with forty-one not voting).

Unlike the resolutions on the general legality of economic coercion, where votes have not shifted over the course of twenty years, the votes have shifted in favor of ending the U.S. embargo against Cuba, as the abstaining countries have changed their vote to support the resolution. In 2016, 191 countries voted in favor of ending the


453 Id. at 6.
454 Id. at pp. 5-6.
456 Id. (preamble).
457 Id. arts. 1-2.
458 Id. (preamble, Romania and the United States voted “no”).
U.S. embargo, none opposed, and the United States and Israel abstained. This most recent version of the resolution added the following:

[1] Statements the Heads of State or Government of Latin America and the Caribbean at the Summits of the Community of Latin American and Caribbean States regarding the need to put an end to the economic, commercial and financial embargo imposed against Cuba; [2] “the Helms-Burton Act”; [3] the progress in the relations between the Governments of Cuba and the United States of America and, in that context, the visit of the President of the United States, Mr. Barack Obama, to Cuba in March 2016; [and] [4] the steps taken by the United States Administration towards modifying some aspects of the implementation of the embargo, which, although positive, are still limited in scope.

In support of the resolutions, Cuba’s most recent report to the U.N. Secretary General’s 2007 report-General claims that:

[1] the economic losses to the Cuban people as a result of the United States economic, commercial and financial embargo against Cuba, taking into account the depreciation of the dollar against

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461 Id.

the price of gold on the international market, amounted to $822,280,000,000. At current prices, over all these years, the embargo has inflicted losses of more than $130,178,600,000.\textsuperscript{463}

\textbf{D. CONCLUSION}

Together, the previous two sections demonstrate the United States and Cuba have relied on and may continue to rely on international law principles to support their legal claims and defenses. The next section provides some guidance on how to best utilize these international law principles through diplomatic and legal mechanisms to resolve claims.

\textbf{IV. USEFUL PRECEDENT FOR RESOLVING SIMILAR LEGAL CLAIMS}

\textbf{A. INTRODUCTION}

The notion of one country making reparations to another for its violations of legal obligations is not new.\textsuperscript{464} An interesting development, however, is the proliferation of international adjudicatory bodies since the end of the Cold War as a result of globalization and the expansion of free trade.\textsuperscript{465} Particularly significant is the spread of BITs and international arbitral tribunals, which adjudicate individual and state claims by applying international

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\textsuperscript{463} \textit{Id.} at 64.  \\
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Historically, states submitted more traditional legal claims among states, such as border disputes, to arbitration. Meanwhile individual mass claims against states were usually settled through state-to-state negotiations, resulting in lump-sum payments. However, the proliferation of BITs and the wide-spread reliance on international arbitration to resolve expropriation-related claims provides another legitimate avenue for resolution of those claims. The U.S. and Cuba alone have entered into over eighty BITs.

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467 See, e.g., Treaty of Amity, Commerce, and Navigation, between His Britannick Majesty and the United States of America, by Their President, with the advice and consent of Their Senate, U.S.-U.K., 19 November 1794 (resolving 19 November 1794, U.S.-U.K. (entered into force 29 February 1796). Commonly referred to as the Jay Treaty, the Treaty resolved various outstanding questions between the United States and the United Kingdom that arose after the United States declared independence and arbitration was used to determine part of the boundary between the remaining British possessions and the United States).
470 Id.
B. LUMP-SUM PAYMENTS

In the United States, the president has the authority to settle the Commission’s certified claims with Cuba by accepting a lump-sum payment. This is known as the “doctrine of espousal.” As applied to Cuba, this doctrine authorizes the executive branch to bind U.S. claimants of expropriated property and provide limited remedies in any settlement agreement with Cuba. Under standard practice, U.S. claimants may not “opt out” of a U.S. government settlement, and dissatisfied claimants cannot pursue their claims before U.S. courts or courts of the settling country. Although the U.S. is not bound to espouse the claims, the Commission report indicates the U.S. government’s intention to be bound by its claims against Cuba.

Of the forty-three lump-sum claims settlement programs concluded by the U.S. for its claimants expropriated property claims, very few provided the U.S. with compensation for the full amount of...

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471 See Dames & Moore v. Regan, 101 S.Ct. 2972, 2986-87, 453 U.S. 654, 679-81 (1981) (holding that the President has the power to compel the transfer of property, subject to the jurisdiction of the United States, to which a foreign country has interest, in the context of a transaction).

472 See id. at 655.


474 FCSC CUBAN REPORT, supra note 1 (“The Commission’s findings are sent to the Secretary of State for use in the future negotiation of a claims settlement agreement with the Government of Cuba.”).
the certified claims;\textsuperscript{475} and none paid the full amount of interest.\textsuperscript{476} Except in the case of Vietnam, none of the post-1975 international settlement agreements provide for any interest from the date of the claim accrual or the date of settlement.\textsuperscript{477} In the case of Vietnam, the amount of frozen Vietnamese assets in the U.S. was sufficient to pay the amount of the certified claims with interest.\textsuperscript{478} Thus, Vietnam simply allowed the U.S. to apply those frozen assets to compensate the claimants.

