

SOUTH CAROLINA JOURNAL  
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**ARTICLES**

THE CORPORATE GOVERNANCE OFFICER AS A TRANSFORMED  
ROLE OF THE COMPANY SECRETARY: AN INTERNATIONAL  
COMPARISON

*Joseph Lee*

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CUBA: APPLYING INTERNATIONAL LAW WHERE DIPLOMACY  
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**STUDENT NOTE**

THE U.S. DEPARTMENT OF COMMERCE'S "PRELIMINARY  
DETERMINATION IN THE LESS-THAN-FAIR-VALUE  
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ANTIDUMPING INVESTIGATIONS AND PRELIMINARY  
DETERMINATIONS

*Aerial Gill*

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# SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW & BUSINESS

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VOLUME 14

SPRING 2018

---

## CONTENTS

### ARTICLES

THE CORPORATE GOVERNANCE OFFICER AS A TRANSFORMED  
ROLE OF THE COMPANY SECRETARY: AN INTERNATIONAL  
COMPARISON

*Joseph Lee* 107

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

*Joyce Rodriguez* 143

### STUDENT NOTE

THE U.S. DEPARTMENT OF COMMERCE'S "PRELIMINARY  
DETERMINATION IN THE LESS-THAN-FAIR-VALUE  
INVESTIGATION OF 100- TO 150-SEAT LARGE CIVIL AIRCRAFT  
FROM CANADA": THE USE OF ADVERSE INFERENCE IN  
ANTIDUMPING INVESTIGATIONS AND PRELIMINARY  
DETERMINATIONS

*Aerial Gill* 249

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VOLUME 14

SPRING 2018

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We would also like to take this opportunity to sincerely thank the administration of the University of South Carolina School of Law, especially Dean Robert M. Wilcox for his gracious support and encouragement of the *Journal*, without which we would not have been able to reach the successes attained this past year. To the entire administration and faculty at the University of South Carolina School of Law, we say with utmost appreciation, thank you for your continued support of the *Journal* and your unwavering commitment to legal education.

## SPECIAL RECOGNITION

The Editorial Board would also like to thank the faculty and staff of the *Journal* for making this year such an outstanding success. As always, we are indebted to Professors Janice M. Baker, Susan S. Kuo, and Aparna Polavarapu, whose diligence and guidance as the *Journal's* Faculty Advisors made this publication possible.

We would also like to extend a sincere thank you to the *Journal's* student staff editors, whose collective efforts have fostered an unbelievable period of success and growth for this *Journal* which will undoubtedly continue in future years. Additionally, we would like to recognize the incoming Editorial Board for 2018–2019 who will lead the *Journal* throughout the next year: Rachel Lee, Editor in Chief; Jeffrey Blaylock, Managing Editor; Samantha Sanders, Associate Managing Editor; Jessica Shultz, Senior Articles Editor; Kendall Crawford, Robert Koons, and Robert Pillinger, Articles Editors; Ryan Bondura and Jessica Paribello, Student Works Editors; Dana Maurizio, Symposium Editor; Bailey Loftis and Assatta Herbert, Associate Symposium Editors; Alexander Carrie and Ivey LaValle, Research Editors; Edward Waelde, Publications Editor; Chandler Hill, Associate Publications Editor; and Timothy Gavigan and William Land, Communications Editors. Thank you for all the hard work you have put forth as *Journal* Staff Editors and good luck in all your future endeavors.

# THE CORPORATE GOVERNANCE OFFICER AS A TRANSFORMED ROLE OF THE COMPANY SECRETARY: AN INTERNATIONAL COMPARISON

*Joseph Lee\**

## INTRODUCTION

Corporate scandals around the global markets have prompted regulatory agencies to rethink the role of governance professionals and their relationship with the companies. Emerging markets in Asia, including China, the world's second largest economy, have also recognized that corporate governance professionals can not only reinforce regulatory norms to sustain their capital markets but also bring value to their companies. Listed companies need to have a corporate governance officer to increase the level of corporate governance enforcement. In this article, the author will discuss how the English company secretary can be transformed into a corporate governance officer and how this new role and the proposed way in which it may operate, if adopted by other jurisdictions, can also create transnational governance synergies.

The company secretary is an English corporate invention and the office has continued to enhance transparency and facilitate board independence. The removal of the requirement to appoint a company secretary to a private company by the Companies Act 2006 creates an opportunity to have a sharper focus on this 108-year-old corporate

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position with increased corporate governance duties.<sup>1</sup> This English invention has at first only been exported to other common law jurisdictions such as Hong Kong and Singapore. However, China, as a civil law country, transplanted such a statutory officer into its company structure since 1993.<sup>2</sup> In 2016, Taiwan also introduced a law requiring all listed companies to have a company secretary.<sup>3</sup> Despite the legal installation of this office, the company secretary's function as a corporate gatekeeper has not been discussed as extensively as that of other gatekeepers such as auditors, compliance officers, and lawyers,<sup>4, 5</sup> either in the U.K. or at any transnational level such as in

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<sup>1</sup> See Companies Act 2006, c. 46, § 270 (U.K.) (although the background thinking is under the motto of "think small first" to reduce red tape for small companies, it has the effect of placing more emphasis on the public companies' governance); see Dep't of Trade and Industry, Company Law Reform, § 4, at 29-55 (Mar. 2005) (U.K.).

<sup>2</sup> See Zhonghua Renmin Gongheguo Gongsifa (公司法) [The People's Republic of China's Company Law] (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG. Dec. 29, 1993) (China).

<sup>3</sup> See Executive Yuan, *Encouraging new businesses and accelerating investment with amendments to the Company Act* (Jan. 2, 2018), [https://english.ey.gov.tw/News\\_Hot\\_Topic.aspx?n=1C42D5D2493FC43F&ms=BC35F9E560578584](https://english.ey.gov.tw/News_Hot_Topic.aspx?n=1C42D5D2493FC43F&ms=BC35F9E560578584).

<sup>4</sup> See John Coffee, *GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE* (Oxford U. Press, 2006); see also Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-party Enforcement Strategy*, 2 J. L. ECON., & ORG. 53-104 (1986); see also Dalvinder Singh, *Role of External Auditors in Bank Supervision: A Supervisory Gatekeeper*, 47 INT'L L. 65-98 (2013).

<sup>5</sup> In the same countries, public regulators also perform a significant role as corporate gatekeeper. In this sense, corporate professionals are the private corporate gatekeepers. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers* 123 YALE L. J. 616 (2013); see also Julia Black, *Enrolling Actors in Regulatory Systems: Examples from U.K. Financial Services Regulation* PUB. L. 63-91 (2003).

the EU or OECD.<sup>6</sup> The aim of this paper is to explore how a company secretary, as a corporate professional and a corporate governance officer, can perform an oversight function to increase the quality of governance.

This paper argues a company secretary can act as a corporate gatekeeper in charge of facilitating investor-led corporate governance built on transparency and board independence. Independence is an important quality that must be regulated. This role can be fulfilled by professional services firms that have been providing corporate gatekeeper services since the advent of capital markets. Thus, the issue of whether a company secretary should be classified as an internal person or an outsider is not important. As the U.K., U.S., and many Asian countries, especially China, have all introduced the position of company secretary, some common ground can be identified to create governance space and synergies.<sup>7</sup> Therefore, at the transnational level, company secretaries of multinational companies have the potential to shape new transnational governance since they manage increasing numbers of joint law enforcement actions. The EU and other transnational regulators should not overlook the ability of this corporate governance officer to close gaps in governance by acting as a corporate gatekeeper along with regulators and other corporate professionals.

Section I examines the evolving role of the company secretary from a mere servant to a corporate governance officer and how this office, parallel with other governance professionals such as auditors and lawyers, continues to evolve in an investor-led corporate ecosystem where transparency and board independence are the main factors for investment decisions. Section II considers whether company secretaries should also be the independent officer's equivalent to auditors, lawyers, and compliance officers and if so, how

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<sup>6</sup> Individual nation states have such a role, such as Ireland. Many U.S. (i.e. Delaware and New York) and Australian states also require companies to have a company secretary.

<sup>7</sup> See Terry McNulty & Abigail Stewart, *Developing the Governance Space: A Study of the Role and Potential of the Company Secretary in and around the Board of Directors*, 36 ORGANISATIONAL STUD. 513 (2015).

such independence can be regulated to best promote corporate values. Section III discusses how professional services firms who are outsiders to the companies can play a role in adding value to the internal governance and discuss how independence can be maintained in the face of market competition, especially for those firms who provide multiple corporate services. Section III will also discuss the rarely explored area of firms' attributed liability—the way in which a company secretary's liability as an internal corporate officer may be attributable to the professional services firms and will also identify any areas that need particular legislative attention in order to avoid any confusion in the interpretation of the current law. The discussion will also provide a model for other countries. Section IV uses multinational companies as a case study to explore the role of the company secretary in the transnational context, and how governance synergies may result.

## SECTION I: THE EVOLVING ROLE OF THE COMPANY SECRETARY

### *A. HISTORICAL DEVELOPMENT*

How has the role of the company secretary, although an internal corporate officer, evolved with investor-led governance? The role is now comparable to other corporate professionals in charge of corporate gatekeeping, but the company secretary was initially an officer of the company who served an important role in the administration and management of the company's affairs.<sup>8</sup> The role has changed from being a mere servant of the company to a statutory officer who takes on managerial functions such as chief of staff to the chairman or adviser to the board. The role of company secretary has a shorter history than that of corporate auditor—another corporate gatekeeper. The U.K. did not include the company secretary in the Companies Act of 1855 where the principle of limited liability was

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<sup>8</sup> See *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd* (1971) 2 QB 711 (CA) (U.K.).

first introduced.<sup>9</sup> In *Barnnett, Hoares & Co v. South London Tramways Co.*, immediately after the principle of limited liability was introduced in that Act, Lord Esher M.R. said “A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all.”<sup>10</sup> While Lord Esher was dealing with an issue of corporate authority, it is important to note that there was no legal requirement in 1887 to have a company secretary which is why Lord Esher thought that this non-statutory role was a mere servant. The company secretary did not receive an official title until the early 1900s when British stock exchanges were becoming more international and offered British companies’ shares abroad.<sup>11</sup> The Companies Act 1908<sup>12</sup> then required each company to appoint a company secretary, while the Companies Act 1929<sup>13</sup> subsequently prescribed the duties and responsibilities of the office. The creation of such a statutory corporate officer has eventually led to judicial recognition of the company secretary with the authority to bind the company with third parties, which is usually only conferred on directors. In *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd*, the court recognized the company secretary as an officer of the company who had authority to bind the company with third parties.<sup>14</sup> In the opinion, Salmon LJ described a company secretary as the chief administrative officer of the company but left open the question whether the company secretary would have any authority in relation to the commercial management

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<sup>9</sup> See An Act for Limiting the Liability of Members of Certain Joint Stock Companies, 1855, 18 & 19 Vict., c. 133 (U.K.).

<sup>10</sup> *Barnnett, Hoares & Co v. South London Tramways Co* (1887) 18 Q.E.D. 815 (U.K.).

<sup>11</sup> See Ranald C. Michie, *THE LONDON STOCK EXCHANGE: A HISTORY* 70-142 (Oxford U. Press 1999).

<sup>12</sup> See Companies (Consolidation) Act 1908, 8 Edw. 7 c. 69 (U.K.).

<sup>13</sup> See Companies Act 1929, 19 & 20 Geo. 5 c. 23 (U.K.).

<sup>14</sup> See *Panorama*, *supra* note 8.

of the company.<sup>15</sup> Since then, the emphasis on the function of the company secretary has shifted to legal compliance.

*B. MODERN FUNCTION TO MAINTAIN CORPORATE TRANSPARENCY  
AND BOARD INDEPENDENCE*

Nowadays, capital markets require two critical confidence-building measures for financial participation of the investor: transparency<sup>16</sup> and board independence.<sup>17</sup> The demand for transparency has led to the development of laws and regulations requiring disclosure through filing with various agencies and timely announcements through recognized channels.<sup>18</sup> Board independence has called for increasing numbers of non-executive directors on a board to act as checks and balances in corporate administration. The traditional role of the company secretary to act as the company's chief administrative officer for filing documents with the Registrar of

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<sup>15</sup> See *id.*

<sup>16</sup> See Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1361-62 (1996); see also Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); see also Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 62 J. FIN. 1147 (2002).

<sup>17</sup> See Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON., 305 (1976); see also Derek Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, DEP'T OF TRADE & INDUSTRY (2003); see also Kevin Corley, *Examining the Non-executive Director's Role from a Non-agency Theory Perspective: Implications Arising from the Higgs Report*, 16 BRITISH J. MGMT., 1-4 (2005); see also EU Commission on the Role of Non-executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, *Commission Recommendation*, 2005/162/EC; see also Jeffrey Gordon *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV., 1465 (2007).

<sup>18</sup> See Regulatory News Service (RNS) of the London Stock Exchange, <http://www.londonstockexchange.com/products-and-services/rns/about/rns-remove.htm> (last visited Mar. 12, 2018).

Companies House continues today. The increasing requirement to disclose corporate information through document filings and timely announcements has made this administrative office indispensable for a company's operations in a rule-based market economy.<sup>19</sup> The role of the company secretary in the U.K. has thus gained greater importance than was originally intended, especially in listed companies which need to comply with law and policy to mitigate exposure to legal and reputational risk. This increased responsibility was not a result of the direct duties imposed on the office by the law or by providing it with more direct legal powers to be exercised against other officers of the company. The driving force for the increased importance of the company secretary has been the developments in the law requiring greater transparency and more precise governance through internal checks and balances. These include splitting the roles of chairman and CEO, increased number of non-executive directors, and the demand for greater corporate social responsibility that is now required by law and policy compliance throughout corporate groups.<sup>20</sup>

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<sup>19</sup> See Modern Slavery Act, 2015, c. 30 (U.K.) (requires certain larger organizations (wherever incorporated) supplying goods or services and carrying on business in the U.K. to publish a slavery and human trafficking statement ('MSA statement') each year, describing steps taken (if any) during the previous year to ensure that slavery and human trafficking are not occurring in its global supply chain). Also, in the EU certain large companies are required to disclose information on policies, risks, and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors. See Council Directive 14/95, 2014 O.J. (L 330).

<sup>20</sup> See Samuel Idowu, *Corporate Social Responsibility from the Perspective of Corporate Secretaries* in PROFESSIONALS' PERSPECTIVES OF CORPORATE SOCIAL RESPONSIBILITY 49-70 (S. Idowu & W. Filho eds., Springer-Verlage Berlin Heidelberg 2009).

C. *THE COMPANY SECRETARY AND BOARD INDEPENDENCE*

The U.K. Corporate Governance Code, a soft law operating on the basis of “comply or explain,”<sup>21</sup> epitomizes a delegalized approach that enhances the role of the company secretary in the facilitation of board independence.<sup>22</sup> Since independent directors play a constantly increasing role in corporate governance,<sup>23</sup> through his close involvement with the board by attending board and other committee meetings, the company secretary is able to act as an interface between the board and shareholder meetings between, for example, a senior independent director and the minority shareholders. In an increasingly devolved governance system where independent committees carry out functions with the primary aim of removing directors’ conflicts of interest, the company secretary can deliver confidence to investors by acting as an interface between the committee and the chairman (an independent role). For instance, risks identified in committee meetings can be fed to the chairman through the company secretary who normally prepares the committee meetings.<sup>24</sup>

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<sup>21</sup> UK Corporate Governance Code, 2016, FIN. REPORTING COUNCIL, (however, it is binding on the premium listed companies on the London Stock of Exchange).

<sup>22</sup> See Kevin Keasey et al., *The Development of Corporate Governance Codes in the U.K.*, CORPORATE GOVERNANCE: ACCOUNTABILITY, ENTERPRISE AND INTERNATIONAL COMPARISONS 21-42 (K. Keasey, S. Thompson, & M. Wright eds., John Wiley & Sons: Chichester 2005) (noting that Hong Kong, Singapore, Taiwan, and Japan all adopt a similar non-statutory code of corporate governance).

<sup>23</sup> See Higgs, *supra* note 17, at 31.

<sup>24</sup> The secretary tends to serve a longer term than the board directors and can thus offer a historical view in the tradition of the company to both the board and investors.

Services provided by company secretaries can enhance the effectiveness of independent directors in the governance system.<sup>25</sup> Assisting the non-executive chairman in the selection and appointment of non-executive directors and providing an induction and training programme to new directors,<sup>26</sup> giving advice to non-executive directors, and assisting the non-executive chairman in conducting board evaluation (a regulatory requirement under the Corporate Governance Code for listed companies) brings confidence to the investors, especially retail investors.<sup>27</sup> These responsibilities may increase investor confidence, which reduces the cost of raising capital.<sup>28</sup> The reduction of cost of capital results in value-creation to companies.<sup>29,30</sup> These examples show how the non-statutory Code can act as a catalyst for providing valuable corporate secretarial services

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<sup>25</sup> UK Corporate Governance Code, 2016, *supra* note 21, at 14 (Principle A.5.3 of the Corporate Governance Code states that a company secretary should be “responsible to the board for ensuring that board procedures are complied with.”).

<sup>26</sup> See ICSA, ICSA GUIDANCE ON INDUCTION OF DIRECTORS, 4 (2012), <https://www.icsa.org.uk/assets/files/pdfs/guidance/Guidance%20notes%202012/Induction%20of%20directors.pdf>.

<sup>27</sup> The Code, as will be recalled, is a soft-law mechanism operating on the basis of “comply or explain.”

<sup>28</sup> See Kevin Chen et al., *Legal Protection of Investors, Corporate Governance, and the Cost of Equity Capital*, 15 J. CORP. FIN. 273 (2009); see also Romilda Mazzotta & Stefania Veltri, *The Relationship between Corporate Governance and the Cost of Equity Capital. Evidence from the Italian Stock Exchange*, 18 J. MGMT. GOV. 419 (2014).

<sup>29</sup> Hannah Langworth, *In good company*, THE GATEWAY, <http://thegatewayonline.com/corporates/types-of-work/icsa-in-good-company> (last visited Mar. 27 2018) (Regarding one of the causes of the 2007-2009 financial meltdown, it has been stated that “[s]ometimes what the directors of financial institutions were being asked to consider was just so complicated that a lot of the non-execs didn’t understand what was being suggested, and then it became difficult for them to question anything.”).

