Redirecting Focus: Justifying the U.S. Embargo against Cuba and Resolving the Stalemate

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Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate

John W. Smagulat†

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I. Introduction

U.S.-Cuban relations are currently at a crossroads. The United States wishes for Cuba to adopt a democratic form of government and a market-based economic system, consistent with the U.S. international goals of freedom and private enterprise. Cuba wishes for the United States to lift its economic embargo so that Cuba may advance from its current economic hardships and become fully integrated into the international community. With the demise of the Soviet Union and its

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2 Cuban President Fidel Castro has conducted an aggressive international campaign to lift the embargo without making any economic or political concessions in return. Castro cogently summarized his view on the embargo in a Venezuelan newspaper, stating that the Cuban position "is a worthy one: Lift the embargo without any conditions." John P. Sweeney, Why the Cuban Trade Embargo Should be Maintained, HERITAGE FOUND. REP., Nov. 10, 1994 (citing Manuel Abrizo, Castro to the U.S.: If They Want My Head, I'll Give It To Them, EL NACIONAL, Sept. 25, 1994). Of the dangers facing Cuba, Castro stressed that the U.S. embargo was "Numero uno, numero uno." America and Cuba; Dealing with Numero Uno, ECONOMIST, July 16, 1994, at 24. Cuba has also been successful in obtaining the U.N. General Assembly's condemnation of the embargo. See infra part V.C.3.
concomitant subsidies to Cuba, the current focus of the U.S.—Cuban relationship is not whether to lift the embargo, but how to lift it. The issue of how to lift the embargo is therefore timely because both countries seek to end the 34-year-old stalemate.

Regardless of the reasons that the U.S. government may give to justify its actions, the embargo against Cuba is economic. Over the years, the executive branch has given a myriad of political reasons to justify the embargo. There has nonetheless been one unifying fundamental issue: Cuba’s confiscation of U.S.—owned private property in violation of international law. This Article diverges from other analyses of the embargo because of its focus on the economic and legal aspects of the embargo, not the commonly heard political rhetoric. Although human rights issues, lingering anti-Communist sentiments, and demands of the Cuban-American electorate are important variables in the embargo equation, the only economic issue is the violation of private property rights. As will be shown, there are three common approaches to the embargo: the liberal humanitarian view, the conservative free trade view, and the conservative isolationist view. None of these approaches focuses on the economic aspects of the embargo; and therefore, they provide inadequate policy responses. Given the economic nature of the embargo, the United States should not lift the embargo against Cuba until Cuba agrees to discharge the obligations arising out of its confiscation of U.S.—owned property.

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3 The U.S. Department of Treasury supervises the embargo through the Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1994). The provisions of these Regulations are exclusively and explicitly economic. See infra notes 98-102 and accompanying text. Moreover, Cuba is not to receive any assistance or portion of the sugar quota until Cuba has taken steps to return or compensate for confiscated property. See infra notes 103-108 and accompanying text.

4 President Carter cited the “presence of Cuban troops in Angola, Cuba’s ‘aggravating influence’ on other countries of Latin America and human rights in Cuba as barriers to normalization of relations from the U.S. viewpoint.” Don Oberdorfer, U.S., Cuba Sign Pacts on Fishing; U.S., Cuba Sign Fisheries Agreements; Agreements Viewed as a Step Toward Improved Relations, WASH. POST, Apr. 29, 1977, at A1. During the Reagan administration, State Department spokesperson Charles Redman stated that the objective of the embargo was “to tighten enforcement of the embargo, denying to the Castro regime economic benefits from the United States while Castro continues to ignore international obligations and to pursue policies inimical to U.S. interests.” Gene Gibbons, Reagan Tightens U.S. Economic Embargo on Cuba, REUTERS, Aug. 23, 1986, available in LEXIS, News library, REUNA file. President Bush said that “Washington’s trade embargo against Cuba will not be lifted until Castro agrees to elections monitored by the United Nations.” Jo Ann Zuniga, Shortages Spark Rumbling — but not Unrest — in Cuba, HOUS. CHRON., July 12, 1992, at A1. When asked what Cuba must do to bring an end to the embargo, President Clinton said, “Mr. Castro knows the conditions for changing the policy.” James Harding, Passionate Talk, Little Action: James Harding Explains Domestic Forces Shaping U.S. Policy on Cuba, FIN. TIMES, Aug. 27, 1994, at 9. The Clinton administration later stated that “before the embargo is lifted, Cuba’s communist rulers must take steps toward democracy.” Castro Plays it Cool; Problems Remain, Despite U.S.-Cuba Refugee Deal, HOUS. POST, Sept. 12, 1994, at A14.

5 See infra notes 111-186 and accompanying text.

6 See infra notes 314-18 and accompanying text.

7 See infra notes 321-22 and accompanying text.

8 See infra notes 324-25 and accompanying text.
The amount of property that Cuba has confiscated is daunting. The value of the claims registered with the U.S. Foreign Claims Settlement Commission9 (hereinafter "FCSC") is $1,851,057,358.10 The present compensable value of this amount is $13,051,845,500.11 There were a total of 5,911 property claims awarded,12 ranging from the seizure of the property of multimillion-dollar U.S. multinationals to the loss of private residences by middle-class Cubans.13 Because the majority of confiscated property was owned by U.S. corporations,14 this analysis will focus on U.S. corporate property claims.

Part II of this Article provides the historical background of the U.S. embargo against Cuba as well as its statutory authority. Part III discusses the international law of expropriation, which provides that a country may expropriate property only if the taking is for a public purpose, is non-discriminatory, and is met with just compensation. Part IV provides that full compensation is the appropriate standard to compensate owners, either as restitution or the fair market value at time of taking plus interest. Furthermore, Part V asserts that Cuba’s confiscation of U.S.-owned property is in violation of international law and that Cuba has an obligation to fully compensate the U.S. owners. This section also addresses the consequent U.S. embargo, justifying its existence under international law. Finally, Part VI suggests the remedy of restitution and a bilateral investment treaty so that both countries can come to an agreement and bring an end to two generations of hostilities.

9 The Foreign Claims Settlement Commission is a branch of the Department of Justice that follows a statutory procedure to determine the amount and validity of claims against a foreign government. The FCSC was an integral part of the International Claims Settlement Act of 1949, 64 Stat. 12 (1950), (codified as amended at 22 U.S.C. § 1621-1645 et seq. (1992)), which was enacted out of a “growing concern of the United States regarding violations by Communist governments of the rights of American citizens who owned property in foreign countries.” Edward D. Re, The Foreign Claims Settlement Commission and the Cuban Claims Program, 1 INT’L L. 81, 83 (1966). The Title V amendment to the International Claims Settlement Act of 1949 [hereinafter “Cuban Claims Act”] authorizes the FCSC to determine the amount and validity of claims against the Cuban government. Pub. L. No. 88-666, 78 Stat. 1110 (1964) (codified at 22 U.S.C. §§ 1643-1643k (1964)). Section 1643b provides that the FCSC “shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims” by U.S. nationals against Cuba arising from 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.” Id.