Most of the agreements have also required the U.S. to return any assets and property that were frozen.\textsuperscript{479} Interestingly, despite the

\textsuperscript{475} See Shanghai Power Co., 4 Cl. Ct., at 239. See also 2015 FCSC ANN. Rep. sec. IV, at 32-33, [hereinafter ANN. REP.] (settling U.S. nationals’ claims against the People’s Republic of China for $80.5 million; which was about forty percent of the $197 million certified by the FCSC.). See also U.S. Department of Justice, Foreign Claims Settlement Commission, 2015 Ann. Sec. IV Table of Completed Programs, available at https://www.justice.gov/fcsc/page/file/934631/download (last visited April 16, 2017).


\textsuperscript{478} Id.

\textsuperscript{479} See, e.g., Agreement Between the Government of the United States of America and the Government of the Republic of Albania on the Settlement of Certain Outstanding Claims art. 6, U.S.-Alb., Jan. 11, 1995, Ex. Rept. 104-19, art. (“Upon entry into force of this agreement, the United States shall inform the Tripartite Commission for the Restitution of Monetary Gold of its
“doctrine of espousal,” which is only applicable to U.S. nationals at the time the claims accrue, (i.e. the time of the taking of property), several of the lump-sum agreements have included claims of foreign nationals, who, since the takings, had become U.S. citizens.\textsuperscript{480} Again, the U.S. is not bound by these previous settlements nor do they provide state practice in support of a new standard of compensation.\textsuperscript{481} Instead, they indicate how the U.S. is likely to settle its claims with Cuba.\textsuperscript{482}

In a 1992 agreement between the U.S. and Germany, the German government agreed to pay up to $190 million, which covered 100% of the principal and approximately 50% of the interest of U.S. claims.\textsuperscript{483} This agreement was pertinent in two respects. First, the U.S. accepted less than the full 6% interest because Germany rejected payment of

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readiness to consent to the release to the Government of Albania, in accordance with the procedures referred to in paragraph 2, of the appropriate amount of gold under Part III of the Agreement of Reparation of January 14, 1946 and the practices and procedures of the Tripartite Gold Commission.”).\end{flushright}

\textsuperscript{480} Id. (The Albanian-US agreement allowed the U.S. government to assess claims on behalf of the “dual United States-Albanian national” if “those nationals are domiciled in the United States currently or for at least half of the period of time between the taking of their property in Albania and the date [of] entry into force of the agreement.”). Similarly, in 1981 the U.S. and Czech governments settled all claims by U.S. nationals against the Czech government, allowing claims of persons whose property was expropriated by the Czech government between 1945 and 1948 and who became U.S. citizens by 1948 to receive a portion of the lump sum. \textit{Czechoslovakian Claims Settlement Act} of 1981, 95 Stat. 1675, Pub. L. No. 97-127 (1981), reprinted in 21 I.L.M. at 414.

\textsuperscript{481} \textit{See} Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 892 (2d Cir. 1981) (“Partial compensation inheres in the process of negotiation and compromise; we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we look to the results of settlements in ordinary tort cases or contract cases to determine the rules of damages to be applied.”).

\textsuperscript{482} \textit{Ann. Rep.}, supra note 475.

any interest, as it had in resolving property claims in East Germany following reunification.\textsuperscript{484} Second, the Commission explicitly stated that interest was to be simple, rather than compound, for the German claims, in accordance with previous Commission decisions.\textsuperscript{485}

Cuba has entered into settlement agreements with five foreign countries for the expropriation of the assets of their respective nationals in Cuba: France, on March 16, 1967; Switzerland, March 2, 1967; United Kingdom, October 18, 1978; Canada, November 7, 1980; and Spain, January 26, 1988.\textsuperscript{486} Although these settlement agreements were confidential, scholars generally agree that the claims were settled at a fraction of the assessed value of the expropriated assets.\textsuperscript{487} The Spanish claims, for example, were valued at $350 million, but were ultimately settled for about $40 million.\textsuperscript{488} Even this limited amount was not paid until 1994, six years after the claims were settled and thirty years after the claims accrued.\textsuperscript{489} Cuba and Canada settled the compensation claims in a similar lump sum agreement where Cuba paid only CAD 875,000 in check installments over several years.\textsuperscript{490} These arrangements support the position that due to the state

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\textsuperscript{484} \textit{Id.}
\textsuperscript{485} \textit{Id.}
\textsuperscript{486} \textit{Burns H. Weston et al., supra note 477, at 81.}
\textsuperscript{488} Ashby, \textit{supra} note 7, at 421–22.
\textsuperscript{489} \textit{Id.}
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of Cuba’s economic and national debt, it would be unable to pay the United States adequate compensation by lump-sum payment.\(^{491}\)

C. Arbitration

Recently, however, countries have come to settle individual claims through the growing field of international arbitration tribunals, which have proven successful in otherwise intractable disputes.\(^{492}\) Thus, in addition to the traditional diplomatic negotiations and a lump-sum payment, the United States and Cuba could use arbitration to settle some, or all, of their legal claims governed by international law.

One of the most attractive features of arbitration is that the proceedings are generally conducted in \textit{ad hoc} courts of arbitration specifically designed to deal with a particular dispute.\(^{493}\) The parties can participate in defining the issue to be adjudicated, retain the power

\(^{491}\) Cuba’s current economic problems may limit compensation to United States claimants to a fractional amount proportionally equal to or less than that received by other countries, regardless of the form of compensation. See \textit{Travieso-Diaz}, \textit{supra} note 487, at 217. See also Ambassador Stuart Eisenstat, Speaking on Cuban Claims, National Public Radio (Jun. 9, 2007) (settling the thousands of claims pending against Cuba should not be much of an obstacle to normalization—when that day finally comes. Given Cuba’s poor economic state, any compensation received by claimants may be little more than token payments.”).

