

2018

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

Joyce Rodriguez

Follow this and additional works at: <https://scholarcommons.sc.edu/scjilb>



Part of the [Law Commons](#)

Recommended Citation

Rodriguez, Joyce (2018) "RESOLVING LEGAL CLAIMS BETWEEN THE UNITED STATES AND CUBA: APPLYING INTERNATIONAL LAW WHERE DIPLOMACY ALONE FALLS SHORT," *South Carolina Journal of International Law and Business*: Vol. 14 : Iss. 2 , Article 8.

Available at: <https://scholarcommons.sc.edu/scjilb/vol14/iss2/8>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Journal of International Law and Business by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

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 LL.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.

¹ U.S. DEP'T OF JUSTICE, FOREIGN CLAIMS SETTLEMENT COMM'N OF THE U.S., SECTION II COMPLETION OF THE CUBAN CLAIMS PROGRAM UNDER TITLE V OF THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949, 69 (1972) [hereinafter FCSC CUBAN REPORT]; U.S. DEP'T OF JUSTICE, FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE U.S., Completed Programs—Cuba (Dec. 5, 2017), <https://www.justice.gov/fcsc/claims-against-cuba> [hereinafter U.S. DEP'T OF JUSTICE].

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

² See President Barrack Obama, Statement by the President on Cuba Policy Changes (Dec. 17, 2014), available at <https://obamawhitehouse.archives.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>. Most of these changes have remained unchanged by President Donald Trump's administration. Adam Fisher, *Trump 'canceling' Obama's Cuba Policy but leaves much in place*, ABC News (Jun. 17, 2017, 4:09 AM), <https://abcnews.go.com/Politics/trumps-cuba-policy/story?id=48058622>.

³ See, e.g., U.N. GAOR, 46th Sess., annex, at 2, U.N. Doc. A/46/193 (Aug. 19, 1991).

⁴ See, e.g., *Alejandro 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

⁵ See ESTABAN MORALES DOMINGUEZ & GARY PROVOST, UNITED STATES CUBAN RELATIONS: A CRITICAL HISTORY 38 (2008).

property on the island.⁶ 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 1959.⁷ Cuba's Foreign Minister's early indication that the new Cuban government was willing to negotiate was rebuffed by the U.S.⁸ 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.⁹ 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.¹⁰ After the U.S. significantly decreased Cuban sugar imports, "[o]n January 1, 1961, Cuba ordered all U.S. diplomatic" staff

⁶ See Bradley Gilmore, *U.S.-Cuba Compensation Policy*, 8 TEX. HISP. J. L. & POL'Y 79, 81 (2002).

⁷ See Timothy Ashby, *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanism*, 40 U. MIAMI INTER. AM. L. REV. 413, 419 (2009).

⁸ See, MICHAEL W. GORDON, *THE CUBAN NATIONALIZATION* 7 (1976).

⁹ See Ashby, *supra* note 7, at 420.

¹⁰ Claire Felter & Danielle Renwick, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS (last updated January 19, 2018), <https://www.cfr.org/backgrounder/us-cuba-relations>.

to leave the island.¹¹ Two days later, the United States announced the formal breaking of diplomatic relations with the Cuban government.¹²

A few months later, on April 15, a U.S. aircraft bombed three airports in Cuba.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.¹⁴ This was the catalyst for Castro's declaration of the socialist revolution.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.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.¹⁷ The U.S. sought to use Cuba's vulnerable state to increase economic pressure on the Castro government.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.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.²⁰ More stringent requirements for lifting the U.S. embargo came after four Cuban-Americans were killed when a Brothers to the Rescue plane

¹¹ Gilmore, *supra* note 6, at 84.

¹² See DOMINGUEZ & PROVOST, *supra* note 5, at 49.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See JONATHAN D. ROSEN & HANNA S. KASSAB, U.S. CUBA RELATIONS CHARTING A NEW PATH 61 (2016).

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).

¹⁷ See DOMINGUEZ & PROVOST, *supra* note 5, at 99.

¹⁸ See *id.* at 104.

¹⁹ See Zimbalist, *supra* note 16, at 11.

²⁰ See DOMINGUEZ & PROVOST *supra* note 5, at 107.

was shot down by Cuban military in 1996.²¹ 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 1996.²² 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.²³ By 2001, the U.S. policy toward Cuba sought to compel a transition to democracy on the island through economic pressure.²⁴ President George W. Bush maintained the same policies toward Cuba.²⁵ The relationship between the U.S. and Cuba remained unchanged until 2008.

*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.²⁶ In his first term, President Obama’s administration eased travel restrictions, enabled remittances to Cuba, and allowed people-to-people exchanges.²⁷

²¹ See ROSEN & KASSAB, *supra* note 15, at 67.

²² See Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act), 22 U.S.C. §§ 6021-91 (2012); *see also* 104 Cong. Rec. E271-04, S1510-02, S1479-04 (daily ed. Mar. 5, 1996).

²³ See Helms-Burton Act, *supra* note 22, at § 6082(a)(1)(A).

²⁴ See ROSEN & KASSAB, *supra* note 15, at 65-66; U.S. DEP’T OF STATE, U.S.-CUBA RELATIONS, <https://2001-2009.state.gov/p/wha/rls/fs/2001/2558.htm> (last visited Jun. 11, 2018).

²⁵ See ROSEN & KASSAB, *supra* note 15, at 67.

²⁶ See CUBA STUDY GROUP, *Restoring Executive Authority Over U.S. Policy Toward Cuba* 4 (2013), http://www.cubastudygroup.org/index.cfm/files/serve?File_id=45d8f827-174c-4d43-aa2f-ef7794831032.

²⁷ See DOMINGUEZ & PROVOST, *supra* note 5, at 129-50; *see also infra* Section II.C. (President Clinton had made some of 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.”²⁸ 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.

³² Julie Hirschfeld Davis & Frances Robles, *U.S. Ends Special Treatment for Cuban Migrants*, N.Y. TIMES (Jan. 13, 2017), at A1.

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

³³ See Marc Frank, *Cuban Leader Raul Castro Says He Will Resign in 2018*, REUTERS (Feb. 25, 2013, 7:45 PM), <https://www.reuters.com/article/us-cuba-castro/cuban-leader-raul-castro-says-he-will-retire-in-2018-idUSBRE91N0HB20130225>. Nicole Acevedo & Carmen Sesein, *Miguel Diaz-Canel becomes Cuba's president, Raúl Castro steps down*, NBC NEWS (Apr. 19, 2018, 9:18 AM), <https://www.nbcnews.com/news/latino/miguel-d-az-canel-becomes-cuba-s-president-ra-l-n867021>.

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

³⁵ See, e.g., Foreign Investment Act, 1995, No. 77, *amended* in 2014, No. 118 (Cuba).

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.

³⁸ See ROSEN & KASSAB, *supra* note 15, at 109-23.

³⁹ See *id.*

enthusiastic for positive change and access to the island.⁴⁰ 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..⁴¹

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.⁴² They deemed Obama's changes as one-sided concessions lacking any credible commitment from Cuba for democratic change on the island.⁴³

Meanwhile, congressional Democrats tend to support lifting the embargo.⁴⁴ In January 2016, House Democrats introduced a bill to lift the embargo that would repeal the Helms-Burton Act.⁴⁵

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.⁴⁶ 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

⁴⁰ See Eric Hershberg & William M. LeoGrande, *Conclusion: Keys to Assessing Progress Toward Establishing Normal Relations between the United States and Cuba*, in A NEW CHAPTER IN US-CUBA RELATIONS 197 (2016).

⁴¹ See ROSEN & KASSAB, *supra* note 15, at 118-23.

⁴² See *id.* at 99.

⁴³ See, e.g., Sabrina Siddiqui, *Marco Rubio: I Will Absolutely Roll Back Obama Cuba Policy*, THE GUARDIAN (Jul. 10, 2015), <https://www.theguardian.com/us-news/2015/jul/10/marco-rubio-cuba-obama-policy-roll-back>.

⁴⁴ See *id.* at 112.

⁴⁵ See Cuba Reconciliation Act, H.R. 574, 115th Cong. (2017).

⁴⁶ See Patricia Mazzei, *Marco Rubio and his wife will dine with the Trumps at the White House*, THE MIAMI HERALD, Feb. 14, 2017, <http://www.miamiherald.com/news/politics-government/election/donald-trump/article132778559.html>.

decades.”⁴⁷ 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.⁴⁸ Thus, a shift toward resolution of these claims is in line with the Republicans’ position on Cuba and Helms-Burton Act requirements.⁴⁹

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.⁵⁰ In addition to the state of affairs in the U.S., recent events in Cuba⁵¹ and Cuba’s continued support of leftist regimes in the region⁵² also serve to exacerbate the breaking down of the relationship between the U.S. and Cuba.

⁴⁷ GLOBE STAFF, *Trump Says Castro was ‘Brutal Dictator Who Oppressed His Own People,’* BOSTON GLOBE, Nov. 26, 2016, <https://www.bostonglobe.com/news/politics/2016/11/26/trump-says-castro-was-brutal-dictator-who-oppressed-his-own-people/t23gmg21BSqLqM8Bqs2CWP/story.html>.

⁴⁸ See COUNCIL ON HEMISPHERIC AFFAIRS, *Helms-Burton Act: Resurrecting the Iron Curtain* (June 10, 2011), <http://www.coha.org/helms-burton-act-resurrecting-the-iron-curtain/>; Helms-Burton Act, *supra* note 22, at § 6067.

⁴⁹ See *id.*

⁵⁰ Cf. Marc Frank, *Cuba’s Raul Castro blasts Trump’s Mexican wall and trade policy*, REUTERS (Mar. 5, 2017, 10:48 PM), <https://www.reuters.com/article/us-cuba-usa-castro/cubas-raul-castro-blasts-trumps-mexican-wall-and-trade-policy-idUSKBN16D0BM>.