10 1987 FOR. CLAIMS SETTLEMENT COMM. ANN. REP. 55.

11 This figure equals the value of the property at the time of taking times six percent interest compounded annually for 34 years. See infra part III.A. for a discussion of this standard.

12 1972 FOR. CLAIMS SETTLEMENT COMM. ANN. REP. 412, 412 (hereinafter 1972 FCSC). The FCSC has not updated or revised this figure.

13 1987 FOR. CLAIMS SETTLEMENT COMM. ANN. REP. 55.

14 Approximately 88% of property taken was owned by U.S. corporations. See 1972 FCSC, supra note 12, at 412.
II. The Embargo

A. Historical Background

On January 1, 1959, Comandante Fidel Castro announced over Cuban radio, "Revolución, sí; golpe militar, no!" ("Revolution, yes; military coup, no!"). Former President Fulgencio Batista announced his intention to leave the country that morning and fled for Santo Domingo. Fidel Castro stepped in as the new leader of Cuba who could mold the island in any way he wished. On January 6, Castro announced that his regime had complete control of Cuba and that Cuba would fulfill all of its existing international commitments.

The Castro regime "quickly instituted substantial changes in Cuba." The new government proceeded to diminish the role of foreign enterprise in Cuba and concentrate production in the hands of the Cuban government. Because land reform was an important objective of the revolution, Cuba employed a massive and complete confiscation of foreign-owned property to effect a shift in ownership.

The Agrarian Reform Law of June 1959 (hereinafter "Agrarian Reform Law") was the first major reform legislation in Cuba that affected foreign-owned property. The Agrarian Reform Law required the expropriation of foreign-owned land "in excess of certain limits." The expropriated land was then either distributed to Cuban citizens or transformed into agricultural cooperatives managed by the newly created Cuban National Institute of Agrarian Reform (hereinafter

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15 Herbert L. Matthews, Revolution in Cuba 121 (1975).
19 Memorandum From Secretary of the State to the President (Jan. 7, 1959), in Foreign Relations of the U.S.: Cuba, supra note 17, at 947 [hereinafter Memorandum].
21 Id.
22 Castro emphasized land reform in his famous "History Will Absolve Me" speech: The Second Revolutionary Law would have granted property to all planters, subplanters, lessees, partners, and squatters who hold parcels of five or less caballerfas of land, and the state would indemnify the former owners on the basis of the rental they would have received on these parcels over a period of ten years. La Historia Me Absolverá, El Pensamiento de Fidel Castro 21 (1963), reprinted in Michael W. Gordon, The Cuban Nationalizations: The Demise of Foreign Private Property 76 (1976) [hereinafter Gordon, The Cuban Nationalizations].
24 Editorial Note, in Foreign Relations of the U.S.: Cuba, supra note 17, at 509.
"INRA"). The Agrarian Reform Law also allowed sugar companies to continue operating only if Cuban citizens owned the companies’ stock.

The Agrarian Reform Law further provided that the government would compensate the owners with twenty-year bonds, bearing an annual interest rate of 4.5%. The compensation plan, however, was illogical and from the outset could not have adequately compensated the foreign owners. To generate the revenues necessary to pay for the property, Castro made a public proposal that the United States increase its purchase of Cuban sugar from approximately 3,000,000 tons of sugar per year to 8,000,000 tons. However, an immediate increase of nearly 200% was not practical. At that time, Cuba’s total sugar output was approximately 5,900,000 tons and Cuba had never produced more than 7,200,000 tons. During this period of agrarian reform, sugar production was expected to decline in Cuba. Moreover, in 1959 Cuba was absorbing seventy-one percent of the U.S. foreign sugar quota and thirty-three percent of the entire U.S. sugar quota, a figure set pursuant to the Sugar Act of 1948. The United States indicated that a further increase of the Cuban quota would be unfair

25 Id.
26 Id.
27 Agrarian Reform Law, supra note 23, art. 31.
28 The 1959 quota allotment for Cuba was approximately 3,215,000 tons. 106 Cong. Rec. 15,236 (1960) [hereinafter Cong. Rec.]. For the authority of the sugar quota, see Act of Aug. 8, 1947, infra note 36.
29 40 DEP’T ST. BULL. 959, 959 (1959) [hereinafter BULLETIN 1].
30 HUGH THOMAS, CUBA; THE PURSUIT OF FREEDOM 1224 (1971).
32 Cuba produced this amount in 1952. Ron Ridenour, Short Change on a Two-Way Ticket; South Survey: Cuba; includes related articles on hardship in Cuba, S. MAG., June, 1990, at 45. Moreover, Cuba’s sugar production has had an annual growth rate of less than one percent. Cuba’s sugar output in 1987 was about 7,200,000 tons. See Johnson, supra note 31, at 1.
33 Telegram From the Embassy in Cuba to the Department of State (June 12, 1959), in FOREIGN RELATIONS OF THE U.S.: CUBA, supra note 17, at 529 [hereinafter Telegram 1]. Cuban officials also announced on many occasions their desire to diversify agricultural production to eliminate “the evils of monopolization” and “the dependence on foreign markets.” Extension of Sugar Act of 1948 as Amended: Hearings Before the Comm. on Agriculture, 86th Cong., 2d Sess. 4, 4 (1960) [hereinafter Hearings] (testimony of Secretary of State Christian A. Herter). Observers predicted that this sentiment, coupled with agrarian reform, would bring about a yearly decline of at least 1,000,000 tons. Id.
34 In 1959, Cuba was allocated 3,060,000 tons; imports from other countries combined amounted to 1,228,000 tons. See BULLETIN 1, supra note 29, at 959.
35 The sugar requirement for the United States in 1959 was estimated at 9,200,000 tons. 53% of this was allocated to domestic suppliers. Id.
to domestic producers and other countries. Furthermore, the United States did not have a demand for additional sugar.37

On June 11, 1959, the U.S. government dispatched an official note to Cuba expressing its views with respect to the Agrarian Reform Law.38 In this note, the U.S. government expressed sympathy for the Cuban objectives of agrarian reform, stating that "soundly conceived and executed programs" of agrarian reform can "contribute to a higher standard of living, political stability, and social progress."39 The United States also acknowledged that under international law, a state has the right to take property within its jurisdiction for public purposes, but "this right is coupled with the corresponding obligation [of] prompt, adequate and effective compensation."40 Castro responded by telling U.S. Ambassador Bonsal that his revolutionary government "was honest and would fulfill promises to pay."41

Soon after the United States dispatched the note, Cuba began to confiscate U.S.-owned property.42 In response to the Cuban actions toward the United States, the U.S. government contemplated adjusting sugar quotas.43 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."44 At that time, the United States was paying Cuba nearly twice the price of the world level,45 and it seemed more sensible to allocate this quota to countries friendly to and respectful of U.S. property interests.46 Despite these misgivings, Congress established the annual quota for 1960 at 3,119,655 tons.47

In 1959 alone, Cuba "seized property belonging to more than 5,000 individuals and 500 companies."48 Tensions heightened due to Castro's persistent threats against the United States.49 U.S. property

largest U.S. import of Cuban sugar was 4,527,000 tons in 1922. See Cong. Rec., supra note 28, at 15, 236.