\(^{492}\) In the Iran-U.S. Tribunal, individual claimants may present their claims to the Tribunal directly in accordance with Article III (3) of the Claims Settlement Declaration: “Claims of nationals of the United States and Iran are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves, or in the case of claims less than $250,000, by the government of such national.” Algiers Declarations (U.S. v. Iran), Settlement Declaration, 20 ILM 230, art III (1981) [hereinafter Settlement Declaration]. See also United Nations Compensation Commission, UNCC/What We Do, http://www.uncc.ch/what-we-do (last visited Feb. 22, 2018). See also Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute Concerning the Taba Area. 27 ILM 1421 (1988).

\(^{493}\) See \textit{LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS} 788 3\textsuperscript{rd} (3d ed. 1993).
to select the arbitrators the forum, and designate the rules of procedure that will be used to settle the dispute.\textsuperscript{494} Arbitration also provides the parties with the option of holding hearings in secret.\textsuperscript{495} Thus, arbitration provides an appealing forum, because it is much more flexible than a court and allows the parties to maintain more control over the proceedings.\textsuperscript{496}

For example, in 1981, the Iran-US Tribunal established a General Declaration to resolve the crisis between the Islamic Republic of Iran and the United States.\textsuperscript{497} The crisis commenced in 1979 when Iranian students held 53 U.S. nationals hostage at the U.S. embassy in Tehran and escalated when the U.S. froze all Iranian property and assets in the U.S. and cancelled arms exports to Iran.\textsuperscript{498} By 1980, over 400 actions were filed in the United States against Iran.\textsuperscript{499} In January 1981, with Algeria as an intermediary, Iran and the U.S. resolved the hostage crisis and the expropriation claims, through two declarations: the General Declaration\textsuperscript{500} and the Claims Settlement Declaration.\textsuperscript{501}

The countries decided how their claims would be decided and by whom. The Claims Settlement Declaration set up the Iran-U.S. Claims Tribunal, with jurisdiction to hear three categories of claims: claims of U.S. nationals against Iran and vice versa;\textsuperscript{502} official claims of the two

\textsuperscript{494} Id. at 790-91.
\textsuperscript{496} Id.
\textsuperscript{497} Iran-United States Tribunal, About the Tribunal, (last visited Feb. 22, 2018), available at https://www.iusct.net/Pages/Public/A-About.aspx.
\textsuperscript{499} Id.
\textsuperscript{500} Algiers Declarations (U.S. v. Iran), Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration, 20 ILM 224, Jan 19, 1981), U.S.-Iran.
\textsuperscript{501} Claims Settlement Declaration, supra note 492, at art II (1).
\textsuperscript{502} Id.
nations against each other;\textsuperscript{503} and interpretive disputes relating to the application of the General Declaration and Claims Settlement Declaration.\textsuperscript{504} The Tribunal consists of nine judges,\textsuperscript{505} with Iran and the United States appointing three judges each, and the remaining three judges are chosen by the six appointed judges.\textsuperscript{506} Each arbitral panel is created by the President of the Tribunal and consists of three judges: one Iranian judge, one U.S. judge, and one third-country judge.\textsuperscript{507} The panels decide most individual claims, but the President of the Tribunal chooses the claims for adjudication by the nine-judge tribunal.\textsuperscript{508} The Tribunal follows the UNCITRAL arbitration rules, and the arbitral decisions are final and binding.\textsuperscript{509}

Some unique characteristics of the Tribunals are noteworthy. The Tribunal was vested with jurisdiction, not only over certain public international law claims, but also over municipal claims against the Iranian government.\textsuperscript{510} Thus, the international nature of the tribunal does not limit itself to only applying international law; but parties are flexible to choose nationals laws that are directly applicable, as well.

Additionally, individual claims against the other country were not based on their respective government’s claims against the other nation

\textsuperscript{503} Id. at art II (2).

\textsuperscript{504} Id. at art. II (3).

\textsuperscript{505} Id. at art. III 13(3).

\textsuperscript{506} Id.

\textsuperscript{507} Id. (Third country judges have come from Poland, Italy, Finland, France, Sweden, the Netherlands, Germany, Switzerland, and Argentina.). See also Jessica Bodack, International Law for the Masses, 15 DUKE J. COMP. & INT’L L. 363, 371 (2005).

\textsuperscript{508} Claims Settlement Declaration, supra note 492, at art. III (1).


\textsuperscript{510} Id. at art. II (1).
through diplomatic protection. In deciding the 1984 Dual Nationality case, the Tribunal held, “the object and purpose of the Algiers Declarations was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense.” Thus, the Claims Settlement Declaration expanded the universe of claims beyond that contemplated by the customary international law principles of state responsibility.

The Iran-U.S. Tribunal is not without criticism. However, the extremely hostile conditions under which it was agreed to may excuse many of its short-comings and justify its characterization as an overall success. The Tribunal has contributed directly and indirectly to the settlement of over 3,000 claims and the paying out of over $2 billion to claimants. It helped diffuse the 1979 U.S.-Iran Hostage Crisis and restore diplomatic relations. The arbitral process employed by the Tribunal highlights the flexibility and adaptability of the arbitral model to resolve complex international law disputes between nations with strained or non-existent diplomatic relations.