⁵¹ See Patrick Oppmann & Laura Koranh, *Senate Holds Hearings on Cuba ‘Sonic Attacks’*, CNN (Jan. 9, 2018, 1:15 AM), <http://www.cnn.com/2018/01/09/politics/senate-cuba-sonic-attacks-hearing/index.html>.

⁵² See Sarah Marsh, *Under Siege at Home, Maduro Gets Support from Regional Allies in Cuba*, REUTERS (Apr. 10, 2017, 11:25 PM), <https://www.reuters.com/article/us-cuba-venezuela/under-siege-at-home-maduro-gets-support-from-regional-allies-in-cuba-idUSKBN17D0AJ>

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.⁵³ 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

⁵³ See Mark P. Sullivan, *Cuba: U.S. Policy in the 115th Congress*, CONGRESSIONAL RESEARCH SERVICE, 56 (2017), <https://fas.org/sgp/crs/row/R44822.pdf>.

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.⁵⁴

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.⁵⁵ 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

⁵⁴ See JESWALD W. SALACUSE, *THE GLOBAL NEGOTIATOR MAKING, MANAGING AND MENDING DEALS AROUND THE WORLD IN THE TWENTY-FIRST CENTURY* 53-57 (2003).

⁵⁵ See *generally* ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81-94 (2d ed. 1991).

taking of, or special measures directed against, [American] property” in Cuba from 1959-1967.⁵⁶ 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,⁵⁷ and claims against the Cuban government for confiscation of property deemed “abandoned.”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,”⁵⁹ from the long-standing U.S. economic sanctions⁶⁰ and personal injury damages sustained by Cubans killed or harmed by alleged U.S. hostilities.⁶¹ The economic damages sought

⁵⁶ See 22 U.S.C. § 1643(b) (2012).

⁵⁷ See Helms Burton Act, *supra* note 22, at. § 6022(6) (2012).

⁵⁸ See CONSEJO DE ESTADO, Ley No. 989, *printed in* GACETA OFICIAL Oct. 16, 2012, no 44 (Cuba).

⁵⁹ U.S. Department of State, “Press Availability with Cuban Foreign Minister Bruno Rodríguez,” July 20, 2015, <http://www.state.gov/secretary/remarks/2015/07/245094.htm>.

⁶⁰ See REPUBLIC OF CUBA, *On Resolution 69/5 of the United Nations General Assembly entitled “Necessity of ending the economic, commercial and financial blockade imposed by the United States of America against Cuba,”* 36-37 (June 2015), <http://www.cubavsbloqueo.cu/sites/default/files/INFORME%20BLOQUEO%202015%20-%20EN.pdf>. Specifically, an estimated \$121 billion in economic damages.

⁶¹ Bruno Rodríguez Parrilla, “Necesidad de poner fin al bloqueo económico, comercial y financiero impuesto por los Estados Unidos de America contra Cuba,” United Nations General Assembly 68th session, October 29, 2013, New York, New York, <http://www.cubaminrex.cu/es/intervencion-del-ministro-de-relaciones-exteriores-de-cuba-bruno-rodriguez-parrilla-en-el-68-periodo>. “Demanda del Pueblo de Cuba al Gobierno de Estados Unidos por Daños Humanos,” May 31, 1999, <http://www.cuba.cu/gobierno/DEMANDA.html>; Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba Transforming Trauma into Opportunity* 1, 7 (Dec. 2015), <https://www.brookings.edu/wp->

by Cuba stem from the effects of the U.S. embargo on various Cuban industries.⁶² Further, the Cuban government claims that U.S. acts of terrorism against Cuba have caused 3,478 deaths and 2,099 disabling injuries.⁶³ 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-Rodríguez, and biological warfare.⁶⁴ 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.⁶⁵

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.

content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf.

⁶² 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.

⁶³ 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.

⁶⁴ See OLGA MIRANDA BRAVO, *NACIONALIZACIONES Y BLOQUEO* (1996); Feinberg *supra* note 61, at 14.

⁶⁵ See *e.g.*, Alejandro *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,⁶⁶ domestic legislation,⁶⁷ and their respective U.N. voting record⁶⁸ exhibited that international law should govern many of their legal claims against the other. Submitting these claims to a third-party neutral mediator,⁶⁹ arbitrator,⁷⁰ or some other agreed-upon legal process⁷¹ (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

⁶⁶ See, e.g., General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (1947); *General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1124 (Apr. 15, 1994).

⁶⁷ See, e.g., Cuban Claims Act, 22 U.S.C. § 1643 (2017).

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

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.*

state.⁷⁵ 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

⁷⁵ See OECD, "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law*, OECD Working Papers on International Investment, No. 2004/04 (Sept. 2004), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf.

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.⁷⁹ Robust amendment requirements also worked to strengthen the property protections.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.⁸¹ The first amendment was the addition of Article 232.⁸² 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.⁸³ As part of that first amendment, the Council changed the language of Article 24.⁸⁴ 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.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

⁷⁹ See *id.* at art. 87.

⁸⁰ See *id.* at art. 285-286.

⁸¹ See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, *supra* note 76, art. 24.

⁸² See *id.* at art. 23.

⁸³ See *id.*

⁸⁴ *Id.* at art. 24.

⁸⁵ See, e.g., Ley 78, Feb. 13, 1959, Gaceta Oficial (Cuba); Ley 151, Mar. 17, 1959, Gaceta Oficial (Cuba).

public utility or social or national interest and that expropriation is necessary.⁸⁶

Compensation for expropriated property was no longer a constitutional requirement.

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, 1959.⁸⁷ 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.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.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.”⁹⁰

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

⁸⁶ Ley de Reforma Constitucional, art. 24, *printed in* GACETA OFICIAL July 5, 1960 (Cuba).

⁸⁷ Amir Rafat, *Legal Aspects of the Cuban Expropriation of American-Owned Property*, 11 ST. LOUIS U. L.J. 45, 46 (1966).

⁸⁸ GORDON, *supra* note 8, at 75.

⁸⁹ *Id.*

⁹⁰ Rafat, *supra* note 87, at 46.

⁹¹ See Ley de Reforma Agraria, at art. 29 *printed in* GACETA OFICIAL Jun. 3, 1959, No. 7 (Cuba).

bonds with 4.5% interest, payable in non-convertible exchange.⁹² The Act's compensation mechanism was to be implemented by Law numbers 576 and 588.⁹³ 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.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.⁹⁵ However, the compensation plan was dead on arrival and never implemented nor accepted by the U.S..⁹⁶ Further, the Act was never carried out as enacted.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

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.).

⁹³ Ley No. 576, *printed in* GACETA OFICIAL Sep. 25 1959 (Cuba); Ley No. 588, *printed in* GACETA OFICIAL Oct. 7, 1959 (Cuba).

⁹⁴ George Harper, *Cuban and Peruvian Agrarian Reforms: At the Crossroads*, 24 MIAMI. L. REV. 763, 768 (1970).

⁹⁵ Ley No. 588, *supra* note 93, at arts. 5 & 13.

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.'").

⁹⁷ See GORDON, *supra* note 8, at 134.

acknowledgment.⁹⁸ INRA made up the rules for expropriation as it went along.⁹⁹

The U.S. Department of State expressed its concerns over Cuban treatment of U.S. property in a diplomatic note on June 11, 1959.¹⁰⁰ 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.”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.¹⁰² As for the compensation provision in the Act, the Ambassador expressed concern about the “adequacy” of compensation.¹⁰³ Further, the Ambassador pointed to Cuba’s 1940 Constitution, which provided similar redress for expropriation.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.”¹⁰⁵ The U.S. answered that the expropriating state cannot use domestic problems to excuse its

⁹⁸ See *id.* at 135.

⁹⁹ See *id.* at 76.

¹⁰⁰ U.S. Dipl. Note on ARL, *supra* note 96, at 958-59 (emphasis added).

¹⁰¹ *Id.* at 958.

¹⁰² *Id.*

¹⁰³ *Id.* at 959.

¹⁰⁴ *Id.*; see also CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, *supra* note 76.

¹⁰⁵ Rafat, *supra* note 87, at 58 (citing Cuban Note of June 15, 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.”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.”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, 1960.¹⁰⁸ The Nationalization Law authorized the Cuban government to forcefully expropriate all American property interests in defense of Cuban national interest.¹⁰⁹ The Law’s preamble stated that it was enacted generally in response to

¹⁰⁶ *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).

¹⁰⁷ *See* U.N. Doc. A/4537 at 13 (Oct. 13, 1960).

¹⁰⁸ *See* Ley 851, *printed in* GACETA OFICIAL Jul. 13, 1960 (Cuba).

¹⁰⁹ *See 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.*

¹¹¹ Proclamation No. 3355, 25 Fed. Reg. 6414 (1960).

¹¹² U.S. Dep't of State, *U.S. Protests New Cuban Law Directed at American Property* 171, 43 Bull. 1101 (Aug. 1, 1960) (emphasis added).

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).

¹¹⁵ See Resolución No. 3, Oct. 24, 1960, art. XXV, Leyes del Gobierno Provisional de la Revolución 181 (Cuba). See GORDON, *supra* note 8, at 104.

Before Resolution No. 3, on October 13, 1960, the Cuban government passed Law Nos. 890¹¹⁶ and 891.¹¹⁷ Law Nos. 890 and 891 with the express aim to reorganize Cuba's economic structure to that of a planned economy¹¹⁸ and nationalize 382 major companies and banks.¹¹⁹ These laws were part of a larger policy aimed at the complete elimination of foreign-owned private investment in all but minor businesses.¹²⁰ Many Cuban businesses were also expropriated at that time.¹²¹

Finally, Cuba passed Law No. 989 of 1961, which authorized the takings of "abandoned" property.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.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.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

¹¹⁶ See Ley 890, *printed in* GACETA OFICIAL 13 Oct. 13, 1960 (Cuba).