<sup>30</sup> In such situations, the company secretary can act as a filter to review the relevant documents and determine whether the right types of information have been provided to the directors who, by definition, are not involved with the company on a daily basis.

to companies that benefit both investors and stakeholders. Hong Kong and Singapore have adopted similar codes for listed companies.<sup>31</sup> Taiwan and China also regulate the company secretary but not through statutory company law. There are more practical reasons for developing such an office through non-statutory rules and this will be discussed in later sections of this paper.

*D. FOCUS ON LISTED COMPANIES THROUGH CODES OF BEST PRACTICE*

While the 2006 Companies Act in the U.K. removed the requirement for private companies to appoint a company secretary and allowed them to decide whether or not the position is required according to their own constitution, public companies are still required to make such an appointment.<sup>32</sup> This is similar to the approach adopted in China and Taiwan, which consider a governance officer to be necessary for companies who are raising capital from the public.<sup>33</sup> Hence, their codes of best practice, which are similar to the U.K.'s Corporate Governance Code, play a more important role than statutory company law. Since private companies (and to some extent public companies) do not raise capital from the public, corporate governance

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<sup>31</sup> See H.K. Exchanges & Clearing, Corporate Governance Code and Corporate Governance Report, 2016, [http://en-rules.hkex.com.hk/net\\_file\\_store/new\\_rulebooks/h/k/HKEX4476\\_3828\\_VER10.pdf](http://en-rules.hkex.com.hk/net_file_store/new_rulebooks/h/k/HKEX4476_3828_VER10.pdf), [hereinafter HKEX]; see also Monetary Authority of Sing., Code of Corporate Governance, 2012, [http://www.mas.gov.sg/~media/resource/fin\\_development/corporate\\_governance/CGCRevisedCodeofCorporateGovernance3May2012.pdf](http://www.mas.gov.sg/~media/resource/fin_development/corporate_governance/CGCRevisedCodeofCorporateGovernance3May2012.pdf) [hereinafter MAS].

<sup>32</sup> See Companies Act *supra* note 1 (stating if the company is private, a company secretary is required. If it is public company, a company secretary must be appointed); The Companies Act, § 171 (2012) (Sing.) (In Singapore, a company secretary is required statutorily for both public and private companies.).

<sup>33</sup> See Rules Governing the Listing of Stocks on Shanghai Stock Exchange, 2008; see also Shenzhen Stock Exchange Listing Rules, 2012; Taiwan Stock Exchange Corporate Governance Best Practice Principles, 2016.

for them may have a different objective.<sup>34</sup> To discuss the role of the company secretary in other jurisdictions, especially in countries that do not practice common law, and to find common ground for developing codes of best governance practice, it is therefore sensible to focus on listed companies. Board independence is less of an issue for private companies and non-listed public companies; hence, the Corporate Governance Code does not apply to private or non-listed public companies because policy compliance to mitigate exposure to reputational damage primarily concerns listed companies.

Many private companies do not operate in jurisdictions outside their home country through subsidiary operations, so have less concern for subsidiary governance.<sup>35</sup> Furthermore, what amounts to a private company or a public company in non-common law jurisdictions such as China and Taiwan may not be comparable to the position in the U.K., Singapore, and Hong Kong. For these reasons, the discussion here focuses on how a company secretary brings value to listed companies and how that role can be transformed into a corporate governance officer.<sup>36</sup> As it happens, company regulators do not develop the rules on the role of the company secretary for listed

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<sup>34</sup> See David Milman, *The regulation of private companies in U.K. law: current policy developments and recent judicial rulings*, 257 SWEET & MAXWELL'S CO. L. NEWSLETTER 1 (2009) (The U.K.'s change in this requirement for private companies was due to the streamlining of private companies' administrative burdens included in the law, resulting in fewer filing and reporting requirements for private companies.).

<sup>35</sup> See Bryan Christansen & Harish C. Chandan, *Handbook of Research on Human Factors in Contemporary Workforce Development*, 2001 (stating some private companies are holding companies with subsidiaries operating abroad, however, most large multinational companies are public companies).

<sup>36</sup> See, Jill Collis, *Directors' View on Accounting and Auditing Requirements for SMES* (Apr. 2008) (claiming private companies can determine in their own constitutions whether to utilize such an office in delivering its organizational objectives. According to Companies House statistics, the number of companies incorporated without a company secretary has increased greatly since April 6, 2008.).

companies in any of the jurisdictions discussed here. In the U.K., the Financial Reporting Council develops the rules, rather than the Department for Business, Energy and Industrial Strategy (BEIS). In Taiwan, the Securities and Futures Bureau promulgates the rules on the company secretary rather than the Ministry of Economic Affairs.<sup>37</sup> In Singapore, it is the Monetary Authority of Singapore rather than the Accounting and Corporate Regulatory Authority (ACRA).<sup>38</sup> In China, it is the China Securities and Regulatory Commission (CSRC) rather than the State Administration for Industry and Commerce (SAIC).<sup>39</sup> In Hong Kong, it is the Stock Exchange of Hong Kong Limited (SEHK).<sup>40</sup> These regulators focus on listed companies, hence common approaches can be more easily adopted.

## SECTION II: THE COMPANY SECRETARY AS AN INDEPENDENT GATEKEEPER

### *A. ATTRIBUTE OF INDEPENDENCE*

If company secretaries are to fulfill the role of corporate governance officer with responsibility for the requirement for corporate transparency and facilitating board independence, they should retain the critical attribute of independence as do other gatekeepers such as auditors, lawyers, and compliance officers. However, this attribute of independence should be regulated to best realize governance goals. Company secretaries should be independent when exercising their professional judgment, just as lawyers, auditors and other governance professionals do. They should be independent in terms of their relationships with the companies and members of the board, just as an independent director is.

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<sup>37</sup> See Securities and Futures Bureau, Financial Supervisory Commission, R.O.C., <https://www.sfb.gov.tw/en/> (last visited on Mar. 27, 2018) (Taiwan).

<sup>38</sup> See MAS, *supra* note 31.

<sup>39</sup> See Chinese Securities and Regulatory Commission, [http://www.csrf.gov.cn/pub/csrf\\_en/](http://www.csrc.gov.cn/pub/csrf_en/).

<sup>40</sup> See HKEX, *supra* note 31.

*B. COMPLIANCE OFFICER AND COMPANY SECRETARY:  
SIMILAR EXERCISE OF INDEPENDENT JUDGMENT*

As mentioned, transparency is an indispensable element of modern corporate governance, and transparency has been translated into various requirements for filing, reporting of law and policy compliance, and timely announcements. Company directors and company secretaries, as officers of the company, assume filing duties under various laws. These filing, reporting, and announcing requirements involve independent judgment to be exercised. For instance, complying with accounting rules,<sup>41</sup> complying with rules specifically designed to protect the shareholders (i.e. the pre-emptive rights regime),<sup>42</sup> understanding the operations of nominee companies to identify rightful investors,<sup>43</sup> the application of proxy rules to increase shareholder engagement,<sup>44</sup> and the proactive development of governance protocol to hedge risks stemming from subsidiary operations,<sup>45,46</sup> all demand a skilled governance officer. In the future,

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<sup>41</sup> See Tamer Elshandidy & Ahmed Hassanein, *Do IFRS and Board of Directors' Independence Affect Accounting Conservatism?*, 24 APPLIED FIN. ECON. 1091 (2014) (stating company secretaries must ensure that companies' account records are prepared in the form required by company law and accounting standards. Corporate governance structures also affect the accounting decisions.).

<sup>42</sup> See Companies Act 2006 *supra* note 1, pt. 17, ch. 3(U.K.) (explaining shareholders' rights on preemption).

<sup>43</sup> See Richard Nolan, *Indirect Investors: A Greater Say in the Company?*, 3 J. CORP. L. STUD. 73 (2003) (discussing the policy on indirect investors' enforcement of corporate governance).

<sup>44</sup> See Tsjalle van der Burg & Aloys Prinz, *Empowering Small Shareholders: a Comparison of Three Instruments*, 14 CORP. GOVERNANCE 406 (2006); see also Paolo Santella et al., *Legal Obstacles to Institutional Investor Activism in the EU and in the U.S.*, 23 EUR. BUS. L. REV. 257 (2012).

<sup>45</sup> See Geoffrey Kiel et al., *Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises*, 14 CORP. GOVERNANCE 568 (2006).

<sup>46</sup> In March 2017, the OECD also released "Responsible Business Conduct for Institutional Investors" to help institutional investors implement

companies may be required to make disclosures under the Freedom of Information Law if they carry out work that is categorised as public service.<sup>47</sup> Hence, independent judgment would be needed to determine issues concerning disclosure requirements.

Furthermore, there are other regulations aiming at removing directors' conflicts of interest and preventing directors' self-dealing. The duty of enforcing these regulations internally falls on the company secretary who shields the company from insider misconduct. Under the U.K. Financial Services and Markets Act 2000,<sup>48</sup> the company secretary also has a role in implementing and communicating procedures for listed company directors to comply with the Model Code on share dealing. To prevent insider dealing by directors,<sup>49</sup> prior reporting and obtaining clearance from a non-executive director should pass through the company secretary so that a record can be kept of any communication.

In some companies, company secretaries also act as gatekeepers to prevent illegal political donations.<sup>50</sup> The U.K. Companies Act 2006 prohibits political donations by U.K. registered companies and subsidiaries of ultimate U.K. holding companies, unless they are authorized by shareholder resolutions in a general meeting.<sup>51</sup> The

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the due diligence recommendations of the OECD Guidelines for Multinational Enterprises to prevent or address adverse impacts related to human and labour rights, the environment, and corruption in their investment portfolios.

<sup>47</sup> See Simone Mezzacapo, *The Right of Access to Public Bodies' Records in Italy and UK: Actio Ad Exhibendum and Freedom of Information, Risks and Opportunities for Private Sector Companies*, 17 EUR. BUS. L. REV. 959 (2006).

<sup>48</sup> See The Financial Services and Markets Act § 96B (2000).

<sup>49</sup> See Simeon Djankov et al., *The Law and Economics of Self-dealing*, 88 J. FIN. ECON. 430 (2008).

<sup>50</sup> See Jack Davies, *From Gentlemanly Expectations to Regulatory Principles: a History of Insider Dealing in the U.K.: Part 1*, 36 CO. LAW. 132 (2015).

<sup>51</sup> See generally Richard Williams, *Regulating Political Donations by Companies: Challenges and Misconceptions*, 75 MOD. L. REV. 951 (2012).

company secretary needs to be familiar with the operations of subsidiary companies both at home and abroad<sup>52</sup> to design an effective reporting line so that shareholder resolutions can be obtained in a timely manner<sup>53</sup> and meet disclosure requirements.<sup>54</sup> For example, one large multi-national group requires group companies to return a certificate to the secretary of the holding company each year, stating either that no payment has been made or providing details when a payment has taken place. The company secretary is the “go to” person who oversees reporting duties for subsidiaries. These results are then reported annually to the audit committee of the company as well as in an interim report to the committee of independent directors.<sup>55</sup> This system can be implemented either through an internal corporate governance protocol or the subsidiary companies’ constitutions.<sup>56</sup>

C. CHIEF OF STAFF TO THE INDEPENDENT CHAIRMAN

For listed companies, investor confidence is increased by the company secretary’s role of enhancing the monitoring and advisory functions of non-executive directors, in a similar way to the greater independence of directors.<sup>57</sup> To whom a company secretary reports will influence the quality of independence of the company secretary. There is no common approach among the jurisdictions discussed here.

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<sup>52</sup> See Companies Act 2006 *supra* note 1, pt. 14 (a holding company is permitted to seek authorization of donations and expenditure in respect of both the holding company itself and one or more subsidiaries through a single approved resolution).

<sup>53</sup> See *id.*

<sup>54</sup> See Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, sched. 7 (U.K.) (directors’ reports must disclose any relevant political donations or expenditures).

<sup>55</sup> See *Standards of Business Conduct*, BRITISH AMERICAN TOBACCO (2017), <http://www.bat.com/sobc> (current practice requires any donation to be authorized by the board of the company and fully documented in the company’s books).

<sup>56</sup> See *id.*

<sup>57</sup> See Rafel Crespi-Cladera & Bartolomé Pascual-Fuster, *Does the Independence of Independent Directors Matter?*, 28 J. CORP. FIN. 116 (2014).

Hong Kong<sup>58</sup> and Singapore,<sup>59</sup> while largely following the U.K. Corporate Governance Code,<sup>60</sup> are not clear on whether the company secretary acts as chief of staff to the chairman. Neither the Hong Kong nor Singapore code makes recommendations for independent non-executive chairmen. China only requires the company secretary to be attached to the board.<sup>61</sup> Taiwan does not specify whether such an office should be placed under the executive directors or the independent directors.<sup>62</sup>

In the U.K., the office of the company secretary is often established under the non-executive chairman's office—acting as chief of staff to the chairman.<sup>63</sup> This coincides with several oversight functions of the chairman, including the responsibility for conducting board evaluations.<sup>64</sup> A company secretary's relational independence, when not working under the control of the executive officers, enhances the functions of the non-executive directors whose major role is to remove the conflicts of interest of the executive directors. Since neither the auditor nor the internal or external lawyers necessarily attend board meetings and may not have direct access to the chairman or other non-executive directors, the company secretary has a unique gatekeeping role.

This role has been recognized as long ago as 1993 in the Cadbury Report, which recommended that the company secretary should give guidance to the board on board members' responsibilities.<sup>65</sup> Board

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<sup>58</sup> See, e.g., HKEX, *supra* note 31.

<sup>59</sup> See, e.g., MAS, *supra* note 31.

<sup>60</sup> See UK Corporate Governance Code, *supra* note 21.

<sup>61</sup> See Gongsifa (公司法), *supra* note 2.

<sup>62</sup> See generally Corporate Governance Roadmap, 2013, (promulgated by the Fin. Supervisory Commission), (Taiwan).

<sup>63</sup> See Caroline Newsholme, *FRC Guidance on Board Effectiveness*, 35 CO. SECRETARY'S REV. 14 (2011).

<sup>64</sup> UK Corporate Governance Code, *supra* note 21, at § B.6.

<sup>65</sup> See Adrian Cadbury, *The Financial Aspects of Corporate Governance* at 4.25 (Dec. 1992), <https://www.icaew.com/>

members should have access to the company secretary for such guidance and advice. In particular, the chairman, who is responsible for the functioning of the board, should have strong support from the company secretary. The company secretary's attribute of independence would not have been as necessary if board meetings were simply a management discussion forum without the aim of ensuring that checks and balances are in place to support investors' confidence.

Combining the roles of law and policy compliance, the company secretary is in a position to detect insider misconduct through an effective reporting system and can whistleblow insider misconduct to the chairman.<sup>66</sup>

## ENFORCEMENT OF INDEPENDENCE

### *A. A STATUTORY DUTY OR A PRINCIPLE-BASED APPROACH?*

As a gatekeeper and an officer, what kind of duty of independence should company secretaries assume? Should they have the duty to exercise independent judgment as directors do, and if so, how should the quality of independence be maintained? In the jurisdictions previously discussed, none have imposed a statutory duty to exercise independent judgment on company secretaries as they have done on the directors.

There are practical difficulties with imposing statutory duties of independence on company secretaries. As a general duty, U.K. law requires directors to act independently by exercising unfettered

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<sup>66</sup> See Indira Carr & David Lewis, *Combating Corruption through Employment Law and Whistleblower Protection*, 39 INDUS. L. J. 52 (2010); Peter Yeoh, *Whistleblowing: Motivations, Corporate Self-regulation, and the Law*, 56 INT'L J. L. & MGMT. 459 (2014).

judgment.<sup>67</sup> However, company secretaries do not take business, management, and executive decisions in the way that company directors do. They act, as recommended in some codes of governance, under the direction of the chairman.<sup>68</sup> It is difficult to define the boundary between exercising independent judgment and acting under the direction of the chairman.

Whether such a duty should be legally imposed on company secretaries depends on their functions vis-à-vis the board (whether they also take executive decisions), the organizational objectives (what kind of responsibilities are delegated to them), and corporate governance agenda (whether they have the task to manage a group's compliance programme). The company secretary may act as the following: chief of staff to the non-executive chairman; adviser to the board; critical appraiser of board members' roles; third person in a chairman-CEO relationship; interface between the board and the shareholders; or a gatekeeper for corporate governance.<sup>69</sup> If these roles are to remain open for organizational innovation, the duty of independence does not need to be legally prescribed. This approach would allow companies to design the job descriptions freely without being caught out unnecessarily by strict legal rules.<sup>70</sup>

Hence, a code of conduct with a situational approach to the meaning of "independence"—using the negative criteria as the Corporate Governance Code of 2016 does for independent directors—can be issued for defining relational independence.<sup>71</sup> In addition, there can be systems and processes to ensure the quality of independence,

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<sup>67</sup> See Companies Act 2006, *supra* note 1, at § 173, pt. 10.

<sup>68</sup> See UK Corporate Governance Code, *supra* note 21; *see also* MAS, *supra* note 31.

<sup>69</sup> See UK Corporate Governance Code, *supra* note 21, at 13.

<sup>70</sup> See Julia Black et al., *Making a Success of Principles-based Regulation*, 1 L. & FIN. MKT.'S REV. 191, 193 (2007) (explaining that principles-based regulation can be considered).