37 See Bulletin 1, supra note 29, at 959.
38 Id.
39 Id. at 958.
40 Id.
41 Id. See infra part III for a discussion of this standard.
42 See Telegram 1, supra note 33, at 529.
43 Gordon, The Cuban Nationalizations, supra note 22, at 78.
44 Id. at 81.
45 Memorandum of a Conversation, Department of State, Washington (Sept. 24, 1959), in Foreign Relations of the U.S.: Cuba, supra note 17, at 605, 608.
46 In October of 1959, the United States was paying 5.66 cents per pound of sugar. The world price at this time was 3.14 cents. Cong. Rec., supra note 28, at 15240.
47 Foreign Relations of the U.S.: Cuba, supra note 17, at 333.
50 See Memorandum From the Assistant Secretary of State for Inter-American Affairs (Rubottom) to the Under Secretary of State (Dillon) (Dec. 28, 1959) in Foreign Relations
owners were regularly harassed by Cuban officials. The Cuban government refused to respond in a positive way to repeated U.S. efforts to "seek a friendly solution to the problem of expropriation."

Furthermore, Cuba did not implement the Agrarian Reform Law according to its expressed requirements. The INRA confiscated property in a random and offensive manner. President Eisenhower commented that INRA was not observing the Law and that U.S. citizens' property was "seized without even a pretense of observing the Castro regime's own laws; so far as I know the promised bonds have not even been printed." Castro thus was not concerned with the legal procedures of the Agrarian Reform Law, but instead, was motivated by the need to remove ownership from foreign control.

U.S.-Cuban tensions reached a fever pitch in 1960. Cuba escalated the rate of confiscation of foreign-owned property in January of that year. An increasingly restless Congress responded by passing a new sugar bill on July 6, 1960, amending the Sugar Act of 1948. The act gave the President discretionary authority to set the Cuban sugar quota at any figure until March 31, 1961. To account for the reduction of Cuban sugar, the United States granted higher quotas to other foreign countries. Castro responded to this U.S. threat by implementing the Nationalization Law directed solely at the confiscation of
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U.S. property. The law authorized Cuban officials to nationalize property whenever they deemed "it convenient in defense of the national interest." The Nationalization Law also provided for payment by thirty-year bonds with two percent interest. Castro hoped to generate the revenue from a dollar surplus fund created by profits from sales of over 3,000,000 tons of sugar purchased annually by the United States.

The compensation fund as established by the Nationalization Law was patently inadequate. Even without a reduction of the sugar quota, it was unlikely that Cuba could ever have created such a fund. However, Cuba's failure to comply with the compensation provisions of the Nationalization law was partly a result of actions taken by the U.S. government as revenues from foreign sales were Cuba's primary method of compensation.

Although the United States may have known that it was hamstringing Cuba's ability to provide compensation, the United States was motivated by more fundamental considerations. A primary U.S. concern involved the possibility that Cuba would export its sugar to other countries. In early 1960, Castro entered into long-range commitments with new purchasers in the Soviet Bloc. On February 13, 1960, Cuba signed its first five-year trade agreement for the sale of sugar to the Soviet Union. Cuba signed trade agreements with East Germany for 50,000 tons and with Poland for 50,000 tons. Cuba also agreed to


Few, if any Cuban assets were available for deposit into a claims fund. See Hearings Before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs on Claims of U.S. Nationals Against the Government of Cuba, 88th Cong., 2d Sess. 164, 164 (1964). Leonard Meeker, Acting Legal Adviser of the Department of State, said that "it is clear that the funds which would be available for distribution under a vesting of Cuban assets would be trivial when compared to the losses which have been sustained." Id. He estimated the total realizable assets to be $60,000,000. Id.

Gordon, The Cuban Nationalizations, supra note 22, at 98 n.97.

Fidel Castro, The Case of Cuba is the Case of All Underdeveloped Countries, Address Before the U.N. General Assembly, 31, 39 n.64 (Sept. 26, 1960), in TO SPEAK THE TRUTH: WHY WASHINGTON'S "COLD WAR" AGAINST CUBA DOESN'T END (Mary-Alice Waters ed. 1992) [hereinafter Castro's Address].

This agreement was for the sale of 1,000,000 tons of sugar per year for the five-year term. Id. See also Hearings, supra note 33, at 4; Dep't St. Bull. 360, 360 (1960) [hereinafter Bulletin 2].

See Castro's Address, supra note 67, at 31.

See Hearings, supra note 33, at 4-5.
supply the People's Republic of China with 80,000 tons. Because a major purpose of the Sugar Act of 1948 was to protect the domestic sugar supply, the United States sought to diversify its sources of supply and reduce its dependence on Cuba. The predicted decline of sugar production during agrarian reform coupled with these commitments to Communist countries forced the United States to turn to other countries to seek a stable source of sugar.

Another U.S. consideration was that cutting the sugar quota was consistent with Cuban domestic interests. Cuban Minister of Commerce Raúl Cepero Bonilla stated on Cuban television that "it would be more advantageous to Cuba if the United States did not purchase a single grain of sugar" from Cuba. Ernesto "Che" Guevara, as President of the National Bank of Cuba, indicated that the sugar quota was responsible for many of Cuba's economic and social difficulties, stating that the sugar premium paid by the United States had the effect of enslaving Cuba to a one crop economy. There were implications that Castro wanted the United States to cut the sugar quota and to ultimately end diplomatic relations so that he could more effectively allege economic aggression. For propaganda purposes in Cuba and Latin America, Castro may have believed that U.S. defensive actions far outweighed his provocations.

On July 7, 1960, President Eisenhower declared his plan to cut the sugar quota. In his announcement, the President reiterated U.S. concerns that the sugar supply to the United States from Cuba was becoming unstable, especially in light of Cuba's commitment to steadily increase exports of sugar to the Soviet bloc. Moreover, Cuba had recently expropriated several U.S. oil refineries, further prompting Eisenhower to cut the sugar quota.