Critics warn that the Iran-US Tribunal model is not adaptable to

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511 Diplomatic protection is a situation in public international law where “in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on h[er] behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law.” Panevezys-Saldutiskis Railway Case (Est. Estonia v. Lith.), 1938 P.C.I.J. Lithuania, 1939 PCIJ (ser A/B) No. 76, at 16 (Judgment of Feb. 28, 2016).

512 Islamic Republic of Iran and United States (Case A18) (Dual Nationality), Dec. 32-A18-FT, 5 Iran-U.S. C.T.R. 251 (1984). Iran asserted that U.S. nationals who also possess Iranian nationality could not bring claims against Iran based on customary international law principles dictating that nations can only espouse claims of their own national against other nations.

513 Id.

514 Bodack, supra note 507, at 372-73.

515 Id. at 374.
the U.S.-Cuba case. First, the Tribunal continues to drag on, now for thirty-five years, running up expenses to maintain its nine arbitrators and staff. Further, a more formal mechanism is likely to lead to “contentious replays of historical grievances,” and removes the governments’ control over the process. Finally, the Iran-U.S. Tribunal has had the advantage of a large amount of funds from Iran, “$1 billion of Iranian assets frozen in the United States,” and from a stream of Iranian petroleum earnings, conditions not present in the US-Cuba case.

D. CONCLUSION

One issue with any resolution mechanism between the United States and Cuba, be it a lump-sum agreement or arbitration, is Cuba’s ability to pay. The United States’ claims against Cuba are significantly higher than many of the previous claims the United States has settled through a lump-sum agreement. There is no indication that the United States will merely accept a symbolic or token amount from Cuba in resolution of its claims. The Cuban blocked assets in the United States are insufficient to cover even one-eighth of the total amount of the claims. Currently, the United States holds approximately $250 million of blocked Cuban assets. Unlike with Vietnam, the United States cannot simply unblock the assets and fully compensate U.S. claimants. Cuba is unlikely to be able to make

517 Id.
518 Id.
519 Id.
520 Id.
521 Helms-Burton Act, supra note 22, at § 6064 (a)-(c). (requiring “full” compensation prior to lifting the embargo).
522 See infra note 552.
substantial deposits into an escrow account as required to fund a tribunal adjudicating 5,911 claims against Cuba. Thus, any lump-sum agreement with Cuba on United States’ claims may require a long-term installment plan.  

Another issue is the lack of urgency. The time is ripe for continued negotiations with Cuba and a Republican-dominated Congress can strategically employ hardline tactics with Cuba since they are in a better position to change the embargo legislation. But Cuba will be in no hurry to pay sixty-year-old claims without strategic incentives. U.S. claimants, after waiting sixty years, are not necessarily inclined to push Congress to make their claims a priority. So unlike the Iran situation, there is no sense of a crisis that requires urgent resolution. And, unlike Central and Eastern European countries such as the Czech Republic, there is no democratic change on the horizon to motivate U.S. investment in Cuba.

The next section will consider these distinguishing qualities while analyzing other scholars’ proposals for resolutions of the U.S.-Cuba claims in order to make a new, less modest proposal.

V. APPLYING PRECEDENT: PROPOSALS FOR MECHANISMS TO RESOLVE THE LEGAL CLAIMS BETWEEN THE UNITED STATES AND CUBA

A. THE TWO MOST COMPREHENSIVE AND CREATIVE PROPOSALS

Much of the literature on U.S. and Cuba claims focus solely on the United States’ claims against Cuba for its expropriated property

524 See Joaquin Roy, Cuba, the United States, and the Helms-Burton Doctrine 17-162 (Univ. Press of Fl. 2000). (stating many of the large corporations whose properties were taken received substantial compensation through indirect tax write-offs).
claims.\textsuperscript{525} Most of these papers limit their proposals to only compensate the Commission-certified claims, that is, those claimants who were U.S. nationals at the time of the taking of property and who filed their claims within the appropriate time periods.\textsuperscript{526} Few proposals include claims of U.S. citizens who were Cuban nationals at the time of the taking and whose property was confiscated upon their departure from Cuba.\textsuperscript{527} Many proposals also assume that a “post-socialist” Cuban government will be in power when a deal is struck.\textsuperscript{528} Other papers have addressed the legality of the Helms Burton Act\textsuperscript{529} and the destructive impact of the embargo on the Cuban population.\textsuperscript{530} But almost none have included or seriously considered resolving Cuba’s potential claims under international law against the U.S.\textsuperscript{531}

\begin{footnotesize}
\begin{enumerate}
\item See generally, Alexander, supra note 527; Ortiz, supra note 525.
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The most comprehensive proposal is the 2007 USAID Report on The Resolution of Outstanding Property Claims Between Cuba and The United States ("Report").\textsuperscript{532} This Report proposes creating a dual-track property claims settlement mechanism: a "bilateral Cuba-U.S. Tribunal established by treaty or executive agreement between a new Cuban government and the U.S.;" and a "Cuban Special Claims Court" constituted as an independent chamber of the Cuban national judiciary.\textsuperscript{533} The instruments establishing the Tribunal and the Special Cuban Court would only allow for property-based claims. The jurisdiction of the Tribunal would be limited to property claims of U.S. nationals certified by the Commission.\textsuperscript{534} The jurisdiction of the Special Court would be limited to the property claims of the Cuban-American exile community.\textsuperscript{535}