<sup>71</sup> See UK Corporate Governance Code, 2016, *supra* note 21, at 9.

notably on the appointment to and removal from office.<sup>72</sup> The professional code can provide guidance and fulfill the independent judgment requirement for lawyers and auditors.<sup>73</sup>

*B. APPOINTMENT AND REMOVAL*

If the company secretary is expected to be a corporate gatekeeper in a similar way as an auditor, the appointment and removal of an auditor could offer an equivalent way of proceeding. Thus, since an individual director cannot unilaterally dismiss an appointed auditor, an individual director should also not be able to remove a company secretary, leaving only the board with the power of appointment or removal.<sup>74</sup> As the law places greater control on the appointment and removal of a company's auditor for greater investor confidence, auditor rotation, control of auditors' remuneration, control procedures for limiting auditors' liabilities to the company, and shareholder participation in appointment and removal processes, all help to ensure auditor independence. Although there is no hard law in the U.K. with the effect of regulating a company secretary's independence, the U.K. Corporate Governance Code recommends that only the board should have the ability to appoint and remove a company secretary; an individual director should not be able to do so unilaterally.<sup>75</sup> This is also the approach adopted in Hong Kong, Singapore, Taiwan, and China except that there is no clear indication of whether an individual director, acting with delegated powers from the board, can unilaterally dismiss the company secretary.<sup>76</sup> Taiwan further specifies that the nomination committee should participate in the appointment of the company secretary.

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<sup>72</sup> See Reiner Quick, *EC Green Paper Proposals and Audit Quality*, 9 ACCT. EUR. 17 (2012) (explaining that some lessons can be learned from auditor's appointment and removal to maintain audit independence).

<sup>73</sup> See APB Ethical Standard 1 (Revised) Integrity, Objectivity and Independence, FIN. REPORTING COUNCIL, 2008 (U.K.), [https://www.frc.org.uk/getattachment/6dc8ccb6-1b3c-47fc-b09d-0780121fe82b/ES-1-\(Revised\)-Integrity,-objectivity-and-independ.pdf](https://www.frc.org.uk/getattachment/6dc8ccb6-1b3c-47fc-b09d-0780121fe82b/ES-1-(Revised)-Integrity,-objectivity-and-independ.pdf).

<sup>74</sup> See UK Corporate Governance Code, *supra* note 21, at 14.

<sup>75</sup> See *id.*

<sup>76</sup> See HKEX, *supra* note 31; see also MAS, *supra* note 31.

*C. SHAREHOLDER APPROVAL*

Should the shareholders have a say on the appointment and dismissal of their governance officer? A company secretary can be a permanent employee of a company, unlike an auditor (a contractor) or a company director of a listed company whose term of office is usually based on a service contract of some limited period. Subjecting company secretaries to similar controls could disrupt the administrative operation of companies, including the strict filing and reporting duties required by the law. If the removal and appointment of a company secretary requires shareholder approval at a general meeting, the board will be unable to quickly suspend a company secretary who is found to be in default of compliance with the law or of his or her contractual or other duties to the company.<sup>77</sup> In an interim period, such a company may need to fulfill its filing duties urgently and convening a meeting to obtain approval of the company's shareholders can cause missed filing deadlines with a consequent contravention of the law for which directors would be liable.<sup>78</sup>

Some lessons may be learned from the auditor's model for regulating the independence of the company secretary. Auditors have the right to make representations to the shareholders who vote on the question of their removal.<sup>79</sup> A similar arrangement could be set up for the removal of a company secretary. Prior to the authorization of their removal, they should be able to make a written or oral representation to the board. Since their removal is not by ordinary resolution, a representation to the general meeting may not be justified. However, the Corporate Governance Code should require a representation to be included in the company's annual report. This will make the removal process more transparent.

Using a soft law approach to regulate the role of company secretary with the emphasis on disclosing company policy as well as

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<sup>77</sup> See UK Corporate Governance Code, *supra* note 21, at 18 (requiring shareholder approval for a removal of the auditor).

<sup>78</sup> See Companies Act 2006, *supra* note 1, at § 541 (U.K.).

<sup>79</sup> See *id.* at § 511.

setting up formal procedures for appointment and removal would allow independence to be enhanced within the board and the company.

### SECTION III: THE PROSPECTS AND LEGAL CHALLENGES OF PROVISIONAL SERVICES FIRMS

#### *A. JUSTIFICATION FOR OUTSIDE PROFESSIONAL SERVICES FIRMS TO ACT*

It is debatable whether a permanent employee (an internal officer) or a contracted professional firm (an external contractor) would better fulfil the role of gatekeeper. An employee company secretary is closer and more integrated into the board and the company than an external consultant. He is in closer proximity to the shareholders and, hence, is in a better position to act as spokesperson for the board in communicating with shareholders. An employee company secretary may hold a longer tenure than executive directors and, having experienced both good and bad times, is also a better repository of corporate memory, which is invaluable for providing guidance to a board.<sup>80</sup>

On the other hand, an external person may be more independent from the management and can take a more objective view. In fact, many corporate gatekeeping functions are now being taken up by outside professional firms as contractors who can provide company secretarial services. Some listed companies have long been using professional services firms to fulfil their statutory requirements. This includes the appointment of professional services firms to act as company secretary, outsourcing some part of the work to the firms, or

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<sup>80</sup> See ICSA: THE GOVERNANCE INST., *THE COMPANY SECRETARY: BUILDING TRUST THROUGH GOVERNANCE* (2014).

retaining them as back-up support.<sup>81</sup> This is also the case for the countries discussed here, except Taiwan and China.

Unlike Singapore, China, and Taiwan, neither Hong Kong nor U.K. law requires a company secretary to be a full-time employee or an individual person.<sup>82</sup>

A body corporate providing secretarial services can be appointed as the company secretary. The benefit of having a corporate company secretary is that it provides flexibility by enabling more than one person to represent the company and gives access to a more extensive knowledge base. Similarly, a professional firm in the form of a partnership or limited liability partnership (LLP) can also provide such services. Professional services firms can have greater expertise and knowledge in particular areas of governance, such as the listing and compliance requirements for stock exchanges. A company does not need to employ a full-time person to hold the office and can contract the service out to a professional firm to be more cost-effective. If a company needs specialised knowledge—in financial law, for example—a law firm can provide the service. A lawyer can be retained by a company to hold the office of company secretary. Such retainers are generally welcomed by law firms because they allow the law firms to become familiar with the company and to forge a good business relationship with it. In such cases, the company is free to design its own job description and the professional services firm can provide tailor-made secretarial services. Market competition between firms allows companies to obtain cost-effective secretarial services.<sup>83</sup>

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<sup>81</sup> This is the case especially at times of peak company secretarial activity, such as the year-end.

<sup>82</sup> See HKEX, *supra* note 31, at 25 (explaining that Hong Kong also allows a body corporate to act as a company secretary).

<sup>83</sup> See Christopher Humphrey et al., *Regulating Audit Beyond the Crisis: A Critical Discussion of the EU Green Paper*, 20 EUR. ACCT. REV. 431 (2011).

*B. QUESTIONS OF INDEPENDENCE AND LIABILITY*

Two major issues arise. As with audit firms, market competition, a driver thought to deliver innovation, can compromise the element of independence that is critical for the gatekeeping service.<sup>84</sup> The company secretary's independence is fundamental to corporate value creation. However, how can secretarial quality be maintained and enhanced in this respect if the provision of the service is subject to market competition? Also, how should a company secretary's acts and liability be attributed? Does the liability rest with the company or the firm that provides the service, whether a company, an ordinary partnership, or limited liability partnership? Professional services firms, which potentially hold assets,<sup>85</sup> are more likely to become a source of compensation than an individual employee with limited assets. Since April 2005, U.K. companies can now freely provide indemnities to a secretary as they see fit.<sup>86</sup> If this can apply to professional services firms, controls should be established to ensure that service quality is not unduly compromised.

*C. MAINTAINING THE ATTRIBUTE OF INDEPENDENCE*

1. LOW-BALLING ISSUE AND DISCLOSURE

Many professional services firms provide a large range of corporate services to companies including audit, management, tax, secretarial, and legal services. The issue of auditor independence has been raised when an auditor, acting as an external gatekeeper, plays

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<sup>84</sup> See Sharad Asthana, et. al, *Fee Competition among Big 4 Auditors and Audit Quality*, 50 REV. OF QUANTITATIVE FIN. & ACCT. (2018), available at <https://doi.org/10.1007/s11156-018-0714-9>.

<sup>85</sup> Companies can provide indemnities to corporate officers (i.e. company directors). The auditor can also enter into a damage limitation agreement with the audited company to control their financial if not reputational exposure.

<sup>86</sup> See Companies (Audit, Investigations and Community Enterprise) Act 2004, c. 27 (U.K.).

“low ball” to gain other non-audit businesses.<sup>87</sup> Such market competition is essential to service innovation, but it can also compromise some of the key requirements for maintaining good corporate governance and creating corporate value. When an independent audit is compromised, market competition fails to deliver value not only as an engine for innovation but also as an alternative regulatory tool for quality control. None of the countries investigated here have provided solutions, specifically in the context of the company secretary.

There are many ways to regulate conflicts of interest when a professional services firm is engaged to provide secretarial services. Company secretarial and other management consulting services are more likely to be among the additional business that can be gained from audit low-balling practices. The issue is how to make sure that the secretarial services offered are not “tagged along” with the audit service. Potential conflicts can be controlled by the company disclosing such a tag-along relationship. Once the tag-along relationship has been disclosed, shareholder approval should be required to further examine potential conflicts and the value provided to the company. Such approval may only be needed for services provided by the professional services firms who offer a full range of services. Furthermore, compulsory rotation, if introduced, would be able to maintain a more arms-length relationship between the company and professional services firms. Rotation can also increase independence since the company secretary will be less attached to the management team, hence fostering a more arms-length relationship. In addition, U.K. whistle-blower protection law also applies to contractors.<sup>88</sup> This law further strengthens professional services firms’ ability to maintain the quality of independence.

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<sup>87</sup> See Patrick Velte & Carl-Christian Freidank, *The Link Between in- and External Rotation of the Auditor and the Quality of Financial Accounting and External Audit*, 40 EUR. J. OF L. & ECON. 225 (2012).

<sup>88</sup> Public Interest Disclosure Act 1998, c. 23, § 43K.

## 2. COMPETING CLIENTS AND A CHINESE-WALL

There is a further issue regarding a service firm's liability for conflicts of interest. If, as discussed in the previous section, company secretaries are contracted to provide value-added services such as the appointment of non-executive directors, designing a cost-effective reporting system, or creating a compliance monitoring programme. A professional services firm providing the same secretarial services to competing companies at the same time may give rise to a claim for a conflict of interest. This is because the firms will have access to sensitive commercial information when they attend board meetings and can access information about subsidiaries through the governance protocol or by virtue of the subsidiary's constitution.<sup>89</sup> For a partnership firm, an internal wall created to absolve potential conflicts may be needed. Such a "Chinese wall" may be more effective for managing the risk of conflicts between the audit and secretarial departments. Whether such a wall can also be effective when raised within the secretarial department is questionable. Would disclosure of the conflicts by the firm and client consent be sufficient to remove the liability? Disclosure by the firm and client consent may remove the conflicts if the secretarial service is purely administrative, but if the work includes more business-oriented services, for instance involvement in the recruitment of non-executive directors, such conflicts are not easily removed. When a law firm is retained to act as company secretary and is tasked with monitoring a corporate compliance programme, this may create a conflict if the firm is also retained by a competing company.

The U.K. is the only country, amongst the discussed jurisdictions, that has dealt with this problem to some extent. Under Section 1214(2) of the Companies Act 2006, the auditor of a company cannot also be the company secretary.<sup>90</sup> However, this does not completely solve the potential for conflicts of interest. If a company appoints an auditor

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<sup>89</sup> See generally Ben Walther, *Bylaw Governance*, 20 FORDHAM J. OF CORP. & FIN. L. 399 (2015).

<sup>90</sup> See Companies Act 2006, *supra* note 1, at § 1214(2).

from a particular services firm, this would not prevent another person from the same services firm from acting as company secretary.

*D. ATTRIBUTION OF PROFESSIONAL FIRMS' LIABILITIES*

Clarifying firms' potential liabilities is crucial for assessing the risk to the governance service industry. Since the company secretary is considered to be an officer of the company in all the jurisdictions investigated here, how can their liabilities be attributable to the firms? None of the jurisdictions investigated have a satisfactory model, even for the U.K.'s more advanced service industry. Other than the U.K. and Hong Kong, all the jurisdictions require the company secretary to be an individual person.<sup>91</sup> The U.K. and Hong Kong are the only two jurisdictions that allow a body corporate to act.<sup>92</sup> This has raised a number of legal uncertainties which have inhibited other countries from following suit.

The U.K. Companies Act 2006 imposes criminal liabilities on the company secretary.<sup>93</sup> Therefore, not having a clear approach to identifying the person to be held accountable would defeat the deterrent effect of the criminal sanctions. For civil liability, identifying the right accountable person affects the remedies to be awarded to injured parties.

1. CRIMINAL LIABILITY

Secretarial services can be provided by a professional firm, which can be a body corporate, including a limited liability partnership or a partnership.<sup>94</sup> The law states that it is possible for an officer of the company to be held civilly and criminally liable.<sup>95</sup> When a company

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<sup>91</sup> *See id.* § 1205.

<sup>92</sup> *See id.* §§ 254-55; *see also* HKEX, *supra* note 31.

<sup>93</sup> *See* Companies Act 2006 *supra* note 1, at §§ 26(3), 32(3), 425, 451.

<sup>94</sup> *See* Limited Liability Partnerships Act, 2000, c. 12, § 1(2) (U.K.) (explaining that a body corporate includes limited liability partnerships).

<sup>95</sup> *See generally id.*

engages a partnership firm (i.e. an LLP, which is a separate legal entity from its members) to provide services, who is the person, in fact and in law, appointed to hold the office of company secretary?

In the U.K., a body corporate can be made criminally liable.<sup>96</sup> Yet, there is some confusion in the wording of the provisions under the Companies Act 2006 (the Act). The Act provides that when a person is an officer of another company, he or she does not commit an offence as an officer in default unless one of the company's officers is in default.<sup>97</sup> The provision can be taken to mean that the company providing the secretarial services, by holding the office of company secretary, cannot be held criminally liable under the Act unless a director of the professional services firm is identified as an officer in default by authorizing, permitting, participating in, or failing to take all reasonable steps to prevent the contravention. Nevertheless, a director of a professional services firm may not be personally involved in the provision of the service, and in that case, the director's firm will not be held criminally liable. The current provisions of the Act can make the application of the attribution rules confusing.

When the services firm is a partnership or limited liability partnership, an individual member of that firm will serve as the company secretary and, thus, criminal liability is assumed by that individual rather than the firm. However, because a limited liability partnership acquires a separate legal identity, if the company engages the services firm rather than an individual from the firm, a similar question can arise. Neither the Act nor case law has yet considered such a situation. A clear legal framework on attributing individual behaviour or liability to the entity or association of the professional services firms should be introduced.

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<sup>96</sup> See Criminal Justice Act, 1993, c. 36, § 52 (U.K.); see also Enterprise Act 2002 c. 40, § 188 (U.K.).

<sup>97</sup> See Companies Act 2006, *supra* note 1.

## 2. CIVIL LIABILITY

In terms of civil liability, the company or its shareholders through a derivative claim can pursue compensation claims or a claim to account for profits against the firm or the individual from the firm providing the service.<sup>98</sup> Assuming the professional services firm is a body corporate such as a company, claims can be made against the company.<sup>99</sup> If the firm is an entity other than a company, claims in contract or in tort brought to obtain compensation will depend on the organizational form of the firm—whether the individual is liable or all the members of the partnership could be claimed against. If an LLP is retained to act as the company secretary, the contract is between the company and the LLP, which is a body corporate under U.K. law.<sup>100</sup> An action for damages should be brought against the LLP. There can be an indemnity provision in the contract. Yet, an action in tort can be brought against the individual person providing the service.<sup>101</sup>

Since other countries use different business forms for professional services firms, it may not be easy for develop a common model among them. This also explains why other countries, apart from the U.K., have capacity—natural person only—and residence requirements.<sup>102</sup> These requirements remove the risks of being unable to hold an individual accountable and not being able to make claims against firms with limited liability protection.

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<sup>98</sup> *See id.* § 210.

<sup>99</sup> *See id.*

<sup>100</sup> *See* Limited Liabilities Partnership Act, 2000, c.1, § 1 (U.K.).

<sup>101</sup> *See* Companies Act 2006, *supra* note 1, at 563.

<sup>102</sup> *See* Dezan Shira, *Nationality and Residency Requirements for Directors across ASEAN – Part One*, ASEAN BRIEFING (Nov. 26, 2015), <https://www.aseanbriefing.com/news/2015/11/26/nationality-residency-requirements-directors-across-asean-part-one.html>.

## SECTION IV: TRANSNATIONAL GOVERNANCE AND COMBINATION WITH THE OFFICE OF GENERAL COUNSEL

### A. *TRANSNATIONAL GOVERNANCE AND THE RESULTING SYNERGIES*

There are a number of jurisdictions that require companies to appoint a company secretary.<sup>103</sup> As multinational companies are becoming the main providers of goods and services, company secretaries' tasks are to design an effective subsidiary governance framework to mitigate harms and to create governance synergies. These synergies can be delivered in the case of actual or potential joint law enforcement actions against multinational companies. In actual joint law enforcement, company secretaries are the first contact point for responding to regulatory and enforcement enquiries across many jurisdictions. In potential joint law enforcement actions, their role is to ensure that measures, such as a subsidiary governance framework,<sup>104</sup> are in place to prevent enforcement actions or to defer an enforcement action in the case of a deferred enforcement action agreement.<sup>105</sup>

### B. *GENERAL COUNSEL AND COMPANY SECRETARY*

Within a multinational company, if the general counsel also serves as company secretary, the legal office can be organized to include the company secretaries of subsidiaries incorporated in different jurisdictions. Many U.K. companies have combined the offices of

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<sup>103</sup> Ireland, Australia (only for public companies), New Zealand, Taiwan, Hong Kong, Singapore, China, and the U.S.A. (see DEL. CODE ANN. tit. 8, § 142(a) (1998)).

<sup>104</sup> See Federico Mazzacuva, *Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the U.K. and U.S. Systems of Criminal Justice*, 78 J. OF CRIM. L. 249, 249-62 (2014).