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71 Id. at 5.
72 See Sugar Act of 1948, supra note 36.
73 See Hearings, supra note 33, at 5; BULLETIN 2, supra note 68, at 360.
75 See BULLETIN 2, supra note 68, at 360 (emphasis added).
76 GORDON, THE CUBAN NATIONALIZATIONS, supra note 22, at 99 n.99.
77 Telegram from the Embassy in Cuba to the Department of State (July 9, 1960) in FOREIGN RELATIONS OF THE U.S.: CUBA, supra note 17, at 995 [hereinafter Telegram 2]. The sister-in-law of Foreign Minister Raúl Roa informed the U.S. embassy that she learned this information from "sources close to Fidel Castro." Id.
78 Id.
79 Proclamation No. 3355, 25 Fed. Reg. 6414 (1960). With 739,752 tons left to purchase from Cuba in 1960 under the quota arrangement, President Eisenhower reduced the Cuban quota by 700,000 tons to 39,752 tons. While no decision regarding the 1961 quota was made, it appeared predictable that the Cuban reaction to the 1960 reduction would be sufficiently severe to nullify the quota for the following year. GORDON, THE CUBAN NATIONALIZATIONS, supra note 22, at 99.
80 43 DEP'T ST, BULL. 140, 140 (1960).
81 Several commentators assert that Eisenhower reduced the amount of the sugar quota to retaliate against Cuba's confiscation the U.S. oil refineries. See, e.g., ANDRÉS SUÁREZ, CUBA: CASTROISM AND COMMUNISM, 1959-1966 93 (1967) (emphasis added); RAHIN, supra note 55,
The Cuban response was severe. The reduction of the sugar quota intensified the hostility and motivated Castro to further expedite the process of confiscation. As Cuba accelerated its confiscation of U.S.-owned property, the United States protested, charging that the Nationalization Law was discriminatory, arbitrary, confiscatory and manifestly in violation of international law.

On October 13, 1960, President Eisenhower announced a complete ban on U.S. exports to Cuba except for nonsubsidized foodstuffs, medicines, and medical supplies under the authority of the Export Control Act. The President stated that the United States must carry out its duty to “defend the legitimate economic interests of the people of [the United States] against the discriminatory, aggressive, and injurious economic policies of the Castro regime.” The Cuban response was swift: by October 25 of that year, Castro had confiscated all remaining U.S.-owned property.

President Kennedy took subsequent measures against Cuba as a result of the property confiscations. On February 6, 1962, the President announced a trade embargo that prevented the importation of any goods of Cuban origin, except as permitted by the Department of Treasury. The President also confirmed President Eisenhower's export restrictions implemented under the Export Control Act.

Since the embargo went into effect, the property issue has

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at 32; W. Raymond Duncan, Cuban-U.S. Relations and Political Contradictions in Cuba, in CONFLICT AND CHANGE IN CUBA 215, 221 (Enrique A. Baloyra & James A. Morris eds., 1993).


83 43 DEP'T ST. BULL. 171, 171 (1960).
84 43 DEP'T ST. BULL. 715, 716 (1960).
86 Id.
87 On October 14, 1960, Castro confiscated 382 large enterprises; by October 25 Cuba had confiscated an additional 166 enterprises. Chronology, supra note 82, at xvii.
88 Thomas, supra note 50, at 1297. See also Halperin, supra note 55, at 82; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 402-03 (1964) (discussing the completeness of Cuban confiscations). In August of 1960, Nicolás Guillén, dean of Cuban Communist poets, published the following verses on the nationalization of U.S. enterprises:

Martí promised it to you
And Fidel accomplished it for you
It is done.

cited in Suárez, supra note 81, at 10 n.9.

gone unresolved. To date, Cuba has established no settlement fund and has paid no approved claims.  

B. Statutory Authority  

In 1917, Congress enacted the Trading With the Enemy Act (hereinafter "TWEA") to permit the President to control wartime trade with Germany and the Austro-Hungarian Empire. In 1933, Congress expanded the TWEA to cover peacetime national emergencies. The Supreme Court in Regan v. Wald underscored the significance of the Act, stating that the TWEA "gave the President broad authority to impose comprehensive embargoes on foreign countries as a means of dealing with both peacetime emergencies and times of war."  

Under the authority of the TWEA, the Treasury Department issued the Cuban Assets Control Regulations (hereinafter "CACR") in 1963. The CACR prohibits all "transactions [that] involve property in which [Cuba], or any national thereof, has . . . any interest of any nature whatsoever, direct or indirect" by "any person subject to the jurisdiction of the United States." The CACR also provides the statutory basis of the embargo, and the provisions are exclusively and

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92 Testimony, June 14, 1995, Ignacio E. Sanchez, Attorney Kelley Drye and Warren, Senate Foreign Relations, Supporting Democracy in Cuba, available in LEXIS, Nexis Library, CURNWS file ("To date, no U.S. properties have been returned nor have U.S. claimants been compensated."); Re, supra note 9, at 81. See also JORGE I. DOMÍNGUEZ, TO MAKE A WORLD SAFE FOR REVOLUTION 191 (1989). For further information concerning U.S. claims for property seized in 1959-1960, see Sidney Friedberg, THE MEASURE OF DAMAGES IN CLAIMS AGAINST CUBA, INTERAMERICAN ECON. AFF. 23 (Summer 1969); Lynn Darrell Bender, U.S. CLAIMS AGAINST THE CUBAN GOVERNMENT, INTERAMERICAN ECON. AFF. 27 (Summer 1983).  


96 Id. at 225-26.  

97 Id. at 225-26.  


99 Id. § 515.201(b).  

100 Id. § 515.201(b)(1).
explicitly economic. The CACR provides substantial civil and criminal penalties for violations.

Other U.S. statutory authority provides that property rights figure explicitly into the embargo equation. For example, Section 2370 of the Foreign Assistance Act of 1961 specifically refers to Cuba and property rights:

[N]o assistance shall be furnished under this [Act] to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefit under any law of the United States, until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens . . . or to provide equitable compensation to such citizens and entities for property taken . . . on or after January 1, 1959, by the government of Cuba.

The Foreign Relations Authorization Act further provides that the President should continue the embargo against Cuba. The Act also provides that "[n]one of the funds made available to carry out this Act, the Foreign Assistance Act of 1961, or the Arms Export Control Act may be provided to a government or any agency or instrumentality thereof," if the government of such country has "nationalized or expropriated the property of any U.S. [citizen]" and has neither returned the property nor provided adequate and effective compensation within a certain period of time.