The "Cuban Special Claims Court" would be established through a bilateral treaty or executive agreement between a successor government to the Castro government and the Court would "be an independent chamber within the Cuban judicial system."\textsuperscript{536} The Report's main argument for the need of a separate Special Court for Cuban-American exiles is as follows:

\begin{quote}
[B]ecause members of this claimant group were nationals of Cuba when their property was expropriated, international law generally does not recognize right of recovery. Consequently, a bilateral system to resolve property claims between this group and the government of Cuba would not be supported by international law. Jurisdiction over their claims would reside within the Cuban
\end{quote}

\textsuperscript{533} Id. at 5.
\textsuperscript{534} Id.
\textsuperscript{535} Id.
\textsuperscript{536} Id. at 6 (emphasis added).
judiciary. While claims by this group are not supported specifically by either [U.S.] domestic or international law, politically and economically their claims should not be ignored.537

In the Report, neither the Tribunal nor the Court would have jurisdiction to hear any government- to- government claims or Cuban nationals’ claims against the U.S.538 The Report recognized that the “Castro government asserts that Cubans have over $100 billion in claims against the U.S. based on harm flowing from the American embargo.”539 But explains that the U.S. should exclude Cuban claims against the U.S. because: “it is difficult to distinguish between harm done by the embargo and that done by the Cuban government;” “it is impossible to verify the claims and claim amounts”; and “[t]he judicial bodies sought to be established here should not be overrun by Cuban claimants seeking redress against the U.S.”540 Finally, the Report leaves room for Cuban claims as follows: “To the extent that Cuban claims are allowed, making the claim settlement process a two-way street, only valid property-based claims should be considered under the jurisdiction of the bilateral Tribunal.”541

Other noteworthy features of the Report-proposed Tribunal would include: “a minimum of nine members – one third appointed each by the governments of Cuba and the U.S. and the remaining third appointed by agreement among the two thirds who have been selected;” “appl[ication of] international law to resolve the claims before it”; and the “[v]aluation of claims certified by the Commission are to be given due weight by the Tribunal.”542 Finally, a distinction is made between small claims and medium or large claims:

537 Id. at 4.
538 Id.
539 Id.
540 Id.
541 Id.
542 Id. at 5.
Small claims are to be compensated monetarily through a streamlined process. Medium and large claims may be compensated monetarily, by specific restitution (under limited circumstances), or by alternative remedy awarded by the Government against which the claim is brought in the form of development rights, tax credits, rights in Government-owned property, or other remedies designed to promote foreign investment if the claimant agrees. Large claims must undergo a period of mandatory good faith mediation prior to seeking resolution by the Tribunal.  

As with most other proposals, the Report assumes the U.S. property claims will only be resolved in a post-socialist Cuba and that a post-socialist Cuba will not assert or need to have its claims against the U.S. adjudicated as well. Ten years after the Report was published, one year after the thawing of relations between the United States and Cuba, and several months after the death of Fidel Castro, the assumption that Cuba will undergo a serious regime change, remains speculative. Thus, many of the problems with the Report are due to its inapplicability under the circumstances as they exist today.

The Report also assumes that it is necessary to bifurcate the claims into two separate dispute settlement mechanisms. Even if the U.S. and Cuban governments agree to apply international law, they are not obligated to espouse the claims of their nationals and limit them to principles of diplomatic protection. Instead, as Iran and the U.S. did in their Claims Settlement Agreement, Cuba and the U.S. can agree to allow dual citizens to assert their claims against the other government directly. Further, they can allow municipal law to apply to the dual citizen cases. Creating two separate agreements and two separate systems of adjudication for similar claims may not be efficient, may

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543 Id.

544 See generally, id. (It is more likely that Cuba will follow the Vietnam or China model of a one-party officially socialist state with a market economic. Thus, more democratic than it is now, but not in the U.S. sense.).
lead to absurd results, and will require more political capital. Finally, it is also unlikely that Cuban-American exiles will deem any Cuban Court in Cuba to be fair, independent, or impartial, which will undermine the effectiveness of this judicial process and the finality of any judgment.

Despite the possibility that the U.S. and Cuba can decide to have a tribunal hear the Cuban-American exile’s claims, the reality is that for legal and political reasons, the Cuban government is unlikely to want to address these claims, at least publicly.\footnote{See Ley de Reafirmación de la Dignidad y Soberanía (Ley 80), 36 I.L.M 472 (1972).} One such reason would be that almost all Cubans living in Cuba would have similar claims against the Cuban government. The U.S. has negotiated lump-sum payment agreements with other nations that settled its dual-citizens’ claims, and it can do so with Cuba.

Another problem with the Report, is how unlikely it would be that the Cuban government will allow a tribunal or a national court to consider U.S. claims against the Cuban government without also addressing its claims against the U.S. government. The Report is not only assuming a successor government, but also assumes that the successor government will relinquish any of the previous government’s claims against the United States. That is a dubious assumption.