¹¹⁷ See Ley 891, *printed in* GACETA OFICIAL 13 Oct. 13, 1960 (Cuba).

¹¹⁸ See Rafat, *supra* note 87, at 48.

¹¹⁹ See GORDON, *supra* note 8, at 103.

¹²⁰ See *id.*

¹²¹ See *id.* at 104.

¹²² See Ley No. 989, *printed in* GACETA OFICIAL Dec. 6, 1961 (Cuba).

¹²³ See Resolución No. 454, *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.).

¹²⁴ See *id.*

and effective” compensation for the takings of its nationals’ property from 1959-1963.¹²⁵ 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.¹²⁶ 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.¹²⁷ 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.

¹²⁷ David Collins, *An Introduction to International Investment Law* 11 (Cambridge Univ. Press 2017); see *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir., 1985).

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.¹²⁸ Then, the embargo was strengthened in response to national security concerns culminating in the Cuban Missile Crisis.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.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.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,¹³² announced a complete ban on U.S. exports to Cuba except for non-subsidized foodstuffs, medicines, and medical supplies.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*

¹²⁸ See, e.g., Foreign Assistance Act, 22 U.S.C. § 2370(a)(2) (2012).

¹²⁹ See, e.g., Proclamation No. 3447, 3 C.F.R. 1959-63 (1962).

¹³⁰ See, e.g., Cuban Democracy Act, 22 U.S.C. §§ 6000-6010 (2017).

¹³¹ See, e.g., Helms-Burton Act, *supra* note 22; 28 U.S.C. § 1611 (2012).

¹³² 50 U.S.C. §§ 2021-32 (repealed in 1969).

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.”¹³⁴ 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.”¹³⁵ In 1961, before the Bay of Pigs invasion but after the official break of diplomatic relations, Congress passed the Foreign Assistance Act.¹³⁶ 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.¹³⁷

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.¹³⁸

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

President Kennedy strengthened the embargo in response to the growing Soviet military presence in Cuba.¹³⁹ On February 6, 1962,

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).

¹³⁸ See U.S. DEP’T OF STATE, *U.S. Informs Cuba of Views on Agrarian Reform Law*, 40 Bull. 958 (1959); see also Foreign Assistance Act, *supra* note 128 at § 2151 (2000).

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.¹⁴⁰ President Kennedy's proclamation cited the Inter-American Treaty of Reciprocal Assistance,¹⁴¹ 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."¹⁴² 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."¹⁴³

In 1963 after the Cuban Missile Crisis, the Treasury Department issued the Cuban Assets Control Regulations (CACR)¹⁴⁴ under the authority of the Trading with the Enemy Act of 1917 (TWEA).¹⁴⁵ TWEA was amended in 1933 to cover peacetime national emergencies¹⁴⁶ 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."¹⁴⁷ The CACR prohibited all "transactions [that] involve property in which [Cuba], or any national thereof, has . . . any interest of any nature

¹⁴⁰ *See id.*

¹⁴¹ Inter-American Treaty Of Reciprocal Assistance, Organization of American States (1947).

¹⁴² Proclamation No. 3447, *supra* note 129.

¹⁴³ *Id.*

¹⁴⁴ 31 C.F.R. §§ 515.101-.901 (2017).

¹⁴⁵ *See* 50 U.S.C. §§ 4301-4341 (2017).

¹⁴⁶ *See* 12 U.S.C. § 95 (2012).

¹⁴⁷ *Regan v. Wald*, 468 U.S. 222 (1984).

whatsoever, direct or indirect”¹⁴⁸ by “any person subject to the jurisdiction of the U.S..”¹⁴⁹

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.¹⁵⁰ 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).¹⁵¹ 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.¹⁵²

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

¹⁴⁸ 31 C.F.R. §§ 515.201(a) (2018).

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.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”¹⁵⁴ in an effort “to continue vigorously to oppose the human rights violations of the Castro regime.”¹⁵⁵

Four years later, Congress passed the Helms-Burton Act, which codified the embargo with the express aim of destabilizing the Cuban government.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.¹⁵⁷ This Act remains in effect today.¹⁵⁸

Title I of the Act prohibits the indirect financing of Cuban interests,¹⁵⁹ opposes Cuba’s membership in international financial institutions,¹⁶⁰ and reduces financial support to countries and institutions that provide loans or other assistance to Cuba.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.¹⁶²

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

¹⁵³ *Id.* at § 6001(1).

¹⁵⁴ *Id.* at § 6002(1).

¹⁵⁵ *Id.* at § 6002(5).

¹⁵⁶ *See* Helms-Burton Act, *supra* note 22.

¹⁵⁷ *See id.* at §§ 6031-46.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at § 6033(a).

¹⁶⁰ *See id.* at § 6034(a).

¹⁶¹ *See id.* at § 6034(b).

¹⁶² *See id.* at § 6042.

¹⁶³ *See id.* at §§ 6061-67.

the president to provide aid to Cuba only after a “transitional” or “democratically elected” government comes to power.¹⁶⁴ 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.¹⁶⁵ Title II’s approach to the to the expropriated-property issue requires a new Cuban government to commit to returning all expropriated property to the U.S. or to provided full compensation for the properties in order to be recognized by the U.S. as a democratically elected government eligible for lifting the embargo.¹⁶⁶

Title III’s aim is to protect U.S. property interests in Cuba and deter foreign investment in Cuba.¹⁶⁷ Under section 6082, any person who traffics 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.¹⁶⁸ 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.”¹⁶⁹ Although this Title has been suspended by each consecutive U.S. president,¹⁷⁰ 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.¹⁷¹ This means that all Cuban nationals that fled Cuba since the Revolution, became U.S. citizens,

¹⁶⁴ See *id.* at § 6062(a).

¹⁶⁵ See *id.* at § 6064-65 (1996).

¹⁶⁶ See *id.* at § 6065.

¹⁶⁷ See *id.* at § 6022.

¹⁶⁸ See 22 U.S.C. § 6082 (2012).

¹⁶⁹ *Id.* § 6023(13)(A)(ii).

¹⁷⁰ See U.S.-CUBA TRADE AND ECON. COUNCIL, INC., *Update On Title Three Suspension Of Libertad Act (Helms-Burton)*, (February 06, 2017), <http://www.cubatrade.org/blog/2017/2/6/update-on-title-three-suspension-of-libertad-act-helms-burton>.

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

¹⁷² See Maria Werlau, *International Law and Other Considerations on the Repatriation of Cuban Balseros by the United States*, ASS'N FOR THE STUDY OF THE CUBAN ECON. (November 30, 2004), https://www.ascecuba.org/asce_proceedings/international-law-and-other-considerations-on-the-repatriation-of-cuban-balseros-by-the-united-states/.

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.¹⁷⁹

After comparing Cuba to Haiti,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.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.¹⁸²

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

¹⁷⁹ *Id.* at § 6021(23)-(24).

¹⁸⁰ *See id.* at § 6021(25).

¹⁸¹ *Id.* at § 6021(26)-(28).

¹⁸² *See id.* at § 6021.

¹⁸³ *See* CUBA STUDY GROUP, *supra* note 26, at 1.

use.¹⁸⁴ President George W. Bush and President Obama would eventually follow suit and continue to implement the waiver.¹⁸⁵ 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 2000¹⁸⁶ (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.¹⁸⁷

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."¹⁸⁸ The humanitarian assistance provision was criticized as illusory since it was clear that the Cuban government would not permit assistance to aid its opposition.¹⁸⁹

In 2003, President Bush laid out plans for creating a Commission for Assistance to a Free Cuba (CAFC).¹⁹⁰ The CAFC's first report,

¹⁸⁴ See Rossella Brevetti & Peter Menyas, *Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 INT'L. TRADE REP. 1158 (Jul. 17, 1996); *Clinton Extends Title III of Helms-Burton Act*, 'NAT'L. J. CONGRESS DAILY (Jan. 16, 1998).

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

¹⁸⁶ See Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549 (2000).

¹⁸⁷ See 22 U.S.C. § 7202(a) (2012); *see also* 31 C.F.R. § 515.560(a)(1-12) (2007) (explaining what the travel categories are).

¹⁸⁸ 31 C.F.R. § 515 (2007).

¹⁸⁹ See John-Thor Dahlburg, *Bush Brothers Keenly Attentive to Cuban Americans*, L.A. TIMES (May 22, 2002), <http://articles.latimes.com/2002/may/22/nation/na-flagop22>.

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.¹⁹¹ To oust the Castros, CAFC's recommendations included funding opposition groups in Cuba,¹⁹² deploying communications aircraft to increase range of TV and radio transmissions to Cuba,¹⁹³ limiting family visits,¹⁹⁴ reducing remittances,¹⁹⁵ and limiting financial aid.¹⁹⁶ The U.S.'s role in post-Castro Cuba would then include providing humanitarian aid,¹⁹⁷ changing the education system to incorporate non-communist curriculums,¹⁹⁸ promoting the rule of law,¹⁹⁹ and converting Cuba to a free-market economy.²⁰⁰ Importantly, these reforms would include the settlement of all compensation claims based on land expropriations.²⁰¹ 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.²⁰²

<https://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031010-2.html>.

¹⁹¹ See generally CAFC I, *supra* note 190 (detailing the U.S.' interactions with Cuba post-Castro regime).

¹⁹² See *id.* at 15-25.

¹⁹³ See *id.* at 27-28.

¹⁹⁴ See 31 C.F.R. § 515.561(a) (2007) (implementing recommendations of CAFC I); see also CAFC I, *supra* note 190, at 41.

¹⁹⁵ See 31 C.F.R. § 515.570(a) (2007) (implementing recommendations of CAFC I); see also CAFC I, *supra* note 190, at 39-40.