The authority that justifies the embargo demonstrates that deriving compensation for confiscated property is the fundamental condition to be resolved before the United States will resume economic relations with Cuba. The economic nature of the CACR, along with the Foreign Assistance Act of 1961 and the Foreign Relations Authorization Act, underscore the condition that Cuba must resolve the property issue prior to the liberalization of the U.S.-Cuban trade relationship. The embargo against Cuba is thus fundamentally

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101 The CACR includes prohibitions of "transactions involving [Cuba]," "transactions with respect to securities," the "importation of and dealings in certain merchandise," and "holding of certain types of blocked property in interest-bearing accounts." Id. § 515.201; Id. § 515.202; Id. § 515.204; Id. § 515.205.
102 Penalties include fines up to $50,000 or imprisonment for up to 10 years. Id. § 515.701.
104 Id. § 2370(a)(2) (emphasis added). The subsection begins with "[e]xcept as may be deemed necessary by the President . . . ." Id. This language, however, does not detract from the paramount position of the property rights.
106 Id. § 527.
107 Id. § 527(a)(1)(A).
108 Id. § 527(a)(2)(A)-(B).
109 Id. § 527(c).
economic.

III. Requirements and Standards for Compensation

International agreements and international custom form the basis of international law.111 International agreements are binding only upon the consenting states.112 State agreements, however, may ultimately become customary law.113 International custom also arises from a general practice among states as well as from international tribunal decisions, since a tribunal's rationale represents what the arbitrators defend in principle as the requirements of international law.115

International law requires that a state pay full compensation for takings of foreign-owned property. The Restatement (Third) of Foreign Relations Law of the United States provides that taking that is discriminatory, not for a public purpose, and not accompanied by "prompt, adequate and effective" compensation is unlawful. Numerous international sources have echoed this standard, including the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,117 the OECD Draft Convention on the Protection of Foreign Property,118 and various international treaties.119

"Confiscation" denotes a government taking of property without compensation to the owner.120 Section 712 of the Restatement

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112 Id. at 1392.

113 Id. at 1982.

114 Stat. of the I.C.J., supra note 111, art. 38(1)(b).


116 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987) [hereinafter RESTATEMENT (THIRD)]. For the text of Section 712, see infra note 269 and accompanying text.

117 [HARVARD] CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS art. 10(2) (Draft No. 12, 1961).


120 GORDON, THE CUBAN NATIONALIZATIONS, supra note 22, at 119 n.24. "Nationalization" is usually used to denote the taking of property, usually an industry or sector of the
(Third) provides that "full" compensation requires the payment of, "in the absence of exceptional circumstances . . . an amount equivalent to the value of the [foreign-owned] property taken . . . paid at the time of taking . . . and in a form economically usable by the foreign [owner]." The Restatement (Third) merely codifies the customary law standard, as embodied in the "Hull formula," stating that the international law of expropriation requires the payment of "prompt, adequate, and effective" compensation.

A. International Customary Law

Article 38(1)(b) of the Statute of the International Court of Justice states that "international custom [is] evidence of a general practice accepted as law." The definition of custom comprises two distinct elements: (1) "general practice" and (2) its acceptance into law. The following discussion shows that the customary law of compensation for confiscated property is a fundamental principle of international law.

1. Origins of the International Law of Expropriation

The international law for confiscation of property has been clearly established for over a century. The laissez-faire era from the mid-nineteenth century to World War I produced the legal rules governing property takings. The underlying assumptions were derived from European legal traditions, in which most states embraced the inviolability of private wealth and the sanctity of contract. During this era, the great majority of states had constitutions and treaties that permitted direct expropriation only with compensation, but regarded any taking of private property as an aberration not impairing the inviolable
nature of private property rights.\footnote{127}

In 1928, the Permanent Court of International Justice codified this customary law principle of full compensation for expropriation in \textit{Factory at Chorzów} \footnote{128} (hereinafter "Chorzów Factory"). \textit{Chorzów Factory} involved the Polish expropriation of German-owned industrial property in Upper Silesia.\footnote{129} Germany claimed that Poland's expropriation violated the Convention Concerning Upper Silesia of May 15, 1922.\footnote{130} The Court held for Germany, deeming that immunity from confiscation is an accepted principle of international law and therefore the expropriation was unlawful.\footnote{131} The Permanent Court of International Justice also stated the now famous passage that articulates the appropriate remedy for a taking:

\begin{quote}
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, \textit{wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed}. \textit{Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; these principles} should serve to determine the amount of compensation due for an act contrary to international law.\footnote{132}
\end{quote}

\textit{Chorzów Factory} is significant because, in addition to embodying the customary law of international expropriations, it is the starting point for many international tribunal decisions.\footnote{133} Moreover, \textit{Chorzów Factory} is important because the court based its opinion on prior decisions made by international claims tribunals.\footnote{134} Numerous decisions handed down between World Wars I and II have followed the \textit{Chorzów Factory} precedent.\footnote{135}

\begin{flushright}
\footnote{128} Indemnity (Factory at Chorzów), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) [hereinafter \textit{Chorzów Factory}].
\footnote{129} Id. at 5.
\footnote{130} Id.
\footnote{131} Id. at 29 ("the Court observes that it is a principle of international law, and even a general conception of international law, that any breach of an engagement involves an obligation to make reparation.").
\footnote{132} Id. at 47 (emphasis added). This passage is dicta because the expropriation fell within the context of a treaty. Nonetheless, the principle of full compensation for an illegal taking, with the object of making the aggrieved owner whole, remains a fundamental principle.
\footnote{133} Norton, \textit{supra} note 115, at 476.
\footnote{134} See generally \textit{Manley O. Hudson, International Tribunals} 196 (1944) (discussing international claims tribunals between the early nineteenth century and World War II, many of which dealt with takings of property).
\end{flushright}
2. Post-World War II Decisions

Between World War II and the early 1960s, arbitrators that addressed the international law of expropriation continued to uphold the principle of full compensation. Four significant decisions arose from efforts made by the states of the Middle East to terminate or renegotiate long-term petroleum concessions.\(^{136}\) Three common elements of these decisions highlight the full compensation principle.\(^ {137}\) First, none of the concession agreements between the United States and the Middle Eastern countries had a clear choice-of-law clause.\(^ {138}\) Each tribunal thus applied general principles of international law. Second, to ascertain the relevant international law, the arbitrators frequently cited as precedents the decisions of earlier international arbitral tribunals that had applied similar general principles of public international law.\(^ {139}\) Third, in each instance the tribunal held the concessionary country to the terms of its concession, or to damages for its breach, largely on the basis of this body of international precedent.\(^ {140}\) These decisions favor a precedent-based jurisprudence of expropriation and support a continued requirement under international law for the payment of full compensation for expropriated property.\(^ {141}\)

3. Resolutions Establishing A Requirement of Full Compensation

Upon gaining independence, many states questioned the customary international law of full compensation.\(^ {142}\) In response, the U.N. General Assembly passed three resolutions regarding expropriation of private property: (1) Resolution 1803, the Resolution on Permanent Sovereignty over Natural Resources,\(^ {143}\) (2) Resolution 3201, the Declaration on the Establishment of a New International Economic Or-

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\(^{137}\) Norton, supra note 115, at 477.

\(^{138}\) See ARAMCO, supra note 136, at 167-69; Sapphire, supra note 136, at 170-75; Qatar, supra note 136, at 545; Abu Dhabi, supra note 136, at 149.