Moreover, it is also unlikely that if the Cuban government agrees to utilize a claims tribunal or a court to adjudicate the U.S.’ claims, it will simply agree to give “due weight” to the ex parte Commission valuations of the certified claims. The purpose of a tribunal or a court will be to independently decide the merits of the claims and the liability of the parties and damages, not to rely on the U.S.’s ex parte decisions of these issues. The less fair the parties perceive the process, the less likely they are to accept the adjudication of the claims as legitimate.
The Report does signal an important distinction between small claims and medium or large claims that should guide any future proposal for the settlement of the U.S. claims against Cuba. This distinction was also noted by Matías F. Travieso-Díaz in his paper “Resolving U.S. Expropriation Claims against Cuba: A Very Modest Proposal.” Travieso-Díaz focuses solely on resolution of the Commission-certified claims. His paper does not assume that the settlement of the claims will be with a successor Cuban government; so it is tailored to the current Cuban government.

After indicating that any settlement must take into account the fundamental differences in the types of properties subject to claims and Cuba’s limited resources, Travieso-Díaz goes on to propose a four-stage plan. Stage one involves direct payment from the Cuban government to all FSCS claimants for all claims of $1.5 million or less. This would provide compensation for all but the 100 highest valued claims and would fully compensate 5,811 claims with $164,336,899.00. With a $164.3 million lump-sum payment the Cuban government could compensate a majority of the claimants. One potential source for these funds, or generally for payment of U.S. claims are the blocked Cuban assets held by OFAC which total $243 million.

Travieso-Díaz, like the authors of the Report, recognize

\[\text{\textsuperscript{546}}\text{ See Travieso-Díaz Proposal, supra note 526.}\]
\[\text{\textsuperscript{547}}\text{ Id. at 3 n. 2. (“These groups include former Cuban nationals who are now citizens or permanent residents of the United States; current Cuban nationals who, whether the claimants are on the island or abroad; and U.S. nationals who for some reason failed to gain certification of their expropriation claims under the Cuban Claims Program.”).}\]
\[\text{\textsuperscript{548}}\text{ Id. at 11, 135 (explaining that different types of remedies will be available for different types of properties).}\]
\[\text{\textsuperscript{549}}\text{ Id. at 14-20.}\]
\[\text{\textsuperscript{550}}\text{ Id. at 14.}\]
\[\text{\textsuperscript{551}}\text{ Id.}\]
that the smaller claims will tend to be for types of property that are less likely to be available for restitution to the original owners.

Stage two would resolve the remaining 100 larger claims with the claimants directly negotiating with the Cuban government.\textsuperscript{553} At this stage, the remaining claimants would waive their rights to a lump-sum and negotiate directly with the Cuban government for more creative forms of compensation like restitution in kind, investment opportunities, payment in commodities, or payment in state obligations.\textsuperscript{554}

The author points to precedent in the U.S. settlement agreement with Germany, which allowed U.S. nationals to decline their portions of the lump-sum settlement funds and pursue their claims under Germany's program for the resolution of the claims arising from East Germany's expropriations.\textsuperscript{555} Potentially, claimants from stage one could also waive their right to their portion of the settlement funds and negotiate directly with the Cuban government.\textsuperscript{556}

If, despite direct negotiations with the Cuban government, claims remain unsettled, then stage three would have the U.S. and Cuba agree that these claims be submitted to binding arbitration.\textsuperscript{557} Stage three would require the U.S. and Cuba to agree on the arbitrations’ legal framework.\textsuperscript{558} The difficulty, the author points out, would be setting up an independent source of funding to ensure the tribunal’s awards

Assets Report shows that there are $243.2 million (as compared to $270 million in 2014) in blocked Cuban funds but that figure excludes the value of real and tangible property.

\textsuperscript{553} Id. at 16.
\textsuperscript{554} Id. at 15.
\textsuperscript{555} Id. at 16-21 (citing to Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Settlement of Certain Property Claims, 57 Fed. Reg. 53175, 53176 (November 6, 1992)).
\textsuperscript{556} Id. at 15 n.55.
\textsuperscript{557} Id. at 19, 20-21.
\textsuperscript{558} Id. at 20.
could be satisfied. Finally, a hypothetical stage four would allow claimants who opted out of the lump-sum settlement not willing to submit their claim to arbitration to proceed in a Cuban domestic claims program.

The USAID Report and Travieso-Diaz’ separation of claims by size is helpful for resolving U.S. claims against Cuba. In addition to facilitating payment to most of the claimants, it provides the rest of the claimants with the opportunity to pursue different types of remedies. As suggested, the smaller claims, “primarily for land, improved real properties, securities and mortgages, and ‘other’ personal properties,” are less likely to be recoverable or transferred to their original owners and less likely to have maintained their value such that compensation is the better alternative. Larger claims, half of which are corporate claims, might be better off with more flexible and alternative remedies.

However, like the Report, Travieso-Diaz’ proposal overestimates the role that the Commission’s claim valuations will play in any U.S.-Cuba settlement and ignores Cuba’s counterclaims against the U.S. The Cuban government is unlikely to accept the FSCS’s certification procedures as fair. Thus, Cuba might require its own claims commission to evaluate the smaller certified claims and meet somewhere in the middle with the U.S. at another valuation or negotiate some percentage of the claims to pay out that it may deem fair. Any proposal for a lump-sum settlement of the small claims may need to consider Cuba’s own valuation of the U.S. certified claims against it. Further, it is unlikely that Cuban negotiators will agree to

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559 Id.
560 Id. at 21.
561 Brookings Proposal, supra note 516, at 19.
562 Travieso-Diaz Proposal, supra note 526, at 17-20.
563 See, e.g., Brookings Proposal, supra note 516, at 22-24 (“[A] counsel to the Cuban government has written that no premium on book value should be allowed for going-business value, in circumstances in which a change in government economic policies has resulted in a doubtful earning capacity for the nationalized entity. . . Going-business value is a very substantial portion of many of the losses found by the Commission to have been suffered.”).
settle the U.S. claims against the Cuban government without addressing their own claims against the United States.