¹⁹⁶ See CAFC I, *supra* note 190, at 44-50.

¹⁹⁷ See *id.* at 59-67.

¹⁹⁸ See *id.* 97-98, 102-03.

¹⁹⁹ See *id.* at 161-71, 175-81, 190-92, 196-98.

²⁰⁰ See *id.* at 214-17, 229-34, 273-315, 317, 345.

²⁰¹ See *id.* at 224.

²⁰² See U.S. Dep't of State, Commission for Assistance to a Free Cuba, 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.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.²⁰⁴ In May 2015, Cuba was removed from the list of state sponsors of terrorism²⁰⁵ and the U.S. embassy in Cuba was re-opened in August 2015.²⁰⁶ 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.²⁰⁷ But, there have not been many substantive changes to the current regulations in place.²⁰⁸

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.).

²⁰⁴ See ROSEN & KASSAB, *supra* note 15, at 72.

²⁰⁵ *Id.* at 73.

²⁰⁶ *Id.* at 74.

²⁰⁷ U.S. DEP'T OF TREASURY, *Treasury, Commerce, and State Implement Changes to the Cuba Sanctions Rules*, (Nov. 8, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0209.aspx> (last visited Feb. 26, 2018).

²⁰⁸ *Id.*

D. U.S. EVALUATION OF ITS PROPERTY CLAIMS

In 1964, Congress added Title V—the Cuban Claims Act²⁰⁹ to the International Claims Settlement Act²¹⁰ to specifically address U.S. citizens’ claims against Cuba.²¹¹ After World War II, Congress enacted the International Claims Settlement Act to establish the Foreign Claims Settlement Commission (hereinafter “the Commission”).²¹² The Commission was established to administer and disburse funds to U.S. citizens who lost their property in specified foreign countries.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.²¹⁴

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

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

²⁰⁹ Cuban Claims Act, *supra* note 67. (In 1966, Chapter V was also amended to extend the applicability of its provisions to Communist China.).

²¹⁰ 22 U.S.C. § 1621 (1955).

²¹¹ Cuban Claims Act, *supra* note 67.

²¹² *Id.*; 22 U.S.C. § 1643b (referring to the FSCS as “the Commission.”)

²¹³ 22 U.S.C. § 1621-1627 (1964).

²¹⁴ Cuban Claims Act, *supra* note 67.

²¹⁵ 22 U.S.C. § 1623(a)(2)(B) (2012).

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).

²¹⁷ 22 U.S.C. § 1622g (2012).

²¹⁸ 22 U.S.C. § 1643b(a) (emphasis added).

from actions taken by or under the authority of the Government of Cuba.²¹⁹

In addition, the Act provides that the Commission must determine the claimant's title²²⁰ to the expropriated property and any offsets to the award.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.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.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.²²⁴ The Final Report of the Commission's Cuba Claims Program,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."²²⁶

²¹⁹ *Id.* § 1643b(b) (emphasis added).

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.").

²²¹ *Id.* § 1643e.

²²² *Id.* § 1643c.

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.").

²²⁴ 22 U.S.C. § 1623 (2012).

²²⁵ See FCSC Cuban Report, *supra* note 1.

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.²²⁷ The total principal value of adjudicated claims was \$1,851,057,358.00.²²⁸ Thereafter, on July 15, 2005,²²⁹ 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.²³⁰ The Commission received a total of five claims and denied three.²³¹ Two claims were certified as valid in principal amounts of \$51,128,926.95 and \$16,000.00.²³²

E. CONCLUSION

Throughout the years, the U.S. has adamantly defended the long-standing 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.²³³ The next section discusses whether the U.S. embargo against Cuba violates or is justified by international law.

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.*

²³³ See, e.g., U.N. GAOR, 56th Sess., 64th plen. Mtg. at 19-20, U.N. Doc. A/56/PV.64 (Nov. 27, 2001) (recording the 2001 vote as 167-3-3 in favor of drafting a resolution for ending the embargo).

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.²⁴⁰ Thus, some multilateral agreements can create binding law for “non-parties that do not actively dissent.”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.”²⁴² Similarly, a “wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.”²⁴³ Customary international law also arises from tribunal decisions, since they are applying requirements of international law.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.²⁴⁵

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

²⁴⁰ *Id.* at § 102 cmt. j. *See also* COLLINS, *supra* note 127, at 28.

²⁴¹ *Id.* at § 102 cmt. i.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Patrick M. Norton, A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation, 85 AM. J. INT’L L. 474, 495 (1991).

²⁴⁵ LORI FISLER DAMROSCH & SEAN D. MURPHY, *International Law: Cases & Materials*, 485 (West, 6th ed. 2014).

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

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.

²⁵¹ See, e.g., Explanatory Memorandum from Ricardo ALARCON de QUESADA, Permanent Representative of Cuba to the United Nations addressed to the Secretary-General U.N. GAOR, 46th Sess., Annex, at 2, U.N. Doc. A/46/193 (Aug. 19, 1991).

²⁵² U.N. Charter art. 2, para. 4.

domestic affairs of another state,²⁵³ as well as on the promotion of development²⁵⁴ and self-determination.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,²⁵⁶ the General Assembly's 1970 Declaration on Friendly Relations,²⁵⁷ and other related U.N. General Assembly resolutions.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.²⁵⁹ Reparations are an "indispensable complement of a

²⁵³ See, e.g., *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].

²⁵⁴ See, 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].

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.

²⁵⁶ OAS Charter, *supra* note 253, at art. 19.

²⁵⁷ See Declaration on Friendly Relations *supra* note 68.

²⁵⁸ D G. A. Res. 2131 (XX) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965); G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, art. 32 (1974).

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.”²⁶⁰

*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.”²⁶¹ The U.S. has claimed that at least some of Cuba’s confiscations of U.S. property were arbitrary and discriminatory.²⁶² An unreasonable distinction in the expropriation measure suggests the measure is arbitrary and discriminatory.²⁶³ 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.²⁶⁴

Banco Nacional de Cuba v. Sabbatino,²⁶⁵ 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.

²⁶⁰ *See, e.g.,* The Factory at Chorzow (Ger. V. Pol.), Judgment 1928 P.C.I.J. (ser. A) No. 13 (Sept. 13) [hereinafter *Chorzow*].

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.

²⁶⁵ *Banco Nacional De Cuba v. Sabbatino*, 193 F. Supp 375 (S.D.N.Y. 1960), *aff’d*, 307 F.2d 845 (2d Cir. 1962), *rev’d*, 376 U.S. 398 (1964).

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.²⁶⁶

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

[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.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.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."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."²⁷⁰ On the other hand, scholars have argued that the subsequent Cuban expropriation measures no longer targeting

²⁶⁶ *Id.* at 385.

²⁶⁷ *Banco Nacional de Cuba*, 307 F.2d 845, 866 (2d Cir. 1962).

²⁶⁸ *Id.*

²⁶⁹ Rafat, *supra* note 87, at 50.

²⁷⁰ *Id.*

American properties and expropriating all foreign-owned property undermined the U.S.' discrimination claim against Cuba.²⁷¹

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.²⁷²

The traditional international law principles on just compensation for expropriation of alien property date back to European traditions from the mid-nineteenth century to World War I, when a majority of states had constitutions and treaties that permitted direct expropriation only with compensation.²⁷³ 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.²⁷⁴ *Chorzow* involved Poland's expropriation of German-owned industrial property.²⁷⁵ The Court held that immunity from confiscation is a principle of international law and that an uncompensated taking of property is illegal.²⁷⁶ 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

²⁷¹ See, e.g., Rafat, *supra* note 87, at 51-52; Gordon, *supra* note 8.

²⁷² See *supra* Section II.B.

²⁷³ See RICHARD B. LILICH, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 6 (R. Lillich ed., 1983); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445, 459 (1940).

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.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.²⁷⁸ This text constitutes dicta, however, since the issue before the Court concerned the interpretation of a treaty and not of customary international law.²⁷⁹ *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.²⁸⁰ Numerous decisions handed down between World Wars I and II followed the *Chorzow* opinion.²⁸¹

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

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.).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 21 (relating to the Convention Concerning Upper Silesia entered into Poland and Germany).

²⁸⁰ *Id.* “[P]ayment of a sum corresponding to the value which a restitution in kind would bear.”

²⁸¹ See, e.g., *Smith v. Compania Urbanizadora del Parque y Playa de Marciano*, 2 R. Int’l Arb. Awards 915, 917-18 (Hale, sole arb., 1929); *Shufeldt Claim (U.S. v. Guat.)*, 2 R. Int’l Arb. Awards 1079, 1099 (Sisnett, sole arb., 1936).

state to provide full compensation.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.”²⁸³ This came to be known as the “Hull formula,” which remains the United States’ formulation of the full compensation standard.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.”²⁸⁵

Widespread opposition to the Hull formula emerged with the rise of developing and emerging economies after the World War II.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

²⁸² RESTATEMENT, *supra* note 234, at § 712 rep. n.1.

²⁸³ *Id.*

²⁸⁴ *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 1I 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.”

²⁸⁵ RESTATEMENT, *supra* note 234, at § 712 rep. n.1 (citing 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 655-61 (1942)).

²⁸⁶ *Id.*

solely subject to local law.²⁸⁷ 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.²⁸⁸ Despite the contemporaneous emergence of the rights to self-determination and the right to dispose of national resources,²⁸⁹ 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*.²⁹⁰

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.²⁹¹ 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.²⁹²

²⁸⁷ *Id.*

²⁸⁸ *Id.* at § 712 cmt. j.

²⁸⁹ ICCPR, *supra* note 255, at art.1; ICESCR, *supra* note 255, at art. 1.

²⁹⁰ GA Res. 1803 (XVII), U.N. GAOR 17th Sess. Supp. No. 15, U.N. Doc. A/5217 (1962) (emphasis added).