\(^{139}\) See, e.g., ARAMCO, supra note 136, at 172; Sapphire, supra note 136, at 175.

\(^{140}\) See ARAMCO, supra note 136, at 191-98, 205, 216-17; Sapphire, supra note 136, at 182-90; Abu Dhabi, supra note 136, at 150-57; Qatar, supra note 136, at 562-65.

\(^{141}\) Norton, supra note 115, at 477-78.

\(^{142}\) Developing countries asserted that only partial compensation is required for expropriations at an amount based on the state's capacity to pay without jeopardizing social or general economic progress. See S.N. Guha Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?, 55 A.I.L. 863 (1961); MOHAMMED BEDJAOUI, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER (1979).

and (3) Resolution 3281; the Charter of Economic Rights and Duties of States. These resolutions, however, are not binding international law and are merely evidence of international practice.

Resolution 1803 affirmed the customary law principle that a country has a duty to compensate a foreign national for expropriated property. Article 4 of the resolution stipulated that compensation be “appropriate.” Although some countries asserted that “appropriate” did not mean “full” and that compensation should be subject to interpretation by the expropriating state, Resolution 1803 more likely reflected the “prompt, adequate and effective” standard as articulated in the “Hull Formula.” In fact, after the adoption of the draft resolution with the term “appropriate,” the United States noted the adoption of the principle of international law that called for full compensation in the event of expropriation.

A subsequent resolution allowed states to expropriate property as a matter of national sovereignty. Article 4 of Resolution 3201 pro-

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146 All nations agree that U.N. resolutions are not legally binding. Henkin, supra note 114, at 129. Instead, these resolutions may be considered as evidence of international custom or of a general principle of law. Id. Moreover, a resolution that has less than unanimous support is more questionable than a resolution that has been adopted without a negative vote or abstention. Id.
147 Resolution 1803 provides in part:
Nationalization, expropriation or requisitioning shall be based on grounds of reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. 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.
Resolution 1803, supra note 143, art. 4 (emphasis added.)
148 Id.
151 Karol N. Gess, Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis, 13 INT'L & COMP. L.Q. 398, 428 (1964). The author argues that the language is form over substance: the United States allowed the terms to be changed in a spirit of compromise, but the meaning did not change. Id. If “appropriate” did not mean “full,” it is unlikely that the United States would have voted for the resolution. See id. The vote was a nearly unanimous 87 to 2 with 12 abstentions. Norton, supra note 115, at 476.
152 Resolution 3201 provides in pertinent part:
In order to safeguard [natural and economic] resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State.
vided for such expropriations, but did not include a provision for compensation.\textsuperscript{155} The General Assembly remedied this deficiency with Article 2 of Resolution 3281, which allowed states to expropriate property only upon payment of “appropriate” compensation.\textsuperscript{154} The Resolution also referred the interpretation of “appropriate” to state law.\textsuperscript{155} International law was not mentioned.\textsuperscript{156}

4. Subsequent Application of the Law of Expropriations

Despite many observers’ contentions that “appropriate” may not mean “full,” arbitral tribunals have rejected partial compensation standards and reaffirmed that a country must fully compensate owners for confiscated property.\textsuperscript{157} Tribunals have looked first at concession agreements between the respective countries and the domestic law of the confiscating country to determine whether a compensation remedy was provided.\textsuperscript{158} If a compensation remedy could not be found, tribunals have relied on general principles of international law. Tribunals have consistently held that full compensation is the appropriate standard under international law.\textsuperscript{159}

\textit{British Petroleum Exploration Co. v. Libyan Arab Republic}\textsuperscript{160} involved arbitration proceedings in connection with the Libyan expropriation of British Petroleum’s property.\textsuperscript{161} The arbitrator appointed by the United Nations International Court of Justice found that Libya’s confiscation of BP’s property “violate[d] public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.”\textsuperscript{162} Following a comprehensive examination of expropriation decisions, the arbitral tribunal found that \textit{restitutio in

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\textsuperscript{153} Resolution 3201, \textit{supra} note 144, art 4(3).
\textsuperscript{154} See \textit{id}.
\textsuperscript{155} Resolution 3281 provides that each state has the right:

To nationalize, expropriate or transfer ownership of foreign property, in which case \textit{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.

Resolution 3281, \textit{supra} note 145, art. 2(2)(c) (emphasis added).
\textsuperscript{156} \textsuperscript{id}. The vote was 118 to 6 with 10 abstentions. Norton, \textit{supra} note 115, at 478. In addition, the major capital-exporting states either opposed or abstained. \textit{Id}.
\textsuperscript{157} \textsuperscript{id}. Article 2 states:

In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.

Resolution 3281, \textit{supra} note 145, art. 2(2)(c).
\textsuperscript{158} See \textit{infra} notes 160-86 and accompanying text.
\textsuperscript{159} See \textit{infra} notes 160-86 and accompanying text.
\textsuperscript{160} Norton, \textit{supra} note 115, at 477-78.
\textsuperscript{161} 53 I.L.R. 297 (1973) [hereinafter \textit{British Petroleum}].
\textsuperscript{162} \textit{Id}.

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**Integrum** was the proper remedy under international law. Implicit in the choice of this remedy is the principle that complete compensation is the appropriate remedy for an unlawful expropriation.

Two subsequent Libyan arbitration decisions, **TOPCO/CALASIATIC** and **AMINOIL**, agreed that the “appropriate” compensation standard in Resolution 1803 is the standard under international law. In **TOPCO/ CALASIATIC**, the arbitrator reasoned that restitutio in integrum is the preferred remedy where there has been a wrongful expropriation. Five years later, the **AMINOIL** arbitration confirmed that the “appropriate” compensation standard as set forth in Resolution 1803 requires full compensation. Both of these standards are equivalent to the U.S. view of Resolution 1803 that “adequate” compensation means “prompt, adequate, and effective” compensation. The tribunal’s decisions thus underscored the principle that “appropriate” compensation means “full compensation,” and that this standard is applicable to expropriations under international law.

In **Libyan American Oil Co. v. Libyan Arab Republic**, it was determined that “equitable” compensation is an acceptable formulation under general principles of law, and thus under international law. Nonetheless, the arbitrator asserted that “the classical formula of ‘[prompt], adequate and effective compensation’ remain[s] as a maximum and a practical guide for . . . assessment.”