<sup>105</sup> The company secretary can also be the designated person to monitor a deferred statement programme.

company secretary and corporate counsel.<sup>106</sup> Under a subsidiary governance framework, the subsidiary company secretaries can provide needed information (e.g. a certificate of political donations) to the general counsel of the parent company and can assist the general counsel with implementing procedures as required by law (e.g. an anti-bribery programme) for the subsidiary companies.<sup>107</sup> A governance structure designed to allow the company secretary of the parent company to supervise, through a reporting line, subsidiary companies' secretaries can effectively ensure improved information-sharing across the group organisation.<sup>108</sup>

In increasing joint enforcement by multi-jurisdictional enforcement agencies, a global settlement agreement with a reform programme would be a cost saving strategy for a defaulting company. This combination of the two offices would make it easier for monitored parent companies to conduct due diligence on other group affiliates.<sup>109</sup> However, a general counsel or a legal officer is not required in the U.K.<sup>110</sup> and in many other jurisdictions, yet many large companies and multinational companies have general counsel offices or legal departments that manage the company's legal affairs. If a general counsel or legal officer is not a legally required officer within the organization, this person may not have legal access to or the power to obtain corporate information. Legally, the general counsel does not have access to the boardroom,<sup>111</sup> but such access can be gained through

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<sup>106</sup> See, Ian Maurice, *General Counsel and Company Secretary: To Combine or Not to Combine*, EGON ZEHNDER (July 31, 2011), <https://www.egonzehnder.com/functions/human-resources/insights/general-counsel-and-company-secretary-to-combine-or-not-to-combine>.

<sup>107</sup> See *Subsidiary Governance: An Unappreciated Risk*, PRICEWATERHOUSECOOPERS LLP, (2013), <https://dpe.pwc.com/content/dam/pwc/gx/en/legal/entity-governance-compliance/publications/assets/subsidiary-governance.pdf>.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Companies Act 2006, c. 46, (U.K.).

<sup>111</sup> See *id.*

becoming the company secretary.<sup>112</sup> Thus, the general counsel may request information from a subsidiary company's in house counsel who does not have the legal power to access the company's information. However, a company secretary who is an officer of the company would have such power, and obtaining corporate information such as records or sales data would not need to be authorised by the executive directors—to whom the general counsel is affiliated.<sup>113</sup>

U.K. companies are required to implement internal procedures under various acts to protect the stakeholders of the company and safeguard the interests of the general public.<sup>114</sup> Companies are required to put in place health and safety procedures to protect employees and to implement an anti-corruption system within the organization, including subsidiary companies incorporated in other jurisdictions.<sup>115</sup> Company secretaries involved in the design and implementation of these procedures who work collaboratively with other company secretaries of the same group under the general counsel's office would ensure that the norms of the parent company are effectively diffused through the subsidiary companies. These procedural mechanisms not only create a safe harbour if there is misconduct by an employee or an agent of the company and its subsidiaries, but they may be required by regulators as a condition for a deferred prosecution.<sup>116</sup> Since some of the countries investigated here require the company secretary to operate under the chairman, it is questionable whether the office of a parent company's secretary can give direct instructions to the company secretaries of their subsidiary companies.

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<sup>112</sup> See generally *id.* § 210 (describing the position of secretary as a board position and its duties and authority).

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See Jessica Dijlani, *The British Importation of American Corporate Compliance*, 76 BROOKINGS L. REV. 303, (2011).

## THE PROBLEM OF WEARING TWO HATS

When a person serves as both general counsel and company secretary of a single company, it is difficult to make a precise distinction between the functions and roles of the two posts. U.K. law requires a company to appoint a secretary, but it does not require a general counsel.<sup>117</sup> Yet, a general counsel acts as an independent legal adviser to a company, and legal advice given to the company receives privileged protection against disclosure.<sup>118</sup> A company secretary, however, is an officer of the company rather than an independent legal adviser and any advice given, even if legal, is not protected by the legal privilege rules.<sup>119</sup> Legal privilege rules confer protection on companies against the disclosure of internal communications, which would otherwise be required by third parties.<sup>120</sup> A company secretary may have a duty to report to the regulator and may have to make a public interest disclosure of misconduct by the company, or an insider of the company, to the regulator while receiving protection.<sup>121</sup> Yet, the general counsel does not have such a duty and may not make a public interest disclosure.<sup>122</sup> So it is understandable why a general counsel may be appointed to hold the office of company secretary, even if not all of the advice given to the board or individual officers of the company in internal communications can be classified as legal advice. There is clearly an advantage for companies to appoint a legally qualified person to act as company secretary. Thus the office can be easily assumed by general counsel of the company. This,

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<sup>117</sup> See Companies Act 2006, c. 46 (U.K.).

<sup>118</sup> See *Three Rivers Dist. Council v. Bank of Eng.* [200] UKHL 48, [2005] 1 AC 610; see also *Three Rivers Dist. Council v. Bank of Eng.* [2003] EWCA Civ 474, [2003] 5 QB 1556.

<sup>119</sup> See *Three Rivers Dist. Council*, [200] *supra* note 118.

<sup>120</sup> See *id.*

<sup>121</sup> See *The Public Interest Disclosure Act, 1998*, c.1 (U.K.).

<sup>122</sup> See *Three Rivers Dist. Council*, [200] *supra* note 118.

however, excludes other governance professionals such as auditors who can provide different set of governance skills to the companies.

### COMMUNICATION PRIVILEGE AGAINST DISCLOSURE GIVEN TO THE COMPANY SECRETARY

Communication privilege against disclosure should be given to a company secretary who is not a legally qualified person in the U.K. to level the playing field. In other jurisdictions, this protection can also encourage a board to communicate with its corporate governance officer.

The corporate governance codes of the U.K., Hong Kong, Singapore, and Taiwan all specify that a company secretary should be accessible to board members for advice.<sup>123</sup> If so, would advice given to individual non-executive directors on their rights and duties constitute legal advice? Such protection may encourage non-executive directors to seek the advice of general counsel or outside counsel on an issue. Based on such advice, non-executive directors can make legally informed decisions. Without such legal privilege protection, members of the board would not only be less willing to use the company secretary for internal governance advice but also less willing to share information with them.

Should privilege protection cover internal communications between a company secretary who is not legally qualified and the company, or the individual directors, to enhance corporate value? In all the work carried out by the company secretary of a listed company, they must put on legal spectacles<sup>124</sup> when providing their service, be it formulating governance protocols and instituting reporting systems to improve governance standards or evaluating governance strategies and

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<sup>123</sup> See UK Corporate Governance Code, 2016, *supra* note 21; see also MAS, *supra* note 31; see also TAIWAN STOCK EXCHANGE, *Taiwan Stock Exchange Corporation Rules Governing the Preparation and Filing of Corporate Social Responsibility Reports by TWSE Listed Companies* (2015), <http://twse-regulation.twse.com.tw/ENG/EN/law/DAT0201.aspx?FLCODE=FL075209>; see also HKEX, *supra* note 31.

<sup>124</sup> See generally Three Rivers Dist. Council [200], *supra* note 118 (detailing the test developed by Lord Roger).

best practice. They also act as a liaison between the board and management. Without such protection, officers may be discouraged from seeking advice from a non-lawyer company secretary. If such a company secretary is not used by other officers for internal advice this would reduce the company secretary's ability to give advice on governance issues. In particular, if the company secretary acts as chief of staff to the chairman and also as the executive and non-executive directors' link to the chairman, protection given to their communications would enhance greater information sharing at that level. Such protection would level the playing field for a company secretary without legal qualifications who can provide an enhanced level of governance compared with a general counsel who is normally attached to the CEO's office.

### CONCLUSION

Many common law and non-common law countries have recognized the governance value of a company secretary playing the role of corporate governance officer in listed companies. This article has shown that soft law based corporate governance has the potential to enhance the gatekeeping functions of the company secretary in facilitating corporate transparency through law and policy compliance. It may also enhance board independence through assisting oversight by non-executive directors. The attribute of independence of a company secretary—both independence in terms of judgment and in terms of his relationships with the company and members of the board—can benefit from a soft law approach to regulation. Professional codes of conduct can be developed to provide situational guidance on independence. Corporate governance codes can include a regime on the appointment and removal of a company secretary, including the right of representation to the board of a removed company secretary, and on conflicts of interest that may arise when appointing a professional services firm as company secretary. More definite rules on corporate attribution in civil and criminal liabilities should be introduced to increase the utility of professional services firms in the provision of such a gatekeeping service. The U.K., as the leading governance services providing country, has the potential to provide guidance. However, some amendment to the current provisions in the Companies Act 2006 should be made to avoid a confusing reading. At the transnational level, there can be governance

synergies in creating joint subsidiary governance frameworks. Although company secretaries may yield synergies in providing coordinated responses to joint enforcement actions at a cross-border level, a non-legally qualified secretary can also bring a different set of skills to companies in assisting the governance programme. Giving protection to communications between the company secretary and board members can increase the ability of the company secretary to give guidance in matters of governance.

# 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.<sup>1</sup> Cuba's socialist revolution and uncompensated expropriation of U.S.

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\* 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.

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<sup>1</sup> 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 Barack Obama's pledge to restore diplomatic relations with Cuba and the subsequent loosening of U.S. economic sanctions against Cuba.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Accordingly, this paper will address the

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<sup>2</sup> See President Barack 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>.

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

<sup>4</sup> See, e.g., *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1253–54 (S.D. Fla. 1997) (arising from Cuban Government directing Air Force to shoot down two unarmed civilian airplanes over international waters on February 24, 1996, where district court entered judgment for the plaintiffs and awarded them compensatory damages of \$49,927,911 against the Cuban Government and Cuban Air Force, as well as punitive damages of \$137,700,000 against the Cuban Air Force alone).

resolution of the U.S. expropriated-property claims against Cuba as well as other potential legal claims each country will likely raise against the other in their diplomatic negotiations.

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

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

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

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

property on the island.<sup>6</sup> 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.<sup>7</sup> Cuba's Foreign Minister's early indication that the new Cuban government was willing to negotiate was rebuffed by the U.S.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> After the U.S. significantly decreased Cuban sugar imports, "[o]n January 1, 1961, Cuba ordered all U.S. diplomatic" staff

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

<sup>7</sup> 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).

<sup>8</sup> See, MICHAEL W. GORDON, *THE CUBAN NATIONALIZATION* 7 (1976).

<sup>9</sup> See Ashby, *supra* note 7, at 420.

<sup>10</sup> 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.<sup>11</sup> Two days later, the United States announced the formal breaking of diplomatic relations with the Cuban government.<sup>12</sup>

A few months later, on April 15, a U.S. aircraft bombed three airports in Cuba.<sup>13</sup> 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.<sup>14</sup> This was the catalyst for Castro's declaration of the socialist revolution.<sup>15</sup> 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.<sup>16</sup> Economic conditions in Cuba worsened when Cubans were deprived of the basic food and necessities usually imported from the Soviet Union and Eastern Europe.<sup>17</sup> The U.S. sought to use Cuba's vulnerable state to increase economic pressure on the Castro government.<sup>18</sup> 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.<sup>19</sup> The revival of foreign investment in Cuba was viewed by the United States as a threat to its legal claims to previously-expropriated property.<sup>20</sup> More stringent requirements for lifting the U.S. embargo came after four Cuban-Americans were killed when a Brothers to the Rescue plane

<sup>11</sup> Gilmore, *supra* note 6, at 84.

<sup>12</sup> See DOMINGUEZ & PROVOST, *supra* note 5, at 49.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> See JONATHON D. ROSEN & HANNA S. KASSAB, U.S. CUBA RELATIONS CHARTING A NEW PATH 61 (2016).

<sup>16</sup> See Andrew Zimbalist, *Treading Water: Cuba's Economic and Political Crisis*, in CUBA AND THE FUTURE 7, 7-11 (Donald E. Schulz ed., 1994).

<sup>17</sup> See DOMINGUEZ & PROVOST, *supra* note 5, at 99.

<sup>18</sup> *See id.* at 104.

<sup>19</sup> See Zimbalist, *supra* note 16, at 11.

<sup>20</sup> See DOMINGUEZ & PROVOST *supra* note 5, at 107.

was shot down by Cuban military in 1996.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> By 2001, the U.S. policy toward Cuba sought to compel a transition to democracy on the island through economic pressure.<sup>24</sup> President George W. Bush maintained the same policies toward Cuba.<sup>25</sup> 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 Barack Obama’s two terms, 2008–2016, marked a historical shift in U.S.-Cuba policy.<sup>26</sup> In his first term, President Obama’s administration eased travel restrictions, enabled remittances to Cuba, and allowed people-to-people exchanges.<sup>27</sup>

<sup>21</sup> See ROSEN & KASSAB, *supra* note 15, at 67.

<sup>22</sup> 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).

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

<sup>24</sup> 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).

<sup>25</sup> See ROSEN & KASSAB, *supra* note 15, at 67.

<sup>26</sup> 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](http://www.cubastudygroup.org/index.cfm/files/serve?File_id=45d8f827-174c-4d43-aa2f-ef7794831032).

<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> The U.S. embassy in Cuba was reopened in August 2015.<sup>31</sup> 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.<sup>32</sup>

### C. OTHER RECENT CHANGES

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

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

<sup>28</sup> ROSEN & KASSAB, *supra* note 15, at 72.

<sup>29</sup> President Barack Obama, *supra* note 2.

<sup>30</sup> See ROSEN & KASSAB, *supra* note 15, at 73.

<sup>31</sup> *Id.* at 74.

<sup>32</sup> 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.<sup>33</sup> Before stepping down, President Raul Castro changed some of the leadership in Cuba, and commenced the process of implementing a new economic reform plan.<sup>34</sup> The Cuban government's rhetoric evidences a move toward liberalization of its economy, including significant changes to its foreign investment laws.<sup>35</sup> Some small private businesses are legal in Cuba, although the licensing process remains unpredictable.<sup>36</sup> Cuba has entered into forty bilateral investment treaties signaling a respect for the legitimacy of international investment law.<sup>37</sup>

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

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<sup>33</sup> 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 Sesin, *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>.

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

<sup>35</sup> See, e.g., Foreign Investment Act, 1995, No. 77, amended in 2014, No. 118 (Cuba).

<sup>36</sup> 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.

<sup>37</sup> See discussion *infra* Section IV.B.

<sup>38</sup> See ROSEN & KASSAB, *supra* note 15, at 109-23.

<sup>39</sup> See *id.*

enthusiastic for positive change and access to the island.<sup>40</sup> 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..<sup>41</sup>

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

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

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.<sup>46</sup> 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

<sup>40</sup> 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).

<sup>41</sup> See ROSEN & KASSAB, *supra* note 15, at 118-23.

<sup>42</sup> See *id.* at 99.

<sup>43</sup> 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>.

<sup>44</sup> See *id.* at 112.

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

<sup>46</sup> 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.”<sup>47</sup> 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.<sup>48</sup> Thus, a shift toward resolution of these claims is in line with the Republicans’ position on Cuba and Helms-Burton Act requirements.<sup>49</sup>

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.<sup>50</sup> In addition to the state of affairs in the U.S., recent events in Cuba<sup>51</sup> and Cuba’s continued support of leftist regimes in the region<sup>52</sup> also serve to exacerbate the breaking down of the relationship between the U.S. and Cuba.

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<sup>47</sup> 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>.

<sup>48</sup> 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.

<sup>49</sup> See *id.*

<sup>50</sup> 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>.

<sup>51</sup> 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>.

<sup>52</sup> 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.<sup>53</sup> 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

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<sup>53</sup> See Mark P. Sullivan, *Cuba: U.S. Policy in the 115<sup>th</sup> 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.<sup>54</sup>

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.<sup>55</sup> 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

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

<sup>55</sup> 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.<sup>56</sup> 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,<sup>57</sup> and claims against the Cuban government for confiscation of property deemed “abandoned.”<sup>58</sup> 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,”<sup>59</sup> from the long-standing U.S. economic sanctions<sup>60</sup> and personal injury damages sustained by Cubans killed or harmed by alleged U.S. hostilities.<sup>61</sup> The economic damages sought

<sup>56</sup> See 22 U.S.C. § 1643(b) (2012).

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

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

<sup>59</sup> 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>.

<sup>60</sup> 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.

<sup>61</sup> 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.<sup>62</sup> Further, the Cuban government claims that U.S. acts of terrorism against Cuba have caused 3,478 deaths and 2,099 disabling injuries.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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.

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

<sup>62</sup> 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.

<sup>63</sup> See REPUBLIC OF CUBA, *Necesidad de poner fin al bloqueo económico, comercial y financiero impuesto por los Estados Unidos de América contra Cuba* (July 2014); Feinberg *supra* note 61, at 13.

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

<sup>65</sup> See *e.g.*, Alejandre *supra* note 4.

In light of the longstanding failure of diplomacy alone and the fragility of the relationship between the countries, agreeing that international law governs their compensation and damages claims will provide a certain legitimacy to the negotiation process. In truth, this should not be too hard. Both the U.S. and Cuba have through treaties,<sup>66</sup> domestic legislation,<sup>67</sup> and their respective U.N. voting record<sup>68</sup> exhibited that international law should govern many of their legal claims against the other. Submitting these claims to a third-party neutral mediator,<sup>69</sup> arbitrator,<sup>70</sup> or some other agreed-upon legal process<sup>71</sup> (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

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<sup>66</sup> 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*, 33I.L.M. 1124 (Apr. 15, 1994).

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

<sup>68</sup> 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].

<sup>69</sup> 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.”).

<sup>70</sup> 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.”).

<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> “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.<sup>74</sup> Under international law, the essential feature of expropriation is the taking of property by the

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<sup>72</sup> 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.”

<sup>73</sup> See GORDON, *supra* note 8, at 119 n.24.

<sup>74</sup> See *id.*

state.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> Article 87 recognized the Cuban right to private property to the fullest extent, limited only for public necessity

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<sup>75</sup> 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](https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf).

<sup>76</sup> CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 24, 1940.

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

<sup>78</sup> See *id.*

or social interest as established by law.<sup>79</sup> Robust amendment requirements also worked to strengthen the property protections.<sup>80</sup>

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.<sup>81</sup> The first amendment was the addition of Article 232.<sup>82</sup> 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.<sup>83</sup> As part of that first amendment, the Council changed the language of Article 24.<sup>84</sup> 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.<sup>85</sup> 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

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<sup>79</sup> *See id.* at art. 87.