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,²⁹³ 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.]²⁹⁴

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.²⁹⁵ 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.²⁹⁶

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

²⁹³ GA Res. 3281(XXIX), U.N. GAOR, 29th Sess., Supp. No. 31 (1974).

²⁹⁴ RESTATEMENT, *supra* note 234, at § 712 rep. n. 1 (citing GA Res 3281(XXIX), U.N. GAOR 9th Sess., Supp. No. 31 (1974) (emphasis added).

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.²⁹⁷ In 1977, the arbitrators in *Texaco Overseas Petroleum Company v. Libya* (TOPC) denied Libya's efforts to obstruct the international law of expropriation.²⁹⁸ 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,²⁹⁹ as opposed to U.N. Resolution 1803 which was "supported by a majority of Member States representing all of the various groups."³⁰⁰ In other words, the Charter reflected the political will of developing states, but not a change in international law.³⁰¹ 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.³⁰² Notably, the Iran-United States Claims Tribunal upheld the same standard. The Iran-United States Claims Tribunal in

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 integrum* (restitution or restoration to the previous condition) was the appropriate remedy under international law).

American Int'l Group v. Islamic Rep. of Iran,³⁰³ 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.”³⁰⁴ However, the claims tribunal confirmed that the standard of compensation was the “full value” of the property taken.³⁰⁵ In a different case, the same claims tribunal confirmed that “just compensation” is “the full equivalent of the property taken.”³⁰⁶

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.³⁰⁷ 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,”³⁰⁸

³⁰³ 4 Iran U.S C.T.R 96, 105, 109 (1983); *Iran-United States Claims Tribunal: Case concerning the American International Group, Inc./American Life Insurance Company and the Islamic Republic of Iran/Central Insurance of Iran (Nationalization of Iranian Insurance Company; Compensation for Equity Interest Held by American Corporation and Wholly-Owned Subsidiaries of American Corporation)*, 23 I.L.M. 14 (1984).

³⁰⁴ Iran U.S C.T.R 96, 105, 109 (1983).

³⁰⁵ *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran U.S. C.T.R. 219, 225 (1984).

³⁰⁶ *Phelps Dodge Corp. Islamic Rep. of Iran*, 25 I.L.M. 619, 626-27 (1986).

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, Argentina³⁰⁹ and Mexico entered into treaties with the U.S., which include the Hull formulation of full compensation.³¹⁰

Thus, many countries have agreed on “just compensation” or payment of the full value, usually the fair market value.³¹¹ However, there is no specific formula that provides exactly how the full value of the expropriated property should be determined.³¹² In fact, even the United States Supreme Court has been “careful not to reduce the concept of ‘just compensation’ to a formula”³¹³ and “has never attempted to prescribe a rigid rule for determining just compensation under all circumstances and in all cases.”³¹⁴ However, there are sufficient analogous arbitral decisions indicating that the market value

customary international law through United Nations resolutions, such as the Charter of Economic Rights and Duties of States.”). *See also* Michael R. Reading, *The Bilateral Investment Treaty in Asean: A Comparative Analysis*, 42 *Duke L.J.* 679, 705 (1992).

³⁰⁹ *See* Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 *MARQ. L. REV.* 205, 206 (1950) (stating thlthe 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 *RESTATEMENT*, *supra* note 234, at § 712 rep. n. 3.

³¹² *Id.*

³¹³ *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1090 (1949).

³¹⁴ *United States v. Commodities Trading Corp.*, 339 U.S. 121, 122, 70 S.Ct. 547, 549 (1950).

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

According to the Restatement, a state is responsible for a taking without just compensation, “in the absence of exceptional circumstances.”³¹⁸ Thus, under certain exceptional circumstances, deviation from the traditional standard may be appropriate.³¹⁹ The Restatement suggests that this exception may include “expropriation as a part of national program of agricultural land reform.”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.³²¹ These scholars³²² 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.”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

³¹⁵ RESTATEMENT, *supra* note 234, at § 712, rep. n. 2.

³¹⁶ *Id.*

³¹⁷ See FCSC Cuban Report, *supra* note 1.

³¹⁸ RESTATEMENT, *supra* note 234, at § 712(1), n.3.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ See Rafat, *supra* note 87, at 53-54.

³²² *Id.* at 54.

³²³ *Id.* See also GORDON, *supra* note 8, at 114. (“Sir Hirsch Lauterpacht of England wrote that the tuel 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.” (citing L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 318 (H. Lauterpacht ed. 1948))).

social reform.”³²⁴ 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.³²⁵

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.³²⁶ 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).³²⁷

Accordingly, it is not surprising that as of 1987 no international arbitral tribunal has applied this exception.³²⁸

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.”³²⁹ 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.”³³⁰ However, no

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.

³²⁹ 8 Iran-U.S. Cl. Trib. Rep. 373, 390 (1985).

³³⁰ *Id.*

international tribunal has actually applied the exception³³¹ and no other Iran-U.S. Claims Tribunal decision has followed Judge Lagergren's dictum.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.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.³³⁴ The International Court of Justice has described these partial compensation settlements as *sui generis* and providing no guidance under general international practice.³³⁵

³³¹ RESTATEMENT, *supra* note 234, at § 712 rep. n. 3.

³³² Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal, 491 n. 2326. (1998).

³³³ RESTATEMENT *supra* note 234, at § 712 rep. n. 1. *See also* GORDON, *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.).

³³⁴ RESTATEMENT, *supra* note 234, at § 712 rep. n. 1.

³³⁵ *Barcelona Traction, Light and Power Co., Ltd. (Belg. V. Spain)*, 1970 I.C.J. 3, 40 (February 5). *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.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.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.³³⁸ The Cuban BITs also contain most-favored nation clauses (MFN).³³⁹ The

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

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.").

³³⁸ See UNCTAD, *supra* note 336.

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.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.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.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.³⁴³

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.”

³⁴⁰ Collins, *supra* note 127, at page 109.

³⁴¹ Jeswald W. Salacuse, *The Law of Investment Treaties* 252 (2010).

³⁴² See 2 Y.B. INT'L L. COMM'N 106-36 (1979), 2 Y.B. INT'L COMM'N. 34-62 (1980); 34 U.N. GAOR Supp. No. 10, at 284-369 (1979); 35 U.N. GAOR Supp. No. 10, at 69-135 (1980); see 2 Y.B. INT'L L. COMM'N 30-34; 35 U.N. GAOR Supp. No. 10, at 59-69 (1980).

³⁴³ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Rep. of the ILC on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001), available at http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_6_2001.pdf&lang=EF.

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.³⁴⁴ 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."³⁴⁵

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 "reprisal"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).

³⁴⁹ See Draft Articles and Commentary on Responsibility of States for Internationally Wrongful Acts, [2001] 2 Y.B. INT'L L. COMM'N 31, 128, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter Draft ILC State Responsibility].

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.³⁵² In the last century, countermeasures have been recognized by the International Court of Justice³⁵³ and international arbitral tribunals as legitimate under international law.³⁵⁴ Further, countermeasures also apply in the realm of treaty law as stated in the Vienna Convention on the Law of Treaties.³⁵⁵ 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.”³⁵⁶

Under customary international law countermeasures are restricted by the doctrines of necessity, and proportionality.³⁵⁷ Countermeasures are only allowed in response to a violation of international law³⁵⁸ and must be necessary to end a violation of international law, to prevent further violation international law, or to remedy the violation of international law.³⁵⁹ Unless there is an emergency state of necessity,

³⁵² OMER YOUSIF ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW* 6-41 (1988) (tracing their development from the seventeenth century).

³⁵³ *See, e.g.*, *Gabcíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7 (Sept. 25).

³⁵⁴ *See, e.g.*, *Air Serv. Agreement of 27 Mar. 1946* (U.S. v. Fr.), 18 R.I.A.A. 417 (1978) (tribunal approved the United States' cancellation of flight route, a clear violation of the countries' air service agreement, in response to France's disruption of its route).

³⁵⁵ Vienna Convention on the Law of Treaties art. 60, opened for signature May 23, 1969, 1155 U.N.T.S. 331; *see also* John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 Va. Int'l L. 881 (1999) (discussing the role of nonforcible treaty-based retaliation in international law more broadly).

³⁵⁶ Vienna Convention on the Law of Treaties, art. 60.

³⁵⁷ Report of the International Law Commission, International Law Commission, 56th Sess., arts. 49, 51-53, U.N. Doc. A/56/10 (Responsibility of States for Internationally Wrongful Acts).

³⁵⁸ International Law Commission, *Responsibilities for States for Internationally Wrong Acts*, at art. 52 (2001).

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.³⁶⁰ The countermeasure must be proportional to the “injury suffered” by the imposing country, although limited amounts of escalation may be appropriate.³⁶¹ 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.³⁶² 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 national security measure.³⁶³

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

³⁶⁰ ILC State Responsibility, *supra* note 349.

³⁶¹ ILC State Responsibility, *supra* note 349, at art. 51. RESTATEMENT, *supra* note 234, at § 905(1)(b). *See also* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008) (discussing the central role of proportionality in countermeasures doctrine and related areas of international law). *See also* Bederman, *supra* note 348, at 820.

³⁶² ILC State Responsibility, *supra* note 349, at art. 50. RESTATEMENT *supra* note 234, at § 905 cmts. a & e, n. 6.

³⁶³ *See* Helms-Burton Act *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.”).

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.³⁶⁴

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.”³⁶⁵ 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.³⁶⁶ 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.³⁶⁷

The first attempts to regulate the use of coercive tactics between countries through international agreements were aimed only at regulating military force.³⁶⁸ The League of Nations Covenant directed member states to “respect... the territorial integrity and existing

³⁶⁴ EMMERICH DE VATTEL, *THE LAW OF NATIONS* 41 (Carnegie Instit. Of Wash. 1916).