Both the Report and Travieso-Diaz’ proposal also overestimate the likelihood that larger claimants, half of which are corporate claimants, and the Cuban government will come to a settlement through mediation or informal negotiations without the initiation of binding arbitration. The Report’s Tribunal and Special Court would require large claimants to undergo a period of mandatory good faith mediation prior to seeking resolution by the Court or the Tribunal. Similarly, Travieso-Diaz’ proposal would allow the Cuban government and large claimants to negotiate a settlement of the claims and agree to binding arbitration if they are unsuccessful. Without the strong incentives provided by participation in the process of binding arbitration culminating in a binding final judgment, it is unclear that the parties will be able to come to a settlement. Arbitration would provide a much needed incentive for the parties to settle, which might otherwise not exist for the sixty- year-old claims.

Further, if any U.S. claimants are allowed to assert their claims against the Cuban government directly, they should do so under the protection of a treaty between the United States and Cuba that, like the Iran-US Claims Settlement Agreement, defines the scope and legal framework of the tribunal. In addition to a claims settlement agreement, if claimants are eligible to elect remedies involving investment opportunities in Cuba, the U.S. and Cuba will need to enter into a BIT to protect any potential U.S. investment in Cuba.

Alternative remedies will provide U.S. claimants and the Cuban government with more creative options for reaching a fair settlement in light of Cuba’s economic situation and inability to pay full compensation to all U.S. claimants. However, remedies other than compensation would require significant changes to U.S. legislation and essentially a lifting of the embargo. Travieso-Diaz’ suggestion that these larger claims be settled last is a prudent one.

B. A MUCH LESS MODEST PROPOSAL

An agreement between the U.S. and Cuba should aim to resolve: (1) the Commission-certified claims; (2) Cuban claims against the U.S.; (3) U.S. claims against Cuba; and (4) the claims of U.S. citizens who were Cuban nationals at the time of the expropriation. This is a
much less modest proposal because it involves the claims of the Cuban
government against the United States and the claims of Cuban
nationals now U.S. citizens’ claims against the Cuban government.
Again, whether or not these claims should be heard or not is irrelevant
to the likelihood that they will be raised at the negotiation table.

Additionally, certain political assurances and agreements to
change to legislation must be included in any agreement. The
negotiations should be confidential and take place in a neutral and
convenient setting such as Panama.

This paper’s proposal is three-fold. First, claims of U.S. nationals
under $1.5 million can be settled through either a one-time lump-sum
payment or in installments within 3-5 years. As it has done before
with Vietnam, the U.S. can push Cuba to include similar small claims
of U.S. citizens who were Cuban nationals at the times of the property
takings and create a separate fund for those claimants. The amount of
interest that should be applied to small claims should also be
negotiated. The U.S. will likely stand by its certified value of the
claims plus simple interest, but it is unlikely that Cuba will accept the
value without its own evaluation of the claims. Thus, the U.S. should
consider, albeit without dismantling the Cuban Claims program,
allowing Cuba to create its own neutral claims commission or review
body that would provide its own evaluation of the certified claims or
another fair process to decide on the best way to fairly evaluate the
small claims.564

All U.S. small claimants must agree to allow the executive branch
to negotiate their claims and to waive their rights to any other remedy
other than their portion of the negotiated settlement. They would not
have the right to opt out of the settlement so that these payments can

564 Id. at 34 (A “less formal umbrella claims committee proposed here
would still provide some useful architecture for facilitating deals in the mutual
interest of the claimant firms and Cuba. It would have the virtues of a
prescribed timeframe and lower expenses. It could also provide some degrees
of transparency and consistency across negotiations.”).
be released as soon as Cuba and the U.S. agree on a settlement amount, if they so choose. This would resolve 5,811 of the 5,911 the Commission certified claims against Cuba. Cuba’s payment of these claims would signal to the United States that Cuba is willing to negotiate the rest of the claims in good faith.

Second, the remaining 100 larger certified claims would be submitted to binding arbitration, the legal framework of which would be agreed to through a claims settlement agreement and subject to a BIT.\textsuperscript{565} The goal of the arbitral tribunal would be to resolve the outstanding claims between the U.S. and Cuba and to provide flexible and alternative remedies and damages to make claimants whole.\textsuperscript{566} The claims settlement agreement would create a claims tribunal similar to the Iran-U.S. Tribunal and would apply international law to adjudicate final binding awards, while taking into account lessons learned from the Iran-U.S. Tribunal and the particular needs of each claimant on a case-by-case basis.\textsuperscript{567} Cuba and the United States will need to commit to deposit in an escrow account an agreed-to amount of funds to compensate claimants.