<sup>80</sup> *See id.* at art. 285-286.

<sup>81</sup> *See* CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, *supra* note 76, art. 24.

<sup>82</sup> *See id.* at art. 23.

<sup>83</sup> *See id.*

<sup>84</sup> *Id.* at art. 24.

<sup>85</sup> *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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.”<sup>90</sup>

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

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

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

<sup>88</sup> GORDON, *supra* note 8, at 75.

<sup>89</sup> *Id.*

<sup>90</sup> Rafat, *supra* note 87, at 46.

<sup>91</sup> *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.<sup>92</sup> The Act's compensation mechanism was to be implemented by Law numbers 576 and 588.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> However, the compensation plan was dead on arrival and never implemented nor accepted by the U.S..<sup>96</sup> Further, the Act was never carried out as enacted.<sup>97</sup> Instead, the National Institute of Agrarian Reform (INRA) acted arbitrarily with broad powers by physically removing owners from the property without any receipt or

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<sup>92</sup> 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.)

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

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

<sup>95</sup> Ley No. 588, *supra* note 93, at arts. 5 & 13.

<sup>96</sup> 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.'").

<sup>97</sup> See GORDON, *supra* note 8, at 134.

acknowledgment.<sup>98</sup> INRA made up the rules for expropriation as it went along.<sup>99</sup>

The U.S. Department of State expressed its concerns over Cuban treatment of U.S. property in a diplomatic note on June 11, 1959.<sup>100</sup> 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.”<sup>101</sup> 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.<sup>102</sup> As for the compensation provision in the Act, the Ambassador expressed concern about the “adequacy” of compensation.<sup>103</sup> Further, the Ambassador pointed to Cuba’s 1940 Constitution, which provided similar redress for expropriation.<sup>104</sup> 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.”<sup>105</sup> The U.S. answered that the expropriating state cannot use domestic problems to excuse its

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<sup>98</sup> *See id.* at 135.

<sup>99</sup> *See id.* at 76.

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

<sup>101</sup> *Id.* at 958.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 959.

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

<sup>105</sup> 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.”<sup>106</sup>

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.”<sup>107</sup>

#### 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.<sup>108</sup> The Nationalization Law authorized the Cuban government to forcefully expropriate all American property interests in defense of Cuban national interest.<sup>109</sup> The Law’s preamble stated that it was enacted generally in response to

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<sup>106</sup> *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).

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

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

<sup>109</sup> *See id.* at Preamble.

U.S. political aggression, obligating the Cuban government to adopt such a sweeping expropriation measure.<sup>110</sup>

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.<sup>111</sup>

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.<sup>112</sup>

In furtherance of the mandates of the Nationalization Law, Resolution numbers 1, 2, and 3 transferred all American-owned enterprises into state ownership.<sup>113</sup> 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.<sup>114</sup> The resolutions also authorized the expropriation of the remaining 166 U.S. companies operating in Cuba.<sup>115</sup>

<sup>110</sup> *See id.*

<sup>111</sup> Proclamation No. 3355, 25 Fed. Reg. 6414 (1960).

<sup>112</sup> 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).

<sup>113</sup> *See Rafat, supra* note 87, at 47.

<sup>114</sup> *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).

<sup>115</sup> *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. 890<sup>116</sup> and 891.<sup>117</sup> Law Nos. 890 and 891 with the express aim to reorganize Cuba's economic structure to that of a planned economy<sup>118</sup> and nationalize 382 major companies and banks.<sup>119</sup> These laws were part of a larger policy aimed at the complete elimination of foreign-owned private investment in all but minor businesses.<sup>120</sup> Many Cuban businesses were also expropriated at that time.<sup>121</sup>

Finally, Cuba passed Law No. 989 of 1961, which authorized the takings of "abandoned" property.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> 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

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

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

<sup>118</sup> See Rafat, *supra* note 87, at 48.

<sup>119</sup> See GORDON, *supra* note 8, at 103.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 104.

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

<sup>123</sup> 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.).

<sup>124</sup> See *id.*

and effective” compensation for the takings of its nationals’ property from 1959-1963.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> 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

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<sup>125</sup> See, e.g., U.S. Dipl. Note ARL, *supra* note 96, at 959.

<sup>126</sup> See, e.g., *id.* at 959.

<sup>127</sup> 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.<sup>128</sup> Then, the embargo was strengthened in response to national security concerns culminating in the Cuban Missile Crisis.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup>

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,<sup>132</sup> announced a complete ban on U.S. exports to Cuba except for non-subsidized foodstuffs, medicines, and medical supplies.<sup>133</sup> 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*

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

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

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

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

<sup>132</sup> 50 U.S.C. §§ 2021-32 (repealed in 1969).

<sup>133</sup> 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.*<sup>134</sup> 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.”<sup>135</sup> In 1961, before the Bay of Pigs invasion but after the official break of diplomatic relations, Congress passed the Foreign Assistance Act.<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup>

#### 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.<sup>139</sup> On February 6, 1962,

<sup>134</sup> S. 63, 81st Cong. § 2(b) (1949) (emphasis added).

<sup>135</sup> Smagula, *supra* note 96, at 75.

<sup>136</sup> *See* Foreign Assistance Act, *supra* note 128, at § 2370.

<sup>137</sup> *Id.* at § 2370(a)(2) (emphasis added).

<sup>138</sup> *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).

<sup>139</sup> *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.<sup>140</sup> President Kennedy's proclamation cited the Inter-American Treaty of Reciprocal Assistance,<sup>141</sup> 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."<sup>142</sup> 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."<sup>143</sup>

In 1963 after the Cuban Missile Crisis, the Treasury Department issued the Cuban Assets Control Regulations (CACR)<sup>144</sup> under the authority of the Trading with the Enemy Act of 1917 (TWEA).<sup>145</sup> TWEA was amended in 1933 to cover peacetime national emergencies<sup>146</sup> 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."<sup>147</sup> The CACR prohibited all "transactions [that] involve property in which [Cuba], or any national thereof, has . . . any interest of any nature

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<sup>140</sup> *See id.*

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

<sup>142</sup> Proclamation No. 3447, *supra* note 129.

<sup>143</sup> *Id.*

<sup>144</sup> 31 C.F.R. §§ 515.101-901 (2017).

<sup>145</sup> *See* 50 U.S.C. §§ 4301-4341 (2017).

<sup>146</sup> *See* 12 U.S.C. § 95 (2012).

<sup>147</sup> *Regan v. Wald*, 468 U.S. 222 (1984).

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

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.<sup>150</sup> 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).<sup>151</sup> 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.<sup>152</sup>

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

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<sup>148</sup> 31 C.F.R. §§ 515.201(a) (2018).

<sup>149</sup> *Id.* at (b)(1).

<sup>150</sup> *See* Cuban Democracy Act, *supra* note 130; Helms-Burton Act, *supra* note 22.

<sup>151</sup> *See* Cuban Democracy Act, *supra* note 130, at § 6006.

<sup>152</sup> *See id.* at § 6007.

representative of the United Nations Human Rights Commission appointed to investigate human rights violations on the island.<sup>153</sup>

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

Four years later, Congress passed the Helms-Burton Act, which codified the embargo with the express aim of destabilizing the Cuban government.<sup>156</sup> 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.<sup>157</sup> This Act remains in effect today.<sup>158</sup>

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

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

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<sup>153</sup> *Id.* at § 6001(1).

<sup>154</sup> *Id.* at § 6002(1).

<sup>155</sup> *Id.* at § 6002(5).

<sup>156</sup> *See* Helms-Burton Act, *supra* note 22.

<sup>157</sup> *See id.* at §§ 6031-46.

<sup>158</sup> *See id.*

<sup>159</sup> *See id.* at § 6033(a).

<sup>160</sup> *See id.* at § 6034(a).

<sup>161</sup> *See id.* at § 6034(b).

<sup>162</sup> *See id.* at § 6042.

<sup>163</sup> *See id.* at §§ 6061-67.

the president to provide aid to Cuba only after a “transitional” or “democratically elected” government comes to power.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

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

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<sup>164</sup> *See id.* at § 6062(a).

<sup>165</sup> *See id.* at § 6064-65 (1996).

<sup>166</sup> *See id.* at § 6065.

<sup>167</sup> *See id.* at § 6022.

<sup>168</sup> *See* 22 U.S.C. § 6082 (2012).

<sup>169</sup> *Id.* § 6023(13)(A)(ii).

<sup>170</sup> *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>.

<sup>171</sup> *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.<sup>172</sup>

In support of the Helms-Burton Act, Congress made twenty-eight findings,<sup>173</sup> many of which referred to Cuba's violations of international obligations.<sup>174</sup> 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."<sup>175</sup> 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."<sup>176</sup>

Finally, the Act points to Cuba's refusal to implement the four United Nations General Assembly Resolutions<sup>177</sup> "condemning violations of human rights and fundamental freedoms in Cuba"<sup>178</sup> citing to the following:

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

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<sup>172</sup> See Maria Werlau, *International Law and Other Considerations on the Repatriation of Cuban Balseiros 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-balseiros-by-the-united-states/](https://www.ascecuba.org/asce_proceedings/international-law-and-other-considerations-on-the-repatriation-of-cuban-balseiros-by-the-united-states/).

<sup>173</sup> See Helms-Burton Act *supra* note 22, at § 6021(1)-(28).

<sup>174</sup> See *id.*

<sup>175</sup> *Id.* at § 6021(9).

<sup>176</sup> *Id.* at § 6081(2)

<sup>177</sup> 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.").

<sup>178</sup> *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.<sup>179</sup>

After comparing Cuba to Haiti,<sup>180</sup> 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.<sup>181</sup>

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.<sup>182</sup>

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

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<sup>179</sup> *Id.* at § 6021(23)-(24).

<sup>180</sup> *See id.* at § 6021(25).

<sup>181</sup> *Id.* at § 6021(26)-(28).

<sup>182</sup> *See id.* at § 6021.

<sup>183</sup> *See* CUBA STUDY GROUP, *supra* note 26, at 1.

use.<sup>184</sup> President George W. Bush and President Obama would eventually follow suit and continue to implement the waiver.<sup>185</sup> In response to the Presidents' use of the waiver and other attempts to bypass elements of the Act, Congress passed the Trade Sanctions Reform and Export Enhancement Act of 2000<sup>186</sup> (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.<sup>187</sup>

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

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

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<sup>184</sup> See Rossella Brevetti & Peter Menyasz, *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).

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

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

<sup>187</sup> 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).

<sup>188</sup> 31 C.F.R. § 515 (2007).

<sup>189</sup> 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>.

<sup>190</sup> 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.'s role in a post-Castro Cuba.<sup>191</sup> To oust the Castros, CAFC's recommendations included funding opposition groups in Cuba,<sup>192</sup> deploying communications aircraft to increase range of TV and radio transmissions to Cuba,<sup>193</sup> limiting family visits,<sup>194</sup> reducing remittances,<sup>195</sup> and limiting financial aid.<sup>196</sup> The U.S.'s role in post-Castro Cuba would then include providing humanitarian aid,<sup>197</sup> changing the education system to incorporate non-communist curriculums,<sup>198</sup> promoting the rule of law,<sup>199</sup> and converting Cuba to a free-market economy.<sup>200</sup> Importantly, these reforms would include the settlement of all compensation claims based on land expropriations.<sup>201</sup> 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.<sup>202</sup>

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

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

<sup>192</sup> See *id.* at 15-25.

<sup>193</sup> See *id.* at 27-28.

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

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

<sup>196</sup> See CAFC I, *supra* note 190, at 44-50.

<sup>197</sup> See *id.* at 59-67.

<sup>198</sup> See *id.* 97-98, 102-03.

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

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

<sup>201</sup> See *id.* at 224.

<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup> In May 2015, Cuba was removed from the list of state sponsors of terrorism<sup>205</sup> and the U.S. embassy in Cuba was re-opened in August 2015.<sup>206</sup> 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.<sup>207</sup> But, there have not been many substantive changes to the current regulations in place.<sup>208</sup>

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<sup>203</sup> 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.)

<sup>204</sup> See ROSEN & KASSAB, *supra* note 15, at 72.

<sup>205</sup> *Id.* at 73.

<sup>206</sup> *Id.* at 74.

<sup>207</sup> 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).

<sup>208</sup> *Id.*

*D. U.S. EVALUATION OF ITS PROPERTY CLAIMS*

In 1964, Congress added Title V—the Cuban Claims Act<sup>209</sup> to the International Claims Settlement Act<sup>210</sup> to specifically address U.S. citizens’ claims against Cuba.<sup>211</sup> After World War II, Congress enacted the International Claims Settlement Act to establish the Foreign Claims Settlement Commission (hereinafter “the Commission”).<sup>212</sup> The Commission was established to administer and disburse funds to U.S. citizens who lost their property in specified foreign countries.<sup>213</sup> 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.<sup>214</sup>

In general, under the International Claims Settlement Act, Congress directed the Commission to apply “principles of international law, justice, and equity.”<sup>215</sup> 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

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

<sup>210</sup> 22 U.S.C. § 1621 (1955).

<sup>211</sup> Cuban Claims Act, *supra* note 67.

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

<sup>213</sup> 22 U.S.C. § 1621-1627 (1964).

<sup>214</sup> Cuban Claims Act, *supra* note 67.

<sup>215</sup> 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.<sup>216</sup>

The Commission is independent in its findings, and its awards are final; there is no appeal from the Commission's determination.<sup>217</sup> 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.<sup>218</sup>

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

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<sup>216</sup> *Id.* (emphasis added).

<sup>217</sup> 22 U.S.C. § 1622g (2012).

<sup>218</sup> 22 U.S.C. § 1643b(a) (emphasis added).

from actions taken by or under the authority of the Government of Cuba.<sup>219</sup>

In addition, the Act provides that the Commission must determine the claimant's title<sup>220</sup> to the expropriated property and any offsets to the award.<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup>

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.<sup>224</sup> The Final Report of the Commission's Cuba Claims Program,<sup>225</sup> 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."<sup>226</sup>

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<sup>219</sup> *Id.* § 1643b(b) (emphasis added).

<sup>220</sup> *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.").

<sup>221</sup> *Id.* § 1643e.

<sup>222</sup> *Id.* § 1643c.

<sup>223</sup> *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.").

<sup>224</sup> 22 U.S.C. § 1623 (2012).

<sup>225</sup> See FCSC Cuban Report, *supra* note 1.

<sup>226</sup> *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.<sup>227</sup> The total principal value of adjudicated claims was \$1,851,057,358.00.<sup>228</sup> Thereafter, on July 15, 2005,<sup>229</sup> 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.<sup>230</sup> The Commission received a total of five claims and denied three.<sup>231</sup> Two claims were certified as valid in principal amounts of \$51,128,926.95 and \$16,000.00.<sup>232</sup>

### 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.<sup>233</sup> The next section discusses whether the U.S. embargo against Cuba violates or is justified by international law.

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<sup>227</sup> See FCSC Cuban Report, *supra* note 1.

<sup>228</sup> *Id.*

<sup>229</sup> Letter from Condoleezza Rice, Secretary of State, to Mr. Tamargo, (July 15, 2005).

<sup>230</sup> *Id.*

<sup>231</sup> FCSC Cuban Report, *supra* note 1.

<sup>232</sup> *Id.*

<sup>233</sup> 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.”<sup>234</sup> The primary sources of international law are international agreements and customary international law.<sup>235</sup> An international agreement’s obligations are binding among the parties to the agreement.<sup>236</sup> 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.”<sup>237</sup>

“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>238</sup> This sense of legal obligation is generally referred to as *opinio juris*.<sup>239</sup> Over time, international agreements evidencing a

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<sup>234</sup> 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.”).

<sup>235</sup> ICJ Statute, *supra* note 234, at art. 38.

<sup>236</sup> *Cf.* RESTATEMENT, *supra* note 234, at § 102 cmt. f; *See also* COLLINS, *supra* note 127, at 28.

<sup>237</sup> *Cf.* RESTATEMENT, *supra* note 234, at § 102(4).

<sup>238</sup> *Id.* at § 102(2).

<sup>239</sup> *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.<sup>240</sup> Thus, some multilateral agreements can create binding law for “non-parties that do not actively dissent.”<sup>241</sup> 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.”<sup>242</sup> Similarly, a “wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.”<sup>243</sup> Customary international law also arises from tribunal decisions, since they are applying requirements of international law.<sup>244</sup> 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.<sup>245</sup>

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

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

<sup>241</sup> *Id.* at § 102 cmt. i.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> 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).

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

property.<sup>246</sup> 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."<sup>247</sup> 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."<sup>248</sup> 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."<sup>249</sup> The principle of "just" compensation is used interchangeably with "full" compensation.<sup>250</sup>

International law also provides a framework for Cuba's claims against the U.S. that the embargo is an illegal act of economic coercion.<sup>251</sup> 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,<sup>252</sup> the prohibition on intervention into

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<sup>246</sup> 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.").

<sup>247</sup> *Id.*

<sup>248</sup> RESTATEMENT, *supra* note 234, at § 712(1).

<sup>249</sup> *Id.*

<sup>250</sup> See *id.* at § 712 cmt. d.

<sup>251</sup> 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).

<sup>252</sup> U.N. Charter art. 2, para. 4.

domestic affairs of another state,<sup>253</sup> as well as on the promotion of development<sup>254</sup> and self-determination.<sup>255</sup> 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,<sup>256</sup> the General Assembly's 1970 Declaration on Friendly Relations,<sup>257</sup> and other related U.N. General Assembly resolutions.<sup>258</sup>

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.<sup>259</sup> Reparations are an "indispensable complement of a

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<sup>253</sup> 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].

<sup>254</sup> 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].

<sup>255</sup> 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.

<sup>256</sup> OAS Charter, *supra* note 253, at art. 19.

<sup>257</sup> See Declaration on Friendly Relations *supra* note 68.

<sup>258</sup> 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).

<sup>259</sup> 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.”<sup>260</sup>

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

*Banco Nacional de Cuba v. Sabbatino*,<sup>265</sup> 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.

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

<sup>261</sup> RESTATEMENT, *supra* note 234, at § 712(1).

<sup>262</sup> 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.”).