³⁶⁵ James Delanis, “Force” Under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion, 12 VAND. J. TRANSNAT’L L. 101,105 (1979).

³⁶⁶ See, e.g., Ibrahim F.I. Shiata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT’L L. 591, 609-16 (1974).

³⁶⁷ Shiata, *supra* note 366, at 609-16. See also Smagula, *supra* note 96. Richard D. Protosky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT’L L. 901, 928-929 (1995).

³⁶⁸ League of Nations Covenant, art. 10. The Peace Conference of Paris, 1919, 13 AM. J. INT’L L. 159, 169 (1919) [League Covenant].

political independence of all Members.”³⁶⁹ The Covenant prohibited states from resorting to war under certain instances.³⁷⁰ However, the Covenant did not mention economic or political force as appropriate measures to resolve international disputes.³⁷¹ Additionally, the League founded a number of treaties prohibiting certain forms of aggression but did not include economic and political coercion.³⁷² Similarly, the Kellogg-Briand Pact of 1928,³⁷³ signed by 63 nations, outlawed all wars, but made no mention of other forms of non-military pressure short of the use of force.³⁷⁴ The 1933 Conventions for the Definition of Aggression,³⁷⁵ signed by many nations, including those within the Soviet Union’s sphere of influence, contained a list of conducts presumed as aggressive.³⁷⁶ 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.).

³⁷³ Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

³⁷⁴ *Id.*

³⁷⁵ Convention for the Definition of Aggression, July 4, 1933. 148 L.N.T.S. 211, reprinted in Secretary General Report 7, U.N. GAOR, Annex (Agenda Item 54) 34-35, U.N. Doc. A/2211 (1952) [Aggression Convention].

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.³⁷⁷

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

The U.S. and Cuba are parties to the U.N. Charter,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.³⁸²

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

³⁷⁷ Aggression Convention, *supra* note 375, at art 3.

³⁷⁸ Charter of the International Military Tribunal, 59 Stat. 1546, 1547, E.A.S. No. 472, 82 U.N.T.S. 284, 288 (Aug. 8, 1945).

³⁷⁹ *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."

³⁸⁰ *Id.*

³⁸¹ U.N. Charter, art. 2, para. 4.

³⁸² *Id.*

armed force and does not include economic or political compulsion.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.³⁸⁴

Further, the U.N. Charter's 1945 *travaux prepertoire*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.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.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.³⁸⁸

³⁸³ James Delanis, "Force" Under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion, 12 VAND. J. TR'NSNAT'L L. 101,103 (1979).

³⁸⁴ *Id.* at 102 (quoting D. Bowett, SELF-DEFENSE IN INTERNATIONAL LAW 148 (1958)).

³⁸⁵ *Travaux preparatoires* are "the materials constituting the development and negotiation of an agreement." RESTATEMENT, *supra* note 234, at § 325 Comm. e. The *travaux preparatoires* serve as an aid in interpreting the U.N. Charter. The Charter of the United Nations: A Commentary 37-38 (1994).

³⁸⁶ *Id.*; Delanis, *supra* note 383, at 105-07.

³⁸⁷ Delanis, *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. *Id.*

³⁸⁸ *Id.* at 107 (citing to Report of the Secretary General, U.N. Doc. A/2211 (1952)); Report of the Special Committee on the Question of Defining Aggression, 24 U.N. GAOR, Supp. (No. 20) 15-16, U.N. Doc. A/7620 (1969).

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.”³⁸⁹ 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.³⁹⁰

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.”³⁹¹ 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),³⁹² 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.³⁹³

³⁸⁹ Paust and Blaustein, “The Arab Oil Weapon – A Threat to International Peace” 68 AM. J. INT’L L. 410, 417 (1974). For a reply to the article, see Shiata, *supra* note 366.

³⁹⁰ Richard B. Lillich, Economic Coercion and the International Legal Order, 51 INT’L AFFAIRS 3, 358-71, 361 (1975) [Lillich II].

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,³⁹⁴ 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. Resolutions⁴⁰⁰ 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

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 1965,⁴⁰² 1970,⁴⁰³ and 1974⁴⁰⁴ 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,⁴⁰⁵ the General Assembly reiterated an authoritative condemnation of the use of economic coercion.⁴⁰⁶

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.⁴⁰⁷

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).

⁴⁰³ Declaration on Friendly Relations, *supra* note 68 ([1] states shall refrain from the threat or use of force against the territorial integrity or political independence of any state; [2] states shall settle their international disputes by peaceful means; [3] *states shall not intervene in matters within the domestic jurisdiction of any state*; [4] states have a duty to cooperate with one another in accordance with the Charter; [5] equal rights and self-determination of peoples; [6] sovereign equality of states; [7] states shall fulfill in good faith their obligations under the United Nations Charter).

⁴⁰⁴ G.A. Res. 3281 (XXIX), (Dec. 12, 1975).

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.").

⁴⁰⁷ See, ROBERT B. LILICH, ECONOMIC COERCION AND THE "NEW INTERNATIONAL ECONOMIC ORDER": A SECOND LOOK AT SOME FIRST IMPRESSIONS, IN ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 107, 112 (Robert B. Lillich ed., 1976).) ("[T]he prohibitions found in the various U.N. resolutions are pitched on such a high level of abstraction as to be virtually meaningless.").

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.⁴⁰⁸ General Assembly resolutions were never intended to be binding.⁴⁰⁹ Generally speaking, their weight as evidence of a possible consensus on customary international law is inconclusive.⁴¹⁰ However, they can contribute to the evolution of customary international law.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.⁴¹² Arguably, the 1970 Declaration would bear the most weight as evidence of, at a minimum, the progressive development of customary international law.⁴¹³ However, its vague language does not provide much guidance.

⁴⁰⁸ Stat. of I.C.J., *supra* note 234, at 302, art 37.

⁴⁰⁹ Delanis, *supra* note 365, at 115.

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.

⁴¹¹ See INT'L LAW COMM'N ILC Sixty-fifth Session, Geneva, 6 May-7 June and 8 July-9 August 2013, First Report on the Formation and Evidence of Customary International Law of Its Sixty-Fifth Session, May 6-June 7, 2013 and July 8-August 9, 2013, U.N. Doc. A/CN.4/663 (May 17, 2013).

⁴¹² Sloan, *supra* note 410, at 138.

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 Declaration⁴¹⁸ 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 GATT⁴²⁰ contracting parties agreed “to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General

⁴¹⁴ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Jun. 27) at paras. 123-25.

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.

Agreement.”⁴²¹ 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.⁴²² However, since 1994, under the new WTO framework, unilateral actions in violation of the GATT are subject to its dispute resolution mechanism.⁴²³

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.⁴²⁴ 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.”⁴²⁵ 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.”⁴²⁶ 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

⁴²¹ Ministerial Declaration, L/5424 (Nov. 29, 1982), GATT B.I.S. (29th Supp.) at 9, 11 (1983).

⁴²² Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing A New Balance Between Sovereignty and Multilateralism*, 26 YALE INT'L L. 413, 436 (2001).

⁴²³ *Id.* at 437.

⁴²⁴ GATT, *supra* note 66, 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

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.").

⁴³³ See Andrew J. Rosell, *The Future of U.S.-Cuba Relations, A policy Shirt from the Helms-Burton Act*, 7 L. & BUS. REV. AM. 235, 241-42 (2001) (The European Union, Mexico and Canada have enacted retaliatory legislation that allows their citizens to recover damages against the United States for any damages awarded by U.S. courts for "trafficking" Cuban property under the Helms-Burton Act.).

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

⁴³⁵ For more on the impact on and development of and human rights, see Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT'L L. & FOREIGN AFF. 199, 235-55 (2007); Benjamin Manchak, *Comprehensive Economic Sanctions, the Right to Development, and Constitutionally Impermissible Violations of International Law*, 30 B.C. THIRD WORLD L.J. 417, 432-49 (2010); Amnesty Int'l, *The U.S. Embargo Against Cuba: Its Impact on Economic and Social Rights*, 15 (2009).

⁴³⁶ Cuba characterizes the embargo as a form of "genocide." See *infra* note 440. Cuba, Country Report on Human Rights Practices for 1996, Dep't St. Rep., at 313 (1997) (State Department reported in 1996 that the human rights conditions worsened.). Human Rights Watch Report 2001: Cuba: Human Rights Developments (A 2000 Human Rights Watch Report did not show any improvement in human rights in Cuba.); See also Ashleigh Reif Kasper, *Helping the Helpless: The Foreign Policy Strategies Underlying Humanitarian Rhetoric in American Refugee Law and Policy*, 32 J. NAT'L ASS'N. ADMIN. L. JUDICIARY 309, 342 (2012).

“responsibility to protect”⁴³⁷ 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,⁴³⁸ the Universal Declaration of Human Rights,⁴³⁹ the International Covenant on Civil and Political Rights⁴⁴⁰ and the International Covenant on Economic Social and Cultural Rights.⁴⁴¹ 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,⁴⁴² evidence an emerging right of a nation to

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.”).

⁴³⁸ U.N. Charter, arts. 55-56.

⁴³⁹ G.A. Res. 217A, at 71, (Dec. 12, 1948).

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).

⁴⁴² G.A. Res. 41/128, at 186, (Dec. 4, 1986).

develop beyond the capacity to only provide its population with the bare essentials.⁴⁴³ As noted, even otherwise necessary and proportional countermeasures may not violate fundamental human rights.⁴⁴⁴

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.”⁴⁴⁵ 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.