One important incentive for Cuba to continue depositing these funds with the tribunal will be the tribunal’s jurisdiction to adjudicate its claims under international law against the U.S. This will require significant political capital by Cuba to accomplish. The claims settlement agreement would provide the claims tribunal with jurisdiction over government to government claims, including over the interpretation of the claims settlement agreement. Thus, the claims

\textsuperscript{565} Compare 2012 U.S. Model BIT, supra note 479, with Cuba-UK BIT, supra note 337 (Cuba’s BITs are similar to the U.S. Model BIT so this should not be a very difficult undertaking.).

\textsuperscript{566} Brookings Proposal, supra note 516, at 32-34 (listing a “menu” of remedy options available to Cuba).

\textsuperscript{567} Although it would mirror the Iran-US Tribunal, hindsight is 20/20 and the failures of that Tribunal should be taken in to account by: actively deciding the seat of the arbitration and whether that law will apply instead of choosing default procedure rules to decide; changing the size of makeup of the Tribunal to reduce the respective government’s direct influence over them, i.e., a five-person tribunal with two from each country, who each choose an arbitrator from a third country and those two choose the president.
tribunal would have jurisdiction over U.S.’ claims against Cuba and Cuba’s claims against the U.S. If no such agreement can be reached, government to government claims could be resolved through a reliance on ongoing relations between the two countries, including future trade and investment concessions and agreements for certain periods of time. Use of public statements acknowledging some responsibility and commitment to future relations between the countries might also prove helpful.

Bringing government to government claims within the jurisdiction of the tribunal or providing Cuba with trade and investment inducements, might also induce Cuba to allow the tribunal to decide the claims of U.S. citizens who were Cuban nationals at the times of the taking. Another incentive might be to allow the tribunal to apply municipal law to these claims. The main problem with compensating this category of claimants, however, is that they would be competing for limited available resources. Another problem may be that current Cuban nationals may raise similar expropriation or related claims and cause internal conflict that the Cuban government would be unwilling to allow. Therefore, the claims settlement agreement may need to significantly restrict the remedies available to these claimants to exclude direct compensation or provide alternative remedies.  

The third part of the agreement involves diplomacy. The final agreement must include an agreed upon timeframe to completely lift the U.S. embargo against Cuba and repeal all Cuban laws and practices.

More research about the interests of this group of claimants needs to be done. Emotional ties to their home, as opposed to other claimants might make them more likely to consider other types of remedies. Although beyond the scope of this paper, an alternative for over 1 million Cuban-American exiles could involve a restorative justice approach. A truth commission could be aimed at the Cuban government taking meaningful responsibility for any alleged egregious human rights violations, executions, illegal confiscations etc., during the revolution. At this time, it is extremely unlikely that the Cuban government would agree to this, especially considering the current state of human rights on the island. However, this might be a better alternative to the changes on the island proposed by the CAFC while maintaining some of the CAFC’s goals.
adverse to U.S. citizens and permanent residents. These changes should be strategically placed to mirror each nation’s compliance with the overall settlement agreement. For example, one such step can be Cuba’s lump-sum payment for the small claims, which would be required prior to any steps to repeal Title IV of the Helms-Burton Act. Another option could be that Cuba reverse unnecessary travel restrictions adverse to former Cuban nationals living in the United States.

The agreement will also have to include some assurances by Cuba that it will improve its respect for human rights on the island. This part of the agreement can involve the U.N. Commission on Human Rights or other agreed upon NGOs to monitor their progress. Similarly, Cuba will likely request assurances from the United States to respect Cuban sovereignty and not intervene in its internal political affairs.

There are a lot of other opportunities available to the United States and Cuba to expand the value of the settlement beyond resolving asserted claims. The use of third party facilitators, like the Catholic Church, have also proven helpful in the past. Neutral allies, like Algeria or The Netherlands might assist with mediating some of the processes. Additionally, there are endless sources for dove-tailing, like bolstering foreign aid and investment in Cuba, leveraging Guantanamo Bay, and restoring Cuban exile’s citizenship status.

CONCLUSION

The United States and Cuba’s willingness to settle similar claims in the past shows that they would be likely to enter into a bilateral settlement agreement as part of a larger bargain to normalize relations. While the Helms-Burton Act and related sanctions regulations present a real impediment to such a deal, these laws can be repealed or amended; and swiftly, with a one-party dominated Congress.

Although the United States’ history with Cuba is one of subversion and mistrust, no less can be said of its history with Vietnam or China, with which the U.S. has normalized relations and settled similar claims. If the United States and Cuba can agree that international law governs their claims against each other, then they would also be agreeing to fair processes and mechanisms, such as those suggested by this paper. The final bargain should account for all of the parties affected by each country’s action and inaction, including the Cuban people living in Cuba. The settlement of the legal claims should fall within the larger economic and political goals of the United States and Cuba and remain forward-looking. As articulated in the Brookings Proposal:

The strategic goals in a massive claims resolution process must be political: to heal the deep wounds of past conflicts, to lay foundations for peaceful coexistence and the non-violent resolution of disputes, to avoid jeopardizing fiscal balances and crippling debt burdens, to build investor confidence and international reputation, and to help render the Cuban economy more open and competitive. These vital goals will not always be fully convergent with the more traditional, legal objective focused narrowly on the rights of property claimants. In designing and implementing solutions, as claimants bang on doors and demand attention, policy makers should not lose sight of their overriding purposes. In the interests of both Cuba and the United States, the twentieth-century trauma of massive property seizures should be transformed into a twenty-first century economic development opportunity.  

570 Brookings Proposal, supra note 516, at 44 (emphasis added).