<sup>263</sup> RESTATEMENT, *supra* note 234, at § 712 cmt. f.

<sup>264</sup> *Id.* at § 712 cmt. e.

<sup>265</sup> *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.<sup>266</sup>

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.<sup>267</sup>

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.'s repeal of its Cuban sugar quota.<sup>268</sup> 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."<sup>269</sup> 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."<sup>270</sup> On the other hand, scholars have argued that the subsequent Cuban expropriation measures no longer targeting

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<sup>266</sup> *Id.* at 385.

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

<sup>268</sup> *Id.*

<sup>269</sup> Rafat, *supra* note 87, at 50.

<sup>270</sup> *Id.*

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

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.<sup>272</sup>

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.<sup>273</sup> 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.<sup>274</sup> *Chorzow* involved Poland's expropriation of German-owned industrial property.<sup>275</sup> The Court held that immunity from confiscation is a principle of international law and that an uncompensated taking of property is illegal.<sup>276</sup> There the Court famously articulated the appropriate remedy for a taking:

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

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

<sup>272</sup> See *supra* Section II.B.

<sup>273</sup> 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).

<sup>274</sup> *Chorzow*, *supra* note 260, at 21.

<sup>275</sup> *Id.* at 5.

<sup>276</sup> *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.<sup>277</sup>

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

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

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<sup>277</sup> *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.).

<sup>278</sup> *Id.*

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

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

<sup>281</sup> *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.<sup>282</sup> 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.”<sup>283</sup> This came to be known as the “Hull formula,” which remains the United States’ formulation of the full compensation standard.<sup>284</sup> 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.”<sup>285</sup>

Widespread opposition to the Hull formula emerged with the rise of developing and emerging economies after the World War II.<sup>286</sup> 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

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<sup>282</sup> RESTATEMENT, *supra* note 234, at § 712 rep. n.1.

<sup>283</sup> *Id.*

<sup>284</sup> *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.”

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

<sup>286</sup> *Id.*

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

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.<sup>291</sup> 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.<sup>292</sup>

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at § 712 cmt. j.

<sup>289</sup> ICCPR, *supra* note 255, at art.1; ICESCR, *supra* note 255, at art. 1.

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

<sup>291</sup> *Id.*

<sup>292</sup> 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,<sup>293</sup> 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.]<sup>294</sup>

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.<sup>295</sup> 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.<sup>296</sup>

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

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

<sup>294</sup> 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).

<sup>295</sup> 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].").

<sup>296</sup> *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.<sup>297</sup> In 1977, the arbitrators in *Texaco Overseas Petroleum Company v. Libya* (TOPC) denied Libya's efforts to obstruct the international law of expropriation.<sup>298</sup> 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;<sup>299</sup> as opposed to U.N. Resolution 1803 which was "supported by a majority of Member States representing all of the various groups."<sup>300</sup> In other words, the Charter reflected the political will of developing states, but not a change in international law.<sup>301</sup> 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.<sup>302</sup> Notably, the Iran-United States Claims Tribunal upheld the same standard. The Iran-United States Claims Tribunal in

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<sup>297</sup> RESTATEMENT, *supra* note 234, at § 712 rep. n. 2.

<sup>298</sup> *Texaco Overseas Petroleum Co.*, at 468-83.

<sup>299</sup> *Id.* at 489.

<sup>300</sup> *Id.* at 491.

<sup>301</sup> *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.").

<sup>302</sup> 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*,<sup>303</sup> 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.”<sup>304</sup> However, the claims tribunal confirmed that the standard of compensation was the “full value” of the property taken.<sup>305</sup> In a different case, the same claims tribunal confirmed that “just compensation” is “the full equivalent of the property taken.”<sup>306</sup>

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.<sup>307</sup> 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,”<sup>308</sup>

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<sup>303</sup> 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).

<sup>304</sup> Iran U.S.C.T.R. 96, 105, 109 (1983).

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

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

<sup>307</sup> 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.

<sup>308</sup> U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, *BILATERAL INVESTMENT TREATIES*, 9 (1988), at 7 (stating that “negotiation of [BITs] developed into a deliberate policy . . . to counteract what some capital-exporting countries considered a continuous erosion of principles of

such as the 1974 Charter. Indeed, the strongest supporters of the opposition, Argentina<sup>309</sup> and Mexico entered into treaties with the U.S., which include the Hull formulation of full compensation.<sup>310</sup>

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

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

<sup>310</sup> *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.”).

<sup>311</sup> *RESTATEMENT*, *supra* note 234, at § 712 rep. n. 3.

<sup>312</sup> *Id.*

<sup>313</sup> *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1986, 1090 (1949).

<sup>314</sup> *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.”<sup>315</sup> Likewise, compensation should be in a usable form.<sup>316</sup> These terms coincide with the standards of compensation used by the Commission.<sup>317</sup>

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

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.<sup>321</sup> These scholars<sup>322</sup> 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.”<sup>323</sup> 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

<sup>315</sup> RESTATEMENT, *supra* note 234, at § 712, rep. n. 2.

<sup>316</sup> *Id.*

<sup>317</sup> See FCSC Cuban Report, *supra* note 1.

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

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> See Rafat, *supra* note 87, at 53-54.

<sup>322</sup> *Id.* at 54.

<sup>323</sup> *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.”<sup>324</sup> 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.<sup>325</sup>

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.<sup>326</sup> 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).<sup>327</sup>

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

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.”<sup>329</sup> 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.”<sup>330</sup> However, no

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<sup>324</sup> Rafat, *supra* note 87, at 54.

<sup>325</sup> GORDON, *supra* note 8, at 114.

<sup>326</sup> RESTATEMENT, *supra* note 234, at § 712 cmt. d.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at § 712 rep. n. 3.

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

<sup>330</sup> *Id.*

international tribunal has actually applied the exception<sup>331</sup> and no other Iran-U.S. Claims Tribunal decision has followed Judge Lagergren's dictum.<sup>332</sup>

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.<sup>333</sup> 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.<sup>334</sup> The International Court of Justice has described these partial compensation settlements as *sui generis* and proving no guidance under general international practice.<sup>335</sup>

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<sup>331</sup> RESTATEMENT, *supra* note 234, at § 712 rep. n. 3.

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

<sup>333</sup> 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.).

<sup>334</sup> RESTATEMENT, *supra* note 234, at § 712 rep. n. 1.

<sup>335</sup> *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.<sup>336</sup> 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.<sup>337</sup>

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.<sup>338</sup> The Cuban BITs also contain most-favored nation clauses (MFN).<sup>339</sup> The

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<sup>336</sup> 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.).

<sup>337</sup> 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.").

<sup>338</sup> See UNCTAD, *supra* note 336.

<sup>339</sup> See, e.g., Treaty between the Republic of Germany and the Republic of Cuba, art. 3(1)-(2) Nov. 22, 1998: "(1) 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.<sup>340</sup> 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.<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup>

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returns of nationals or companies of any third State. (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.”

<sup>340</sup> Collins, *supra* note 127, at page 109.

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

<sup>342</sup> 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).

<sup>343</sup> 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](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.<sup>344</sup> 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."<sup>345</sup>

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<sup>344</sup> GORDON, *supra* note 8, at 108.

<sup>345</sup> *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"<sup>346</sup> or "reprisal"<sup>347</sup> under international law and whether it complies with the doctrines of necessity and proportionality.<sup>348</sup> The international legal system allows a large scope of retorsions, non-forcible acts of lawful retaliation, such as the limiting of diplomatic relations.<sup>349</sup> Such retorsions are legal and are not subject to limitations of necessity and proportionality.<sup>350</sup>

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."<sup>351</sup> Throughout history

<sup>346</sup> 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."

<sup>347</sup> 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)).

<sup>348</sup> See David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 827 (2002). See also RESTATEMENT, *supra* note 234 at § 905(1).

<sup>349</sup> 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].

<sup>350</sup> 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.").

<sup>351</sup> ILC State Responsibility, *supra* note 349, at 128.

states have relied on countermeasures to enforce international legal obligations.<sup>352</sup> In the last century, countermeasures have been recognized by the International Court of Justice<sup>353</sup> and international arbitral tribunals as legitimate under international law.<sup>354</sup> Further, countermeasures also apply in the realm of treaty law as stated in the Vienna Convention on the Law of Treaties.<sup>355</sup> 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.”<sup>356</sup>

Under customary international law countermeasures are restricted by the doctrines of necessity, and proportionality.<sup>357</sup> Countermeasures are only allowed in response to a violation of international law<sup>358</sup> 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.<sup>359</sup> Unless there is an emergency state of necessity,

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

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

<sup>354</sup> *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).

<sup>355</sup> 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).

<sup>356</sup> Vienna Convention on the Law of Treaties, art. 60.

<sup>357</sup> 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).

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

<sup>359</sup> 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.<sup>360</sup> The countermeasure must be proportional to the “injury suffered” by the imposing country, although limited amounts of escalation may be appropriate.<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup>

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

<sup>360</sup> ILC State Responsibility, *supra* note 349.

<sup>361</sup> 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.

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

<sup>363</sup> *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.<sup>364</sup>

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.”<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup>

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

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

<sup>365</sup> 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).

<sup>366</sup> 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).

<sup>367</sup> 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).

<sup>368</sup> 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.”<sup>369</sup> The Covenant prohibited states from resorting to war under certain instances.<sup>370</sup> However, the Covenant did not mention economic or political force as appropriate measures to resolve international disputes.<sup>371</sup> Additionally, the League founded a number of treaties prohibiting certain forms of aggression but did not include economic and political coercion.<sup>372</sup> Similarly, the Kellogg-Briand Pact of 1928,<sup>373</sup> signed by 63 nations, outlawed all wars, but made no mention of other forms of non-military pressure short of the use of force.<sup>374</sup> The 1933 Conventions for the Definition of Aggression,<sup>375</sup> signed by many nations, including those within the Soviet Union’s sphere of influence, contained a list of conducts presumed as aggressive.<sup>376</sup> The only mention of economic or political

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* arts. 12, 13, & 15.

<sup>371</sup> League Covenant, *supra* note 368, at art. 10.

<sup>372</sup> *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.).

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

<sup>374</sup> *Id.*

<sup>375</sup> 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].

<sup>376</sup> *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.<sup>377</sup>

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

The U.S. and Cuba are parties to the U.N. Charter,<sup>381</sup> 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.<sup>382</sup>

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

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<sup>377</sup> Aggression Convention, *supra* note 375, at art 3.

<sup>378</sup> 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).

<sup>379</sup> *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.”

<sup>380</sup> *Id.*

<sup>381</sup> U.N. Charter, art. 2, para. 4.

<sup>382</sup> *Id.*

armed force and does not include economic or political compulsion.<sup>383</sup> 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.<sup>384</sup>

Further, the U.N. Charter's 1945 *travaux prepertoire*<sup>385</sup> has been used to demonstrate that article 2(4) was not, at the time that it was drafted, intended to apply to economic force.<sup>386</sup> 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.<sup>387</sup> 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.<sup>388</sup>

<sup>383</sup> 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).

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

<sup>385</sup> *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).

<sup>386</sup> *Id.*; Delanis, *supra* note 383, at 105-07.

<sup>387</sup> 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.*

<sup>388</sup> *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.”<sup>389</sup> 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.<sup>390</sup>

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.”<sup>391</sup> 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),<sup>392</sup> 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.<sup>393</sup>

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<sup>389</sup> 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.

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

<sup>391</sup> Lillich II, *supra* note 390, at 358-71, 361

<sup>392</sup> *Id.*

<sup>393</sup> 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,<sup>394</sup> which provides more generally that: “[n]o state has the right to intervene *in the internal or external affairs* of the other;”<sup>395</sup> “[d]ifferences of any nature which arise between them should be settled by recognized pacific methods;”<sup>396</sup> 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.”<sup>397</sup> Additionally, in 1948, the U.S. and Cuba ratified the OAS Charter,<sup>398</sup> 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*.<sup>399</sup>

Whereas earlier U.N. Resolutions<sup>400</sup> 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.<sup>401</sup>

<sup>394</sup> OAS Charter, *supra* note 253.

<sup>395</sup> *Id.* at art. 8 (emphasis added).

<sup>396</sup> *Id.* at art. 10.

<sup>397</sup> *Id.* at art. 11 (emphasis added).

<sup>398</sup> *Id.* at art. 15.

<sup>399</sup> *Id.* (emphasis added).

<sup>400</sup> *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.

<sup>401</sup> *See, e.g.*, G.A. Res. 2131 (XX), (Dec. 21, (1965)).

Particularly, three resolutions, adopted in 1965,<sup>402</sup> 1970,<sup>403</sup> and 1974<sup>404</sup> 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,<sup>405</sup> the General Assembly reiterated an authoritative condemnation of the use of economic coercion.<sup>406</sup>

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.<sup>407</sup>

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<sup>402</sup> *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).

<sup>403</sup> 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).

<sup>404</sup> G.A. Res. 3281 (XXIX), (Dec. 12, 1975).

<sup>405</sup> *Id.*

<sup>406</sup> *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.").

<sup>407</sup> *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.<sup>408</sup> General Assembly resolutions were never intended to be binding.<sup>409</sup> Generally speaking, their weight as evidence of a possible consensus on customary international law is inconclusive.<sup>410</sup> However, they can contribute to the evolution of customary international law.<sup>411</sup> 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.<sup>412</sup> Arguably, the 1970 Declaration would bear the most weight as evidence of, at a minimum, the progressive development of customary international law.<sup>413</sup> However, its vague language does not provide much guidance.

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

<sup>409</sup> Delanis, *supra* note 365, at 115.

<sup>410</sup> 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.

<sup>411</sup> 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).

<sup>412</sup> Sloan, *supra* note 410, at 138.

<sup>413</sup> 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.<sup>414</sup> 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.”<sup>415</sup> 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.”<sup>416</sup>

State practice has not supported a widely recognized international legal prohibition on the use of economic coercion.<sup>417</sup> Legal commentators have listed numerous instances of the use of economic coercion, both pre-1970 Declaration<sup>418</sup> and post-1970 Declaration.<sup>419</sup>

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

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

<sup>415</sup> *Id.* at para. 275.

<sup>416</sup> *Id.* at para. 276.

<sup>417</sup> 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.

<sup>418</sup> *Id.* at 609-16.

<sup>419</sup> *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.

<sup>420</sup> GATT, *supra* note 66.

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

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.<sup>424</sup> 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.”<sup>425</sup> 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.”<sup>426</sup> Therefore, a contracting party may impose protectionist trade restrictions that would otherwise violate the GATT to preserve its national security. Whether or not the U.S. embargo against Cuba is or was necessary to protect its national security since 1994, is a question of international law. The GATT provides a dispute

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

<sup>422</sup> 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).

<sup>423</sup> *Id.* at 437.

<sup>424</sup> GATT, *supra* note 66, at art. 11.

<sup>425</sup> *Id.* at art. XI.

<sup>426</sup> *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.<sup>427</sup> 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.<sup>428</sup> 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.<sup>429</sup> 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.<sup>430</sup> 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.<sup>431</sup> Even if the Act is not unreasonable as it relates to Cuba, its application may conflict with the interests of other countries to

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<sup>427</sup> OAS Charter, *supra* note 253, art. 19; *See also* RESTATEMENT *supra* note 234, at § 402.

<sup>428</sup> 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.").

<sup>429</sup> *Id.* at § 403.

<sup>430</sup> *Id.* at 403 § cmt. g.

<sup>431</sup> Helms-Burton Act *supra* note 22, at § 6081.

regulate the trade activities addressed by the Act.<sup>432</sup> Many states have expressed their dismay with the Act for these reasons.<sup>433</sup>

Despite the U.S. embargo legislation's express aim to alleviate the human rights violations in Cuba,<sup>434</sup> the Cuban government and other commentators have argued that its impact<sup>435</sup> has exacerbated or directly contributed to human rights violations.<sup>436</sup> Accordingly, any

<sup>432</sup> 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.”).

<sup>433</sup> 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.).

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

<sup>435</sup> 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).

<sup>436</sup> 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”<sup>437</sup> 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,<sup>438</sup> the Universal Declaration of Human Rights,<sup>439</sup> the International Covenant on Civil and Political Rights<sup>440</sup> and the International Covenant on Economic Social and Cultural Rights.<sup>441</sup> 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,<sup>442</sup> evidence an emerging right of a nation to

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<sup>437</sup> 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.”).

<sup>438</sup> U.N. Charter, arts. 55-56.

<sup>439</sup> G.A. Res. 217A, at 71, (Dec. 12, 1948).

<sup>440</sup> See generally, ICCRP, *supra* note 255.

<sup>441</sup> 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).

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

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

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.”<sup>445</sup> 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

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<sup>443</sup> 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.

<sup>444</sup> RESTATEMENT, *supra* note 234, at § 905 comm. a.

<sup>445</sup> *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.<sup>446</sup>

The most recent resolutions include references to the WTO, suggesting economic coercion violates the GATT.<sup>447</sup> 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.<sup>448</sup>

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.<sup>449</sup> 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."<sup>450</sup> The letter focused on the extraterritorial effect of the embargo, Cuban sovereignty and the principle of non-intervention.<sup>451</sup> Cuba issued a second letter to the Secretary-General<sup>452</sup> stating that U.S. economic coercion violated

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<sup>446</sup> 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.

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

<sup>448</sup> 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.").

<sup>449</sup> 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).

<sup>450</sup> *Id.* at p. 2.

<sup>451</sup> *Id.* at pp. 2-4.

<sup>452</sup> Letter Dated 25 October 1991 from the Charge d'Affairs. of the Permanent Mission of Cuba for the United Nations Addressed to the

norms that are “universally acknowledged to have attained status of binding international law.”<sup>453</sup> The second letter cited to the 1970 Declaration, the GATT and the OAS Charter.<sup>454</sup>

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

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.<sup>459</sup> In 2016, 191 countries voted in favor of ending the

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

<sup>453</sup> *Id.* at 6.

<sup>454</sup> *Id.* at pp. 5-6.

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

<sup>456</sup> *Id.* (preamble).

<sup>457</sup> *Id.* arts. 1-2.