⁴⁴⁵ *See, e.g.*, G.A. Res. 200 U.N. GAOR, 68th Sess., 71st plen. mtg., U.N. Doc. A/RES/68/200 (Dec. 20, 2013) (Yes: 127, No: 2, Abstentions: 50); G.A. Res. 186, U.N. GAOR, 66th Sess., 91st plen. mtg., U.N. Doc. A/RES/66/186 (Dec. 22, 2011) (Yes: 122, No: 2, Abstentions: 53); G.A. Res. 54, U.N. GAOR, 54th Sess., 87th plen. mtg., U.N. Doc. A/RES/54/200 (Jan. 20, 2000) (Yes: 107, No: 3, Abstentions: 46); G.A. Res. 48, U.N. GAOR, 48th Sess., 86th plen. mtg., U.N. Doc. A/RES/48/168 (Dec. 21, 1993/1994) (Yes: 116, No: 32, Abstentions: 16); G.A. Res. 185, U.N. GAOR, 40th Sess., 119th plen. mtg., U.N. Doc. A/RES/40/185 (Dec. 17, 1985) (Yes: 128, No: 19, Abstentions: 7) (These resolutions on economic coercion, the latest of which was adopted in 2014, are not law-declaring; but, they “reaffirm” the language concerning economic coercion in the 1970 Declaration.); *see, e.g.*, G.A. Res. 66/186 (Dec. 22, 2011).

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.⁴⁴⁶

The most recent resolutions include references to the WTO, suggesting economic coercion violates the GATT.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.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.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."⁴⁵⁰ The letter focused on the extraterritorial effect of the embargo, Cuban sovereignty and the principle of non-intervention.⁴⁵¹ Cuba issued a second letter to the Secretary-General⁴⁵² stating that U.S. economic coercion violated

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.

⁴⁴⁷ See, e.g., U.N. Doc. A/RES/68/200, *supra* note 445.

⁴⁴⁸ See, e.g., United Nations Bibliographic Information System, available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares68200> (The last 2014 resolution A/RES/68/200 results were: "Yes: 127 [Most Developing Countries], No: 2 [U.S. and Israel], Abstentions: 50 [Most Developed Nations], Non-Voting: 14.").

⁴⁴⁹ See Letter from the Permanent Representative of Cuba to the United Nations to the Secretary-General, U.N. Doc. A/46/193 (Aug. 16, 1991).

⁴⁵⁰ *Id.* at p. 2.

⁴⁵¹ *Id.* at pp. 2-4.

⁴⁵² Letter Dated 25 October 1991 from the Charge d'Affairsi. 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.”⁴⁵³ The second letter cited to the 1970 Declaration, the GATT and the OAS Charter.⁴⁵⁴

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.”⁴⁵⁵ 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.”⁴⁵⁶ 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.⁴⁵⁷ The first vote, recorded in November 1992, was fifty-nine in favor, three opposed, and seventy-one abstentions (with forty-one not voting).⁴⁵⁸

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.⁴⁵⁹ In 2016, 191 countries voted in favor of ending the

Secretary-General, U.N. GAOR, 46th Sess., Annex, Agenda Item 14, at 3-5, U.N. Doc. A/46/599 (Oct. 25, 1991).

⁴⁵³ *Id.* at 6.

⁴⁵⁴ *Id.* at pp. 5-6.

⁴⁵⁵ U.N. GAOR, 48th Sess., 70th plen. mtg., at 88, U.N. Doc. A/RES/47/19 (Nov. 24, 1992).

⁴⁵⁶ *Id.* (preamble).

⁴⁵⁷ *Id.* arts. 1-2.

⁴⁵⁸ *Id.* (Israel, Romania and the United States voted “no”).

⁴⁵⁹ *See generally*, U.N. Doc. A/48/PV.48 (Nov. 3, 1993); U.N. Doc. A/49/PV.45 (Oct. 26, 1994); U.N. Doc. A/50/PV.48 (Nov. 2, 1995); U.N. GAOR, 51st Sess., 57th plen. mtg., at 21-22, U.N. Doc. A/51/PV.57 (Nov.

U.S. embargo, none opposed, and the United States and Israel abstained.⁴⁶⁰ This most recent version of the resolution added the following:

[1] [S]tatements 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.⁴⁶¹

In support of the resolutions, Cuba’s most recent report to the U.N. Secretary General’s 2007 report -General⁴⁶² claims that:

[t]he 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

12, 1996); U.N. GAOR, 52nd Sess., 45th plen. mtg., at 17, U.N. Doc. A/52/PV.45 (Nov. 5, 1997); U.N. GAOR, 53rd Sess., 37th plen. mtg., at 20, U.N. Doc. A/53/PV.37 (Oct. 14, 1998); U.N. GAOR, 54th Sess., 50th plen. mtg., at 19, U.N. Doc. A/54/PV.50 (Nov. 9, 1999) U.N. GAOR, 61st Sess., 50th plen. mtg., U.N. Doc. A/61/PV.50 (Nov. 8, 2006); U.N. GAOR, 62nd Sess., 38th plen. mtg., U.N. Doc. A/62/PV.38 (Oct. 3, 2007); U.N. GAOR, 63rd Sess., 33rd plen. mtg., at 22; U.N. GAOR, 64th Sess., 27th plen. mtg., U.N. Doc. A/64/PV.27 (Oct. 28, 2009).

⁴⁶⁰ U.N. GAOR, 71st Sess., 32nd plen. mtg., at 31, U.N. Doc. A/RES/71/5 (Oct. 26, 2016).

⁴⁶¹ *Id.*

⁴⁶² The Secretary General, Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba, U.N. Doc. A/62/9268/ (Aug. 3, 2007).

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 \$130,178,600,000.⁴⁶³

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.

IV. USEFUL PRECEDENT FOR RESOLVING SIMILAR LEGAL CLAIMS

A. INTRODUCTION

The notion of one country making reparations to another for its violations of legal obligations is not new.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.⁴⁶⁵ Particularly significant is the spread of BITs and international arbitral tribunals, which adjudicate individual and state claims by applying international

⁴⁶³ *Id.* at 64.

⁴⁶⁴ See Howard M. Holtzman, *Mass Claims Processes*, 13 AM. REV. INT'L ARB. 69, 74 (2002) (proving mass claims processes usefully provide compensation).

⁴⁶⁵ See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U.J. INT'L L. & POL'Y 709, 729 (1999); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC. 160, 165 (2000).

law.⁴⁶⁶ Historically, states submitted more traditional legal claims among states, such as border disputes, to arbitration.⁴⁶⁷ Meanwhile individual mass claims against states were usually settled through state-to-state negotiations, resulting in lump-sum payments.⁴⁶⁸ 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.⁴⁶⁹ The U.S. and Cuba alone have entered into over eighty BITs.⁴⁷⁰

⁴⁶⁶ Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC. 160-62 (2000).

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).

⁴⁶⁸ Lump sum payments are paid from one government to another and individual claims are not directly considered. See, e.g., Claims Settlement Agreement between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya, U.S.-Libya, Aug. 14, Jamahirirya (2008, 122 Stat. 2999 (demonstrating how lump sum payments are paid from one government to another and individual claims are not directly considered), available at <https://www.state.gov/documents/organization/109771.pdf> (last visited April 16, 2017); Claims Settlement Agreement between the United States of American and the Great Socialist People's Libyan Arab Jamahirirya (2008), available at <https://www.state.gov/documents/organization/109771.pdf> (last visited April 16, 2017); Canada-Cuba Agreement of Nov. 7, 1980, 1981 Can. T.S. No. 18.

⁴⁶⁹ U.N. Centre on Transnational Corporations, BILATERAL INVESTMENT TREATIES 31 (1988).

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.⁴⁷¹ 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.⁴⁷² 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.⁴⁷³ 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.⁴⁷⁴

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

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.

⁴⁷³ See *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 248 (Cl. Ct. 1983) (rejecting the plaintiff's claim for a Fifth Amendment taking of its property by the United States), *aff'd*, 756 F.2d 159 (Fed. Cir. 1984), *cert. den'd* 474 U.S. 909 (1985).

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;⁴⁷⁵ and none paid the full amount of interest.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.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.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.⁴⁷⁹ Interestingly, despite the

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).

⁴⁷⁶ Agreement Concerning the Settlement of Certain Property Claims, U.S.-F.R.G., May 13, 1992, S.-F.R.G., T.I. A, T.I.A.S. 11959. See Letter from Ronald J. Bettauer, Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State, to claimants (May 29, 1992) (noting how a 1992 settlement with Germany over East Germany's expropriations of U.S. nationals' assets included the payment of simple interest at the approximate annual rate of 3% from the time the U.S. properties were taken); 11959 Department of State, to claimants (May 29, 1992); Agreement Concerning the Settlement of Certain Property Claims, May 13, 1992, U.S.-F.R.G., T.I.A.S. 11959.

⁴⁷⁷ BURNS H. WESTON ET AL., INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995, 23 77 (The Procedural Aspects of Int'l Law Monograph Series, (Vol. 23 1999)).

⁴⁷⁸ *Id.*

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.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.⁴⁸¹ Instead, they indicate how the U.S. is likely to settle its claims with Cuba.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.⁴⁸³ This agreement was pertinent in two respects. First, the U.S. accepted less than the full 6% interest because Germany rejected payment of

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.”).

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. CZECHOSLOVAKIAN CLAIMS SETTLEMENT ACT OF 1981, 95 Stat. 1675, Pub. L. No. 97-127 (1981), reprinted in 21 I.L.M. at 414.

⁴⁸¹ *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.”).

⁴⁸² ANN. REP., *supra* note 475.

⁴⁸³ FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE U.S., 1981 FCSC, “Final Report on the German Democratic Republic Claims Program,” 1981.

any interest, as it had in resolving property claims in East Germany following reunification.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.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, 1988.⁴⁸⁶ 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.⁴⁸⁷ The Spanish claims, for example, were valued at \$350 million, but were ultimately settled for about \$40 million.⁴⁸⁸ Even this limited amount was not paid until 1994, six years after the claims were settled and thirty years after the claims accrued.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.⁴⁹⁰ These arrangements support the position that due to the state

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ BURNS H. WESTON ET. AL, *supra* note 477, at 81.