The Iran-U.S. Claims Tribunal, which had jurisdiction over expropriation claims of U.S. nationals against Iran, confirmed the customary law of full compensation for expropriation in the U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights. Each of the significant decisions handed down by the Iran-U.S. Claims Tribunal, the arbitrators examined the applicable legal standard of compensation for expropriations, and all of the majority opinions required the

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163 “Restitutio in Integrum” is defined as restoration or restitution to the previous condition. BLACK’S LAW DICTIONARY 1313 (6th ed. 1990).
164 British Petroleum, supra note 160, at 347.
165 Texas Overseas Petroleum Company & California Asiatic Oil Co. v. Libyan Arab Republic, 17 I.L.M. 1 (1978) [hereinafter TOPCO/CALASIATIC].
167 TOPCO/CALASIATIC, supra note 165, at 32-35.
168 AMINOIL, supra note 166, at 1039.
170 See id. The tribunal acknowledged that Resolution 1803’s “appropriate compensation” standard was valid international law because of its near unanimous acceptance. Subsequent resolutions (i.e., Resolutions 3201 and 3281) were not valid international law because of the lack of consensus and challenge by developed nations. Id. See also TOPCO/CALASIATIC, supra note 165, at 29.
172 Id. at 86 (emphasis added).
173 See U.S.-Iran Treaty of Amity, infra note 197, art. III § 3.
payment of full compensation. For example, citing \textit{TOPCO/CALASIA\textsc{tic}} and AMINOIL, the arbitrators in \textit{Sola Tiles, Inc. v. Iran} found that recent arbitral and judicial tribunals generally equated the "appropriate" compensation standard with full compensation.

The International Centre for Settlement of Investment Disputes heard two disputes that further reinforced the full compensation standard. In \textit{Benvenuti et. Bonfant v. People's Republic of the Congo}, the court stated that the "principle of compensation in the event of nationalization is . . . one of the generally recognized principles of international law as well as of equity." The tribunal's analysis revealed that the arbitrators intended this principle to mean "full compensation."

In \textit{AGIP Co. v. Popular [sic] Republic of the Congo}, the tribunal also based its determination of damages on the full compensation standard. \textit{AGIP} involved the Congolese government's expropriation of \textit{AGIP}'s assets. The tribunal reasoned that international law required that Congo compensate \textit{AGIP} for damages suffered including both actual damages and lost profits.

5. Conclusion

Each recent arbitral tribunal decision has required that full compensation be paid for expropriated property. While they do not espouse the exact "prompt, adequate and effective" compensation language of the Hull formula, they nonetheless require the payment of full compensation and provide no support for a flexible standard.

\footnotesize{\begin{itemize}
    \item[174] American Int'l Group and Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983) (asserting the general principle of international law that "even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken"); Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984) (holding that a claimant was "entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived"); Iran-U.S. Claims Tribunal: Interlocutory Award in Case Concerning Sedco, Inc. and National Iranian Oil Co. and Iran, 25 I.L.M. 629, 634-35 (1986) (arguing that customary international law required the payment of full value); Amoco Int'l Fin. Corp., 15 Iran-U.S. Cl. Trib. Rep. 189 (1987) (the international law of expropriation authorizes \textit{restitutio in integrum} in cases of unlawful expropriation); INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985) (\textit{restitutio in integrum} and full compensation are the available remedies in cases involving unlawful expropriation).
    \item[176] \textit{Id.} at 484.
    \item[177] \textit{21 I.L.M.} 740 (1982).
    \item[178] \textit{Id.} at 758.
    \item[179] \textit{See id.} at 758-61.
    \item[180] \textit{21 I.L.M.} 725 (1979) [hereinafter \textit{AGIP}].
    \item[181] \textit{Id.} at 735.
    \item[182] \textit{Id.} at 727. Congo expressly limited its right to expropriate the property in a provision contained in an investment contract. \textit{Id.} at 735.
    \item[183] \textit{Id.} at 736-37; Norton, supra note 115, at 488.
    \item[184] \textit{See AGIP, supra} note 180, at 737.
    \item[185] M.H. Mendelson, \textit{Compensation for Expropriation: The Case Law}, 79 A.J.I.L. 414, 415 (1985) (dismissing the semantic argument and asserting that the result would be the same if they had applied the terminology of the Hull formula).}

Therefore, the full compensation holdings start from the premise that the foreign investor must be “made whole.”  

B. International Agreements

Article 38 of the Statute of the International Court of Justice gives first priority to “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.”  

The rights and duties of states are therefore determined in the first instance by their agreement as expressed in treaties.

Since 1982, there has been a proliferation of bilateral investment treaties with explicit provisions that ensure compensation for expropriated property. A bilateral investment treaty (hereinafter “BIT”) is an agreement that protects investments of nationals and companies of one contracting party in the territory of the other party. One of the major purposes of the BIT program was to create a network of bilateral investment treaties embracing the prompt, adequate, and effective compensation standard of customary international law.

From 1982 to 1986, the United States concluded ten BITs with other states: Egypt, Panama, Morocco, Zaire, Cameroon, Bangladesh, Senegal, Haiti, Turkey, and Grenada. A critical feature of these negotiations was the unwillingness of the United States to compromise on the standard of compensation.

The collapse of the Soviet empire at the end of the 1980s brought about a new wave of BITs in Eastern Europe and elsewhere. By January 1993, the United States had concluded agreements with Argentina, Armenia, Bulgaria, Congo, the Czech and Slovak Republic, Kazakhstan, Kyrgyzstan, Poland, Romania, Russia, Sri Lanka, and Tunisia. Throughout this second wave of BITs, the United States continued to insist upon full compensation.

The language from the model BIT that was commonly used in the above-mentioned BITs provides:

Investments shall not be expropriated or nationalized either directly

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186 Norton, supra note 115, at 489.
190 BITs were developed to protect U.S. investments and to reduce uncertainties associated with them, as well as to encourage a freer flow of capital investment. Kathleen Kunzer, Developing a Model Bilateral Investment Treaty, 15 L. Pol’y in Int’l Bus. 273, 273 (1983).
191 KENNETH J. VANDERVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 21 (1992) [hereinafter Vanderwelde, Policy and Practice].
193 Vanderwelde, Policy and Practice, supra note 191, at 125. However, the BIT with Haiti did not go into force because of political upheaval in Haiti in 1986. Robert I. Rotberg, Haiti’s Past Mortgages Its Future, 67 Foreign Aff., Fall 1988, at 94-95.
194 See Vanderwelde, The Second Wave, supra note 189, at 633-34.
195 Id.
or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law. . . . Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.\(^{196}\)

Other treaties have embodied similar principles. For example, the U.S.-Iran Treaty of Amity provides:\(^ {197}\)

Property of [U.S. nationals] shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.\(^ {198}\)

A recent example highlighting the full compensation principle is the North American Free Trade Agreement (hereinafter "NAFTA")\(^ {199}\) which states:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law, and (d) on payment of compensation in accordance with paragraphs 2 through 6.\(^ {200}\)

NAFTA provides that compensation shall be equivalent to the fair market value immediately before the expropriation took place, with valuation being a flexible standard to best compensate the owner.\(^ {201}\) Compensation shall "include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment."\(^ {202}\) Moreover, compensation shall be paid "without
delay and be fully realizable.\(^\text{203}\)