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

<sup>459</sup> *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.<sup>460</sup> 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.<sup>461</sup>

In support of the resolutions, Cuba’s most recent report to the U.N. Secretary General’s 2007 report -General<sup>462</sup> 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

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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).

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

<sup>461</sup> *Id.*

<sup>462</sup> 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.<sup>463</sup>

#### 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.<sup>464</sup> 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.<sup>465</sup> Particularly significant is the spread of BITs and international arbitral tribunals, which adjudicate individual and state claims by applying international

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<sup>463</sup> *Id.* at 64.

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

<sup>465</sup> 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.<sup>466</sup> Historically, states submitted more traditional legal claims among states, such as border disputes, to arbitration.<sup>467</sup> Meanwhile individual mass claims against states were usually settled through state-to-state negotiations, resulting in lump-sum payments.<sup>468</sup> 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.<sup>469</sup> The U.S. and Cuba alone have entered into over eighty BITs.<sup>470</sup>

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<sup>466</sup> 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).

<sup>467</sup> 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).

<sup>468</sup> 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.

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

<sup>470</sup> *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.<sup>471</sup> 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.<sup>472</sup> 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.<sup>473</sup> 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.<sup>474</sup>

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

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<sup>471</sup> 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).

<sup>472</sup> See *id.* at 655.

<sup>473</sup> 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).

<sup>474</sup> 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;<sup>475</sup> and none paid the full amount of interest.<sup>476</sup> 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.<sup>477</sup> 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.<sup>478</sup> 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.<sup>479</sup> Interestingly, despite the

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<sup>475</sup> 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).

<sup>476</sup> 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.

<sup>477</sup> 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)).

<sup>478</sup> *Id.*

<sup>479</sup> 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.<sup>480</sup> 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.<sup>481</sup> Instead, they indicate how the U.S. is likely to settle its claims with Cuba.<sup>482</sup>

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.<sup>483</sup> This agreement was pertinent in two respects. First, the U.S. accepted less than the full 6% interest because Germany rejected payment of

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

<sup>480</sup> *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.

<sup>481</sup> *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.”).

<sup>482</sup> ANN. REP., *supra* note 475.

<sup>483</sup> 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.<sup>484</sup> Second, the Commission explicitly stated that interest was to be simple, rather than compound, for the German claims, in accordance with previous Commission decisions.<sup>485</sup>

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.<sup>486</sup> 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.<sup>487</sup> The Spanish claims, for example, were valued at \$350 million, but were ultimately settled for about \$40 million.<sup>488</sup> Even this limited amount was not paid until 1994, six years after the claims were settled and thirty years after the claims accrued.<sup>489</sup> 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.<sup>490</sup> These arrangements support the position that due to the state

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<sup>484</sup> *Id.*

<sup>485</sup> *Id.*

<sup>486</sup> BURNS H. WESTON ET. AL, *supra* note 477, at 81.

<sup>487</sup> 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.").

<sup>488</sup> Ashby, *supra* note 7, at 421-22.

<sup>489</sup> *Id.*

<sup>490</sup> *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.<sup>491</sup>

### 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.<sup>492</sup> 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.<sup>493</sup> The parties can participate in defining the issue to be adjudicated, retain the power

<sup>491</sup> 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.”).

<sup>492</sup> 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).

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

to select the arbitrators the forum, and designate the rules of procedure that will be used to settle the dispute.<sup>494</sup> Arbitration also provides the parties with the option of holding hearings in secret.<sup>495</sup> 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.<sup>496</sup>

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.<sup>497</sup> 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.<sup>498</sup> By 1980, over 400 actions were filed in the United States against Iran.<sup>499</sup> In January 1981, with Algeria as an intermediary, Iran and the U.S. resolved the hostage crisis and the expropriation claims, through two declarations: the General Declaration<sup>500</sup> and the Claims Settlement Declaration.<sup>501</sup>

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,<sup>502</sup> official claims of the two

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<sup>494</sup> *Id.* at 790-91.

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

<sup>496</sup> *Id.*

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

<sup>498</sup> 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).

<sup>499</sup> *Id.*

<sup>500</sup> 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.

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

<sup>502</sup> *Id.*

nations against each other;<sup>503</sup> and interpretive disputes relating to the application of the General Declaration and Claims Settlement Declaration.<sup>504</sup> The Tribunal consists of nine judges,<sup>505</sup> with Iran and the United States appointing three judges each, and the remaining three judges are chosen by the six appointed judges.<sup>506</sup> 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.<sup>507</sup> The panels decide most individual claims, but the President of the Tribunal chooses the claims for adjudication by the nine-judge tribunal.<sup>508</sup> The Tribunal follows the UNCITRAL arbitration rules, and the arbitral decisions are final and binding.<sup>509</sup>

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.<sup>510</sup> 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

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<sup>503</sup> *Id.* at art II (2).

<sup>504</sup> *Id.* at art. II (3).

<sup>505</sup> *Id.* at art. III 13(3).

<sup>506</sup> *Id.*

<sup>507</sup> *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).

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

<sup>509</sup> Algiers Declarations (U.S. v. Iran), Rules of Civil Procedure, arts IX-XII, IV(1) (May 3, 1983), Algiers Declarations (U.S. v. Iran), <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf>.

<sup>510</sup> *Id.* at art. II (1).

through diplomatic protection.<sup>511</sup> In deciding the 1984 Dual Nationality case,<sup>512</sup> 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.”<sup>513</sup> 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.<sup>514</sup> 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.<sup>515</sup> It helped diffuse the 1979 U.S.-Iran Hostage Crisis and restore diplomatic relations. The arbitral process employed by the Tribunal highlights the flexibility and adaptability of the arbitral model to resolve complex international law disputes between nations with strained or non-existent diplomatic relations.

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

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<sup>511</sup> 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).

<sup>512</sup> *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.

<sup>513</sup> *Id.*

<sup>514</sup> Bodack, *supra* note 507, at 372-73.

<sup>515</sup> *Id.* at 374.

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

#### 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.<sup>520</sup> 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.<sup>521</sup> 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.<sup>522</sup> 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

<sup>516</sup> 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].

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

<sup>519</sup> *Id.*

<sup>520</sup> Brookings Proposal, *supra* note 516, at 28-29.

<sup>521</sup> Helms-Burton Act, *supra* note 22, at § 6064 (a)-(c). (requiring “full” compensation prior to lifting the embargo).

<sup>522</sup> *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.<sup>523</sup>

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.<sup>524</sup> 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

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<sup>523</sup> Brookings Proposal, *supra* note 516, at 28-29.

<sup>524</sup> 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.<sup>525</sup> 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.<sup>526</sup> 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.<sup>527</sup> Many proposals also assume that a “post-socialist” Cuban government will be in power when a deal is struck.<sup>528</sup> Other papers have addressed the legality of the Helms Burton Act<sup>529</sup> and the destructive impact of the embargo on the Cuban population.<sup>530</sup> But almost none have included or seriously considered resolving Cuba’s potential claims under international law against the U.S.<sup>531</sup>

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<sup>525</sup> 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).

<sup>526</sup> See, e.g., Matias 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].

<sup>527</sup> *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-Díaz, *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).

<sup>528</sup> See generally, Alexander, *supra* note 527; Ortiz, *supra* note 525.

<sup>529</sup> 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).

<sup>530</sup> 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).

<sup>531</sup> *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”).<sup>532</sup> 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.”<sup>533</sup> 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.<sup>534</sup> The jurisdiction of the Special Court would be limited to the property claims of the Cuban-American exile community.<sup>535</sup>

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.*”<sup>536</sup> 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

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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.

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

<sup>533</sup> *Id.* at 5.

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

<sup>536</sup> *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.<sup>537</sup>

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.<sup>538</sup> 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.”<sup>539</sup> 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.”<sup>540</sup> 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.”<sup>541</sup>

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.”<sup>542</sup> Finally, a distinction is made between small claims and medium or large claims:

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<sup>537</sup> *Id.* at 4.

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *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.<sup>543</sup>

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.<sup>544</sup> Thus, many of the problems with the Report are due to its inapplicability under the circumstances as they exist today.

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

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<sup>543</sup> *Id.*

<sup>544</sup> *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.<sup>545</sup> 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.

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<sup>545</sup> 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.”<sup>546</sup> Travieso-Díaz focuses solely on resolution of the Commission-certified claims.<sup>547</sup> His paper does not assume that the settlement of the claims will be with a successor Cuban government; so it is tailored to the current Cuban government.

After indicating that any settlement must take into account the fundamental differences in the types of properties<sup>548</sup> subject to claims and Cuba’s limited resources, Travieso-Díaz goes on to propose a four-stage plan.<sup>549</sup> Stage one involves direct payment from the Cuban government to all FSCS claimants for all claims of \$1.5 million or less.<sup>550</sup> This would provide compensation for all but the 100 highest valued claims and would fully compensate 5,811 claims with \$164,336,899.00.<sup>551</sup> 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.<sup>552</sup> Travieso-Díaz, like the authors of the Report, recognize

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<sup>546</sup> See Travieso-Díaz Proposal, *supra* note 526.

<sup>547</sup> *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.”).

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

<sup>549</sup> *Id.* at 14-20.

<sup>550</sup> *Id.* at 14.

<sup>551</sup> *Id.*

<sup>552</sup> *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.<sup>553</sup> 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.<sup>554</sup>

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.<sup>555</sup> Potentially, claimants from stage one could also waive their right to their portion of the settlement funds and negotiate directly with the Cuban government.<sup>556</sup>

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.<sup>557</sup> Stage three would require the U.S. and Cuba to agree on the arbitrations' legal framework.<sup>558</sup> The difficulty, the author points out, would be setting up an independent source of funding to ensure the tribunal's awards

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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).

<sup>553</sup> *Id.* at 16.

<sup>554</sup> *Id.* at 15.

<sup>555</sup> *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)).

<sup>556</sup> *Id.* at 15 n.55.

<sup>557</sup> *Id.* at 19, 20-21.

<sup>558</sup> *Id.* at 20.

could be satisfied.<sup>559</sup> 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.<sup>560</sup>

The USAID Report and Travieso-Diaz' separation of claims by size is helpful for resolving U.S. claims against Cuba. In addition to facilitating payment to most of the claimants, it provides the rest of the claimants with the opportunity to pursue different types of remedies. As suggested, the smaller claims, "primarily for land, improved real properties, securities and mortgages, and 'other' personal properties,"<sup>561</sup> 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.<sup>562</sup>

However, like the Report, Travieso-Diaz' proposal overestimates the role that the Commission's claim valuations will play in any U.S.-Cuba settlement and ignores Cuba's counterclaims against the U.S. The Cuban government is unlikely to accept the FSCS's certification procedures as fair.<sup>563</sup> Thus, Cuba might require its own claims commission to evaluate the smaller certified claims and meet somewhere in the middle with the U.S. at another valuation or negotiate some percentage of the claims to pay out that it may deem fair. Any proposal for a lump-sum settlement of the small claims may need to consider Cuba's own valuation of the U.S. certified claims against it. Further, it is unlikely that Cuban negotiators will agree to

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<sup>559</sup> *Id.*

<sup>560</sup> *Id.* at 21.

<sup>561</sup> Brookings Proposal, *supra* note 516, at 19.

<sup>562</sup> Travieso-Diaz Proposal, *supra* note 526, at 17-20.

<sup>563</sup> *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.<sup>564</sup>

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

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<sup>564</sup> *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.<sup>565</sup> 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.<sup>566</sup> 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.<sup>567</sup> 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

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<sup>565</sup> 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.).

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

<sup>567</sup> 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.<sup>568</sup>

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

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<sup>568</sup> 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.<sup>569</sup> 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.

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<sup>569</sup> 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.<sup>570</sup>

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<sup>570</sup> Brookings Proposal, *supra* note 516, at 44 (emphasis added).

THE U.S. DEPARTMENT OF COMMERCE’S  
“PRELIMINARY DETERMINATION IN THE LESS-  
THAN-FAIR-VALUE INVESTIGATION OF  
100- TO 150-SEAT LARGE CIVIL AIRCRAFT  
FROM CANADA”:

THE USE OF ADVERSE INFERENCE IN  
ANTIDUMPING INVESTIGATIONS AND PRELIMINARY  
DETERMINATIONS

*Aerial Gill\**

INTRODUCTION

The Tariff Act of 1930, now codified as 19 U.S.C. Chapter 4, and also known historically as the Hawley-Smoot Act (“the Act”), is the legal authority that the U.S. Department of Commerce (“the Department”) and the U.S. International Trade Commission (“the Commission”) use to investigate and determine trade violations involving U.S. industries and to provide and administer trade remedies.<sup>1</sup> The Department and the Commission jointly administer

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<sup>1</sup> See Tariff Act of 1930, 19 U.S.C. § 4, (1930); Antidumping and Countervailing Duty Handbook, U.S., USITC Pub. 4540, (Jun. 2015). See also *Understanding Antidumping & Countervailing Duty Investigations*, U.S., USITC, [https://www.usitc.gov/press\\_room/usad.htm](https://www.usitc.gov/press_room/usad.htm) (last visited Mar. 27, 2018).

antidumping<sup>2</sup> and countervailing duty<sup>3</sup> laws codified under the Act, with each possessing different responsibilities as to the administration of these laws.<sup>4</sup>

Under the Act, interested parties<sup>5</sup> may file an antidumping or countervailing duty petition with the Department and the Commission alleging that a U.S. industry is either materially injured or threatened with material injury from imports sold in the U.S. at less-than-fair-value (“LTFV”).<sup>6</sup> If the Department makes a finding that a foreign product or merchandise sold in the U.S. at LTFV and is, or is likely to

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<sup>2</sup> 19 U.S.C. § 1677(34) (1930) (defining “dumping” as the sale or likely sale of goods at less than fair value. In more specific terms, dumping is defined as selling of a product in the U.S. at a price that is lower than the price for which it is sold in the home market. Antidumping is the administration of duties (taxes) or laws that combat and discourage dumping activities); Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at A-4, U.S. (Jun. 2015).

<sup>3</sup> Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at A-3, U.S. (Jun. 2015) (defining “countervailing duty” as a duty levied on an imported good to offset subsidies to producers or exporters of that good in the exporting country).

<sup>4</sup> See Antidumping and Countervailing Duty Handbook, U.S.USITC Pub. 4540 (Jun. 2015).

<sup>5</sup> 19 U.S.C. § 1677(9) (1930) (“interested party” includes a foreign manufacturer, producer, or exporter, the government of a country in which the merchandise in question is produced or manufactured, a certified union which is representative of an industry engaged in the manufacture or production of the merchandise in question, a trade or business association a majority of whose members manufacture or produce the merchandise in question). See also Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at A-5, U.S. (Jun. 2015).

<sup>6</sup> THE FINANCIAL DICTIONARY, The Free Dictionary, <https://financial-dictionary.thefreedictionary.com/Less+Than+Fair+Value> (“Less-than-fair-value” is defined as the deliberate sale of an export so that the export is significantly less expensive than a domestically produced good. A less-than-fair-value sale is not simply less expensive, but is determined to be anti-competitive. Selling products at less than fair value is synonymous with dumping).

be, injurious to a U.S. industry, then the Department may impose an antidumping duty on that product or merchandise.<sup>7</sup>

This article will discuss and evaluate a recent Department preliminary determination, finding that a Canadian civil aircraft manufacturer was selling its products in the U.S. at LTFV over a period of twelve months.<sup>8</sup> In the Department's investigation and ultimate preliminary determination, it used adverse facts available ("AFA") or adverse inference to fill gaps and draw necessary information for its LTFV determination.<sup>9</sup> Under the Act, the Department has the option to use facts otherwise available, or an adverse inference, when the Department finds that an interested party has failed to comply with a request for information.<sup>10</sup> In this case, the Department found the Canadian aircraft manufacturer, an interested party, failed to cooperate with the investigation by not complying with a request for information, despite multiple opportunities to do so.<sup>11</sup> Consequently, the Department was permitted to use, at its discretion, an adverse inference in its determination of a preliminary estimated-weighted-average dumping margin to be applied to the Canadian products under consideration.<sup>12</sup>

Part I of this article will provide background information on the Tariff Act of 1930 and its current role as the authority on antidumping and countervailing duty investigation proceedings conducted by the U.S. Department of Commerce and other U.S. based trade bodies today. More specifically, this part will explain the procedural use of

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<sup>7</sup> 19 U.S.C. § 1673 (1930).

<sup>8</sup> See Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of 100- to 150-Seat Large Civil Aircraft from Canada from the Office of Antidumping and Countervailing Duty Operations, Int'l Trade Admin., U.S. Dep't. of Commerce to Carole Showers, Exec. Director, Office of Policy (Oct. 4<sup>th</sup>, 2017).

<sup>9</sup> *Id.*

<sup>10</sup> See 19 U.S.C. § 1677e (1930).

<sup>11</sup> U.S. Dep't. of Commerce, *supra* note 8 at II.

<sup>12</sup> *Id.*

“adverse inference” in antidumping cases under investigation by the Department of Commerce and what qualifies for its usage.

Part II will lay out the facts of the case at issue, specifically the Preliminary Determination in the Less-Than-Fair-Value Investigation of 100- to 150-Seat Large Civil Aircraft from Canada. Part III will analyze and discuss the contents of the case, focusing on the Department’s use of adverse inference to arrive at its LTFV preliminary determination and its correlating estimated-weighted-average dumping margin.

Part IV will discuss the controversial implications and practical effects of adverse inference in practice today. Part V will conclude by summarizing the key findings and highlights of adverse inference as it was used in both the case discussed here and in daily practice.