⁴⁸⁷ Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriations Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, (1995). *See also* Michael W. Gordon, *The Settlement of Claims for Expropriated Foreign Private Property Between Cuba and Foreign Nations Other than the United States*, 5 LAW. AM. 457, (1973) (opining that Cuba's settlements with other countries do "not suggest a Cuban recognition of a right to compensation under either Cuban or international law, but rather an intention to settle claims as a condition precedent to the development or continuation of trade patterns with specific nations.").

⁴⁸⁸ Ashby, *supra* note 7, at 421-22.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* (citing to Agreement Relating to the Settlement of Canadian Claims, Can.-Cuba, June 26, 1981, 1981 Can. T.S. No. 18).

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 *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 Travieso-Diaz, *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 I.L.M 1421 (1988).

⁴⁹³ See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 788 3rd (3d ed. 1993).

to select the arbitrators the forum, and designate the rules of procedure that will be used to settle the dispute.⁴⁹⁴ Arbitration also provides the parties with the option of holding hearings in secret.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.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.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.⁴⁹⁸ By 1980, over 400 actions were filed in the United States against Iran.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 Declaration⁵⁰⁰ and the Claims Settlement Declaration.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;⁵⁰² official claims of the two

⁴⁹⁴ *Id.* at 790-91.

⁴⁹⁵ Jonathan I. Charney, Third Party Dispute Settlement and International Law, 36 COLUM. J. TRANSNAT'L L. 65, 70 (1998).

⁴⁹⁶ *Id.*

⁴⁹⁷ Iran-United States Tribunal, About the Tribunal, (last visited Feb. 22, 2018), available at <https://www.iusct.net/Pages/Public/A-About.aspx>.

⁴⁹⁸ CHARLES BOWER, THE LESSONS OF THE IRAN-US CLAIMS TRIBUNAL APPLIED TO CLAIMS AGAINST IRAQ, IN THE UNITED NATIONS COMPENSATION COMMISSION 15, 15 (Richard B. Lillich ed. 1995).

⁴⁹⁹ *Id.*

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.

⁵⁰¹ Claims Settlement Declaration, *supra* note 492, at art II (1).

⁵⁰² *Id.*

nations against each other;⁵⁰³ and interpretive disputes relating to the application of the General Declaration and Claims Settlement Declaration.⁵⁰⁴ The Tribunal consists of nine judges,⁵⁰⁵ with Iran and the United States appointing three judges each, and the remaining three judges are chosen by the six appointed judges.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.⁵⁰⁷ The panels decide most individual claims, but the President of the Tribunal chooses the claims for adjudication by the nine-judge tribunal.⁵⁰⁸ The Tribunal follows the UNCITRAL arbitration rules, and the arbitral decisions are final and binding.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.⁵¹⁰ Thus, the international nature of the tribunal does not limit itself to only applying international law; but parties are flexible to choose national 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

⁵⁰³ *Id.* at art II (2).

⁵⁰⁴ *Id.* at art. II (3).

⁵⁰⁵ *Id.* at art. III 13(3).

⁵⁰⁶ *Id.*

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).

⁵⁰⁸ Claims Settlement Declaration, *supra* note 492, at art. III (1).

⁵⁰⁹ Algiers Declarations (U.S. v. Iran), Rules of Civil Procedure, arts IX-XII, IV(I) (May 3, 1983), Algiers Declarations (U.S. v. Iran), <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf>.

⁵¹⁰ *Id.* at art. II (1).

through diplomatic protection.⁵¹¹ In deciding the 1984 Dual Nationality case,⁵¹² 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.”⁵¹³ 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.⁵¹⁴ 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.⁵¹⁵ 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

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.⁵¹⁶ First, the Tribunal continues to drag on, now for thirty-five years, running up expenses to maintain its nine arbitrators and staff.⁵¹⁷ Further, a more formal mechanism is likely to lead to “contentious replays of historical grievances,” and removes the governments’ control over the process.⁵¹⁸ 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.⁵¹⁹

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.⁵²⁰ 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.⁵²¹ 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.⁵²² 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

⁵¹⁶ Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba: Transforming Trauma into Opportunity*, Latin America Initiative at Brookings 34 (Dec. 2005), available at <https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf> (last visited Apr. 17, 2017) [Brookings Proposal].

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ Brookings Proposal, *supra* note 516, at 28-29.

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.⁵²³

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.⁵²⁴ 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

⁵²³ Brookings Proposal, *supra* note 516, at 28-29.

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.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.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.⁵²⁷ Many proposals also assume that a “post-socialist” Cuban government will be in power when a deal is struck.⁵²⁸ Other papers have addressed the legality of the Helms Burton Act⁵²⁹ and the destructive impact of the embargo on the Cuban population.⁵³⁰ But almost none have included or seriously considered resolving Cuba’s potential claims under international law against the U.S.⁵³¹

⁵²⁵ See, e.g., Ashby, *supra* note 7, at 421–22; Jose Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of The Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. INT’L & COMP. L. REV. 321 (2000).

⁵²⁶ See, e.g., Matías F. Travieso-Díaz, *Resolving U.S. Expropriation Claims Against Cuba: A Very Modest Proposal*, 22 L. & BUS. REV. AM. 3 (2016) [hereinafter Travieso-Díaz Proposal].

⁵²⁷ But see Kern Alexander et al, *Resolving Property Claims in A Post-Socialist Cuba*, 27 L. & POL’Y INT’L BUS. 137 157-76 (1995).). Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, 16 U. PA. J. INT’L BUS. L. 217 (1995).

⁵²⁸ See generally, Alexander, *supra* note 527; Ortiz, *supra* note 525.

⁵²⁹ See, e.g., Luisette Gierbolini, *The Helms Burton Act: Inconsistency with International Law and Irrationality at their Maxim*, 6 J. TRANSNAT’L L. & POL’Y, 289 (1997).

⁵³⁰ See, e.g., Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT’L L. 901 (1995).

⁵³¹ But see, Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT’L L. & FOREIGN AFF. 199, 235-55 (2007); Benjamin Manchak, *Comprehensive Economic Sanctions, the Right to Development, and Constitutionally Impermissible Violations of International Law*, 30 B.C. THIRD WORLD L.J.

The most comprehensive proposal is the 2007 USAID Report on The Resolution of Outstanding Property Claims Between Cuba and The United States (“Report”).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.”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.⁵³⁴ The jurisdiction of the Special Court would be limited to the property claims of the Cuban-American exile community.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*.”⁵³⁶ The Report’s main argument for the need of a separate Special Court for Cuban-American exiles is as follows:

[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

417, 432-49 (2010). Whether or not Cuba’s claims have merit or should be heard at all by the U.S. is irrelevant to the high likelihood that they will be raised.

⁵³² See U.S. AGENCY INT’L Dev., et al., Report On The Resolution Of Outstanding Property Claims Between Cuba & The United States (2007).

⁵³³ *Id.* at 5.

⁵³⁴ *Id.*

⁵³⁵ *Id.*

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.⁵⁴³

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.⁵⁴⁴ 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

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.⁵⁴⁵ 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.

⁵⁴⁵ See Ley de Reafirmación de la Dignidad y Soberanía (Ley 80), 36 I.L.M 472 (1972).

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.”⁵⁴⁶ Travieso-Díaz focuses solely on resolution of the Commission-certified claims.⁵⁴⁷ 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 properties⁵⁴⁸ subject to claims and Cuba’s limited resources, Travieso-Díaz goes on to propose a four-stage plan.⁵⁴⁹ Stage one involves direct payment from the Cuban government to all FSCS claimants for all claims of \$1.5 million or less.⁵⁵⁰ This would provide compensation for all but the 100 highest valued claims and would fully compensate 5,811 claims with \$164,336,899.00.⁵⁵¹ 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.⁵⁵² Travieso-Díaz, like the authors of the Report, recognize

⁵⁴⁶ See Travieso-Díaz Proposal, *supra* note 526.

⁵⁴⁷ *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.at 1.”).

⁵⁴⁸ *Id.* at 11, 135 (explaining that different types of remedies will be available for different types of properties).

⁵⁴⁹ *Id.* at 14-20.

⁵⁵⁰ *Id.* at 14.

⁵⁵¹ *Id.*

⁵⁵² *Id.* at 15 (citing Terrorist Assets Report Calendar Year 2015, available at <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2015.pdf> (last visited April 18, 2017). (The 2015 Terrorist

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.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.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.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.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.⁵⁵⁷ Stage three would require the U.S. and Cuba to agree on the arbitrations' legal framework.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.).

⁵⁵³ *Id.* at 16.

⁵⁵⁴ *Id.* at 15.

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)).

⁵⁵⁶ *Id.* at 15 n.55.

⁵⁵⁷ *Id.* at 19, 20-21.

⁵⁵⁸ *Id.* at 20.

could be satisfied.⁵⁵⁹ 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.⁵⁶⁰

The USAID Report and Travieso-Díaz' 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,"⁵⁶¹ 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.⁵⁶²

However, like the Report, Travieso-Díaz' 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.⁵⁶³ 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

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.* at 21.

⁵⁶¹ Brookings Proposal, *supra* note 516, at 19.

⁵⁶² Travieso-Díaz 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 a 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.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.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.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

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.).

⁵⁶⁶ Brookings Proposal, *supra* note 516, at 32-34 (listing a "menu" of remedy options available to Cuba).

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.⁵⁶⁸

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

⁵⁶⁸ 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.⁵⁶⁹ 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.

⁵⁶⁹ Jim Yardley & Gaia Pianigiani, *Pope Francis Is Credited With a Crucial Role in U.S.-Cuba Agreement*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/2014/12/18/world/americas/breakthrough-on-cuba-highlights-popes-role-as-diplomatic-broker.html>.

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

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