## I. BACKGROUND

The Tariff Act of 1930, or “the Act,” was developed in accordance with trade protectionist policies under the Hoover Administration during the Great Depression.<sup>13</sup> The Act was intended to protect American jobs and businesses, particularly in the agricultural sector, from imports by placing duties on imported goods.<sup>14</sup> After several additions and amendments to the statute over the last eighty-plus years, the Act today serves as an authority on trade and customs and is used by the Department and the Commission to administer laws, investigate trade violations, and provide trade remedies.<sup>15</sup>

Until 1979, the U.S. Department of the Treasury was responsible for administering antidumping laws under the Antidumping Act of

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<sup>13</sup> See generally Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at IV-3, (June 2015).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

1921.<sup>16</sup> The Trade Agreements Act,<sup>17</sup> with roots in the General Agreement on Trade & Tariffs ("GATT"),<sup>18</sup> repealed the Act of 1921, making significant substantive and procedural changes to antidumping laws that were added to the Tariff Act of 1930 and ultimately shifted the responsibility of antidumping administration from the Department of the Treasury to the Department of Commerce.<sup>19</sup>

Today, the Act permits the use of a controversial tool that is subject to "hotly contested litigation" and controversy known as adverse inference.<sup>20</sup> Under U.S. antidumping and countervailing duty laws, AFA (or adverse inference) is available for the Department's use if an interested party in an investigation fails to comply with information requests in trade proceedings.<sup>21</sup> Non-cooperative parties are not a new challenge in international trade investigations as "[p]arties have refused to cooperate with agency requests for information since the inception of the trade laws, and the agencies have

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<sup>16</sup> *Id.* at IV-4.

<sup>17</sup> *See id.*, (The Trade Agreements Act of 1979 governs trade agreements negotiated between the U.S. and other countries; it implemented GATT antidumping codes into American antidumping laws under the Tariff Act of 1930 and repealed the Antidumping of 1921.).

<sup>18</sup> International Trade Commission, *supra* note 13, at IV-3; *see* The GATT Years: From Havana to Marrakesh, World Trade Organization, (The General Agreement on Tariffs and Trade or the GATT was established after WWII in conjunction with the failed attempt to create the International Trade Organization (ITO), which would eventually be replaced by the World Trade Organization (WTO), to develop and establish strong rules for a prosperous multilateral trading system. The GATT was eventually replaced by the WTO in 1994, but Article VI of the GATT on antidumping serves as a model for antidumping laws worldwide.).

<sup>19</sup> International Trade Commission, *supra* note 13, at IV-3.

<sup>20</sup> Joshua E. Kurland, *Emerging Trends in the Court of International Trade's 2013 Market Economy Jurisprudence*, 46 GEO. J. INT'L LAW 81, 115 (2014).

<sup>21</sup> *See* 19 U.S.C. § 1677e (1930).

been forced to resolve cases despite that noncooperation.”<sup>22</sup> The option to use adverse inference was added to the Act through the Uruguay Round Agreements Act (“URAA”) with the goal of inducing cooperation of interested parties and deterring non-compliance.<sup>23</sup> The Department is permitted to draw facts that are adverse to the non-cooperating party in its determination of a dumping margin rate so that the non-cooperating party does not receive a favorable outcome (i.e. is not rewarded) when it fails to comply with the Department’s requests for information that are pertinent to the investigation.<sup>24</sup>

Under the Act, anytime the Department resorts to adverse inference and consequently draws on secondary information,<sup>25</sup> as opposed to information that is attained through a trade investigation, “it must corroborate to the extent practicable, information from independent sources that are reasonably at its disposal.”<sup>26</sup> This essentially requires the Department to ensure that the secondary information being used is reasonably reliable and relevant.<sup>27</sup>

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<sup>22</sup> Kathleen W. Cannon & Benjamin Blase Caryl, *18<sup>th</sup> Judicial Conference of the United States Court of International Trade: Salvaging Court, Agency, and Private Litigant Resources When Faced With Noncooperative Parties*, 23 TUL. J. INT’L & COMP. L. 301, 302 (2015).

<sup>23</sup> See *id.* at 305 (The Uruguay Round Agreement or URAA was an act enacted by U.S. in 1994 that implemented the Marrakesh Agreement into U.S. law.).

<sup>24</sup> *Id.* at 304.

<sup>25</sup> See U.S. Dep’t of Commerce, *supra* note 8, at 7 (“Secondary Information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under Section 751 of the Act concerning subject merchandise.”).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## II. FACTS

On April 27, 2017, the Boeing Company ("Boeing") filed an antidumping duty ("AD") petition with the Department against Canadian aircraft manufacturer, Bombardier, Inc. ("Bombardier").<sup>28</sup> The Department initiated an investigation into these allegations on May 17, 2017.<sup>29</sup> Shortly after, "On June 9, 2017, the Department issued the AD Questionnaire<sup>30</sup> to Bombardier" and informed both parties about their opportunity to comment on the physical characteristics (i.e. the scope) of the merchandise under consideration.<sup>31</sup> On June 19, 2017, the parties submitted their comments to the Department regarding the physical characteristics of the merchandise, and the Department incorporated them into the investigation at their discretion.<sup>32</sup> While Bombardier submitted commentary regarding the physical characteristics of the merchandise described in the petition, Bombardier never submitted the required AD Questionnaire issued by the Department on June 9.<sup>33</sup>

On October 4, 2017, the Department announced its preliminary finding: Bombardier imported and sold its merchandise in the U.S. at LTFV and determined a dumping margin rate of 79.82% for these products.<sup>34</sup> Because Bombardier did not comply with the Department's request for information, the Department resorted to adverse facts in its preliminary LTFV determination and subsequent preliminary estimated weighted average dumping margin.<sup>35</sup> The Department selected the alleged rate in Boeing's petition—specifically

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<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2, 5.

<sup>34</sup> *Id.* at 1, 7.

<sup>35</sup> *Id.* at 5.

choosing not to calculate a rate for the “individually-examined respondent” (i.e. Bombardier).<sup>36</sup> Rather, the Department chose the only rate or dumping margin mentioned in the investigation.<sup>37</sup> The Department sufficiently validated the petition, thereby fulfilling the statutory requirements for drawing an adverse inference to make a preliminary determination.<sup>38</sup>

### III. CASE ANALYSIS

#### A. ANALYSIS OF THE DEPARTMENT’S USE OF ADVERSE INFERENCE

In its LTFV investigation, the Department determined that Bombardier “failed to cooperate by not acting to the best of its ability to comply with a request for information” and, under the authority of Section 776(b) of the Act, resorted to facts adverse to Bombardier’s interests in determining a weighted-average dumping margin for their products.<sup>39</sup> The Act provides the guidelines for utilizing secondary facts.<sup>40</sup> If an interested party: “(A) withholds information requested by the Department; (B) fails to provide such information by the deadlines for submission of the information; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified,” the Department shall use facts otherwise available in reaching the applicable determination.<sup>41</sup>

The Act also goes on to say that the Department must consider the ability or fitness of the interested party to provide the requested information, provided the interested party promptly gives notification “that such party is unable to submit the information requested in the

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<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.*

<sup>38</sup> U.S. Dep’t of Commerce, *supra* note 8, at 9.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> 19 U.S.C. § 1673, *supra* note 7, at 776(a)(1); 776(a)(2)(A)-(D) (1930).

<sup>41</sup> 19 U.S.C. § 1677e (1930).

requested form and manner, together with a full explanation and suggested alternate forms in which such party is able to submit the information."<sup>42</sup> This consideration provision also relies upon the assumption that the interested party completely submits the information by the deadline.<sup>43</sup>

In this case, the Department had provided Bombardier with numerous opportunities to comply with their information request. After not receiving the requested information by the deadline along with no notification or explanation for why the party was unable to provide the requested information, the Department preliminarily determined that Bombardier withheld the requested information, failed to provide the requested information by the specified deadline, and significantly impeded the proceeding. Thus, the Department was able to rely on adverse facts available in its determination of Bombardier's preliminary estimated weighted-average dumping margin in the LTFV investigation.<sup>44</sup>

According to the Act, the Department is free to employ an adverse inference that is "derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record."<sup>45</sup> In using an adverse inference to select a rate, as is the case here, the Department selects a rate that "is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated."<sup>46</sup> In practice, the norm is to select "the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation."<sup>47</sup> Here,

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<sup>42</sup> 19 U.S.C. § 1677m(c)(1) (1930).

<sup>43</sup> *Id.* at (e)(1).

<sup>44</sup> *See* U.S. Dep't of Commerce, *supra* note 8, at 5.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; *See also* 19 U.S.C. § 1677e, *supra* note 10, at (d)(2).

the Department opted to use the only dumping margin that Boeing, the petitioner, alleged in its petition – 79.82%.<sup>48</sup>

*B. ANALYSIS OF DOC'S AFA CORROBORATION*

After drawing the dumping margin from secondary information (Boeing's petition), the Department was required under the statute to "corroborate, to the extent practicable" the "reliability and relevance of the information to be used."<sup>49</sup> To satisfy the reliability requirement, the Department analyzed "evidence supporting the calculations in the petition" which included export price, constructed value, and normal value among other key elements of the margin calculation;<sup>50</sup> the Department found the evidence to have probative value and to be reliable.<sup>51</sup>

Under the statute, the Department was also required to determine the relevance of the secondary information used to draw the adverse inference.<sup>52</sup> The Act makes it clear that the Department "is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated," nor is it required to "demonstrate that the dumping margin reflects an 'alleged commercial reality' of the interested party."<sup>53</sup> The Department determined the rate derived from the petition to be relevant because "it is derived from information about prices and accounting methodologies used in the aircraft industry."<sup>54</sup>

The Department was therefore able to preliminarily determine that the dumping margin alleged by Boeing in the petition was acceptable

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<sup>48</sup> U.S. Dep't of Commerce, *supra* note 8, at 7.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 9.

under the statute because the Department had corroborated the alleged rate to the extent practicable by demonstrating that the rate was both reliable and relevant.<sup>55</sup>

#### IV. DISCUSSION

##### A. EFFICIENCY/RESOURCE ALLOCATION RATIONALE

One of the primary rationales behind the use of adverse inference is to promote efficiency and preserve Department resources.<sup>56</sup> While the statute requires the Department to provide parties to the investigation with sufficient time to amend or edit responses that are incomplete or inadequate, the statute does not articulate the number of opportunities the Department is required to give parties to respond to requests for information.<sup>57</sup> In many antidumping and countervailing duty cases, it is not uncommon for the Department to have to send information requests to foreign producers multiple times and afterwards to have to go through a series of back-and-forth responses with the producer because their responses are insufficient, incomplete, or altogether incorrect.<sup>58</sup> These insufficient responses to information are often strategically withholding and not only waste Department resources, but also impede Department proceedings.<sup>59</sup>

One criticism: when a non-cooperating foreign producer fails to submit required information to the Department during an investigation, that producer often ends up expending resources arguing

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<sup>55</sup> *Id.*

<sup>56</sup> *See Cannon & Caryl, supra* note 22, at 302.

<sup>57</sup> *Id.* at 309.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

against the use of or final determination from the AFA rate that should have been devoted to supplying the requested information.<sup>60</sup>

*B. IS ADVERSE INFERENCE TOO HARSH?*

The adverse inference option has been criticized for being too intentionally punitive or harsh.<sup>61</sup> Section 776(b) of the Act specifically states that when the Department sets about determining a rate that is based on adverse facts available, the Department should select a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.<sup>62</sup>

Though often the non-cooperating respondent in an investigation fails to provide any of the information requested by the Department, the AFA can be applied in cases where the respondent merely fails to provide all of the requested information or provides the incorrect information, even by mistake—which makes the usage of the AFA option seem somewhat severe and contributes to its surrounding controversy in courts today.<sup>63</sup> This is exemplified in *Mukand, Ltd. v. United States*, which stems from an administrative review of the Department's standard approach to adverse inference in antidumping cases.<sup>64</sup> In *Mukand*, the Court upheld the Department's determination to use AFA was proper because the respondent, an Indian company that exports stainless steel into the U.S., had failed to sufficiently respond to the Department's request for specific information related to

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<sup>60</sup> *Id.* at 307.

<sup>61</sup> *See generally id.* at 310.

<sup>62</sup> *See* 19 U.S.C. 776(b); *Id.* at 305.

<sup>63</sup> *See generally, Mukand, Ltd. v. United States*, 767 F. 3d. 1300 (demonstrating that partial, mistaken, and other forms of noncooperation are equally as liable to AFA treatment in antidumping cases as full noncooperation is).

<sup>64</sup> *Id.*

production costs.<sup>65</sup> In *Mukand*, the Indian company responded to every information request initiated by the Department, including requests that asked for supplemental or explanatory information.<sup>66</sup> The Court stated that “[t]he proper inquiry for AFA is not whether Mukand intended to thwart [the Department] in its efforts to complete the record” but whether it “fail[ed] to cooperate to the best of its ability, regardless of motivation or intent.”<sup>67</sup> The Court went on to state that the Department made its dissatisfaction with Mukand’s responses known repeatedly and explained to Mukand both the rationale for their request and what it would be used for, concluding that Mukand’s responses “consistently avoided the substance” of the Department’s questions.<sup>68</sup>

As demonstrated by the example above, there is no bad faith requirement in the statute, nor is there a good faith exception.<sup>69</sup> There is only a standard to determine the “best of its ability” which simply requires “the respondent put forth its maximum effort to investigate and obtain full and complete answers to [the Department’s] inquiries”.<sup>70</sup> This means that even if a respondent timely responds to every request for information (including requests for additional and supplemental information) and supplies all information it believes required in good faith, the Department may still choose to resort to an adverse inference as it would in a case where the respondent never responds to any request for information. This anomaly leads to the inevitable and questionable outcome where a fully cooperative party receives the same negative result as a non-cooperative party. This inconsistency points out a marked and inherent degree of unfairness in the statute, begging the question of whether the Department should

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<sup>65</sup> *Id.* at 1302.

<sup>66</sup> *Id.* at 1303-04.

<sup>67</sup> *See* Kurland, *supra* note 20 (quoting *Mukand*, 767 F.3d. at 1304).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See* 19 U.S.C. § 1677(e)(b)(1); *see also* Jennifer S. Huber and Simon G. Courtman, *2014 International Trade Law Decisions of the Federal Circuit*, 64 AM. U. L. REV. 899, 939 (2015).

distinguish the non-cooperative parties from cooperative parties in its AFA treatment and subsequent dumping margin determination. Currently, there is nothing in the statute to suggest that AFA treatment and rate determination for parties subject to an investigation should differentiate between cooperating and non-cooperating parties.

*C. TOO MUCH DEPARTMENT DISCRETION*

Another criticism contributing to the controversial nature of the use of adverse inference in investigations is that the Department has too much discretion in its determination of applicable dumping margin rates in cases involving non-cooperating foreign producers and that such rates have been too high.<sup>71</sup> Indeed, the Federal Circuit has acknowledged that in such cases, “the discretion granted by the statute appears to be particularly great, allowing [the Department] to select among an enumeration of secondary sources as a basis for its adverse factual inferences.”<sup>72</sup> In anti-dumping cases involving a non-cooperating foreign party, if the Department invokes an adverse inference to determine a dumping margin, they are free to select from any of the secondary information submitted during the proceeding, including the petition containing the allegations against that foreign party.

Alternatively, courts have determined that the application of an AFA rate cannot be punitive and have elaborated that a rate drawn from adverse inference must be “based on facts”.<sup>73</sup> Responding to fears and criticisms of potentially punitive behavior, courts have remanded the Department on several occasions when the AFA rate in investigations exceeds 100%.<sup>74</sup> This was seen in a recent case involving a Chinese exporter of furniture where the Department’s AFA rate determination of 216.01% was found unreasonable by the

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<sup>71</sup> Cannon and Caryl, *supra* note 22, at 309-10.

<sup>72</sup> *Id.* at 310.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

U.S. Court of International Trade.<sup>75</sup> The court in this case expounded that, "as the rate becomes larger and greatly exceeds the rates of cooperating respondents, [the Department] must provide a clearer explanation for its choice and ample record support for its determination."<sup>76</sup> In this particular case, the Department ultimately was remanded three times for determining an AFA rate for a non-cooperating foreign party that was too high.<sup>77</sup>

In keeping with the resource allocation and efficiency criticisms, time-consuming remands, such as these,<sup>78</sup> have been criticized for encouraging foreign parties involved in such investigations to withhold information during the investigation and instead use their resources to argue against the final margin determination, alleging that it is punitive in nature.<sup>79</sup> The most blatantly non-cooperative foreign parties, even ones who submit fraudulent information to the Department, will impose litigation to argue over what the rate should be, often appealing several times, taking the issue to the Court of International Trade.<sup>80</sup> The issues of why the party simply did not submit the requested information accurately and timely in the first place often get lost in the litigation.<sup>81</sup> This negative incentive to litigate is not only a waste of Court and Department resources but is also time-consuming and counter to the purpose of the Department to administer trade investigations and remedies efficiently. These types of resource-wasting scenarios give rise to the practical and ethical questions of whether foreign parties who blatantly refuse to cooperate with government agencies or worse, knowingly submit false information to the government, should be permitted to take their claims to court. Further, should the number of resources potentially

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<sup>75</sup> *Id.*

<sup>76</sup> *See id.*; *see also, Lifestyle Enterprise v. United States*, 768 F.Supp. 2d 1286, 1298 (Ct. Int'l Trade 2011).

<sup>77</sup> *See generally, id.*

<sup>78</sup> Cannon and Caryl, *supra* note 22.

<sup>79</sup> *Id.* at 310.

<sup>80</sup> *Id.* at 303.

<sup>81</sup> *Id.*

wasted in such cases be taken into consideration at all when these cases arise?

## V. CONCLUSION

While the Department of Commerce plays an important role in protecting American industry from foreign competitors dumping goods into the U.S. at LTFV, the ruling body of laws that govern anti-dumping and the Department's application of these laws are not without controversy and criticism. The Tariff Act of 1930 provides the Department with broad discretion and power for dealing with non-cooperating foreign parties in its investigations into anti-dumping cases with the goal of efficiently and expeditiously resolving these issues, saving valuable resources and time. However, these goals are often frustrated in modern practice and the applicable laws that are intended to promote efficiency and expediency in dealing with such parties sometimes have the opposite desired effect: encouraging unnecessary and excessive litigation, wasting Department resources, and inadvertently treating cooperating parties in the same punitive manner as non-cooperating parties. Nevertheless, as seen in the Department's recent Preliminary Determination in the Less-Than-Fair-Value Investigation of 100- to 150-Seat Large Civil Aircraft from Canada and application of adverse inference to determine the applicable anti-dumping margin rate, this tool is still very much in use and continues to reinforce the message that non-cooperating foreign parties in anti-dumping investigations will not go unpunished.