The negotiation of BITs in recent years has reaffirmed the traditional standard of "prompt, adequate, and effective" compensation by explicitly including the full compensation standard.\(^\text{204}\) The insertion of the Hull formula into these treaties also reinforces customary rules of international law, as treaty practice and arbitral decisions are evidence of such customs.\(^\text{205}\)

**IV. Full Compensation as the Standard under International Law**

In *Chorzów Factory*, the Permanent Court of International Justice stated that the amount of compensation due for a wrongful taking is "restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear."\(^\text{206}\) This principle is still valid under international law. Where restitution is not possible, full compensation is the appropriate standard.\(^\text{207}\) Recent arbitral tribunals that have considered the issue of compensation have affirmed that customary international law requires a state that expropriates the property of a foreign national to pay the full value of that property, measured, where possible, by the market price at the time of the taking plus interest from that date.\(^\text{208}\)

**A. The Rate of Interest**

1. **Compound Interest as Part of Full Compensation**

Full compensation requires that the property owners receive compensation in an amount equivalent to the value of the property at the time of taking plus compound interest. Although the Cuban Claims Act\(^\text{209}\) is silent on the issue of interest on claims that the FCSC certi-
fied, the FCSC nonetheless held that international law requires that Cuba pay interest as a "part of [a] claimant's loss" resulting from the taking of U.S.-owned property. In reaching its decision, the FCSC regarded "as a settled principle of international law that 'interest, according to the usage of nations, is a necessary part of a just national indemnification.' The FCSC also relied upon the precept that the award of interest is commonly determined to be only a part of making full reparation. Moreover, the FCSC stated that the award of interest not only is "in conformity with the principles in international law," but also is "required by equity and justice."

In connection with the applicable rate of interest, the FCSC determined that "in light of this international law precedent, custom and tradition" that "the rate of 6% is an appropriate, equitable and just measure of compensation...." Finally, the FCSC ruled that interest was to run "from the date the claim arose until the date of payment."

2. Property Owners are Entitled to Compound Interest

Only compound interest on the certified claims of U.S. citizens against Cuba meets the principal objectives of the Cuban Claims Act: the full and fair compensation of U.S. citizens for their losses in Cuba. The FCSC's express purpose in awarding interest is to ensure "full reparation" for the "amount of loss" suffered in Cuba by U.S. citizens. Such "full reparation" can only be achieved by compounding that interest.

There are also analogies in U.S. law that state compound interest constitutes adequate interest. The U.S. Judicial Code states, "Interest shall be computed daily and shall be compounded annually." Authority from international sources also provides that compound interest is properly awardable to compensate a party whose property was expropriated by a foreign state. For example, in AMINOIL the

210 See American Cast Iron Pipe Co., supra note 60, at 50.
211 Id. at 51 (emphasis added).
212 Id. at 51 (quoting 6 MOORE, A DIGEST OF INTERNATIONAL LAW 1029 (1906)).
213 See id.
214 Id. at 52.
215 Id. Subsequently, the FCSC cited another case as authority for the inclusion of interest. Claim of Lisle Corp., Claim No. CU-0644, Decision No. CU-0267 (1967).
216 Claggett argues that the award of simple interest is insufficient; if the purpose is to make the owner whole "compounding is plainly required." Brice B. Claggett, Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts, in PRIVATE INVESTORS ABROAD - PROBLEMS AND SOLUTIONS IN INT'L BUS. 18 (sponsored by the Southwestern Legal Foundation, 1989).
218 AMINOIL, supra note 166, at 976.
tribunal held that Kuwait's taking of the company's assets in 1977 left Kuwait liable to Aminoil in the amount of $83,000,000.220 The tribunal concluded its decision by awarding a total amount of $179,750,764 by capitalizing the $83,000,000 at a compound rate of 17.5% annually.221 In Starret Housing Corp. v. Iran,222 Judge Holtzmann supported the award of compound interest to the U.S. claimants to compensate them for "the actual loss and damage they suffered."223 There is also academic commentary affirming that compound interest is the appropriate measure of interest.224

In light of this authority, Cuba must therefore pay compound interest on the losses incurred by U.S. citizens. Compound interest at six percent per annum brings the total value of the claims certified against Cuba to $13,051,845,500. The U.S. government values the claims at only $5.6 billion,225 which includes only simple interest.226 This figure is inadequately low and inconsistent with international and U.S. authority.

B. Full Compensation as an Inflexible Standard

In extreme cases, full compensation may not be necessary.227 The Restatement (Third) also notes that full compensation is required "in the absence of exceptional circumstances."228 Comment d of the Restatement (Third) further discusses a very narrow range of "exceptional" circumstances, but exempts takings characteristic of those done by Cuba.229 In INA Corp. v. Iran,230 Judge Lagergren endorsed, in prin-

220 Id. at 1042.
221 Id.
223 Id. at 188.
224 See, e.g., F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 380 (1990). Mann argues that "compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals." Id. (emphasis added).
225 In a U.S. State Department Cable it was estimated that Cuba owes investors more than $5 billion for factories, land, and other confiscated property. Christopher Marquis, Exile Warns Against Cuban Deals, TIMES-PICAYUNE, Jan. 15, 1995, at A26; Christopher Marquis, Sweeping Bill Targets Investment in Cuba, THE RECORD, Fed. 10, 1995, at A17. See also Bruce Stokes, The Cuban Conundrum, NAT'L J., Sept. 17, 1994, at 2142, 2144-45.
226 Stokes, supra note 225.
227 See L. OPPENHEIM, INTERNATIONAL LAW 352 (8th ed. H. Lauterpacht 1955). In his treatise, Professor Oppenheim states that when private property interferes on a large scale with a state's political or economic structure, it is "probable" that partial compensation is permissible. Id. Unfortunately, Professor Oppenheim does not provide more specific guidance concerning situations in which the partial compensation standard is more appropriate. See id.
228 RESTATEMENT (THIRD), supra note 116, § 712.
229 RESTATEMENT (THIRD), supra note 116, § 712 cmt. d. Comment d states, "National programs of agricultural land reform" may be "exceptional" circumstances justifying less than appropriate compensation. Id. Specifically excluded from "exceptional" circumstances are (1) a business "authorized or encouraged by the state;" (2) an enterprise taken for operation as a growing concern by the state; (3) expropriations discriminating against aliens; and (4) "wrongful" takings. Id. The Cuban confiscations fall within this exception, particularly (1) and (3).
principle, a lower standard of compensation in "large-scale nationalizations," in which a country simply cannot afford to pay full compensation.\footnote[321]{Id. at 390.} In recent decisions, however, no arbitrator has argued that the amount of an award should be reduced due to economic effects on the expropriating state.\footnote[322]{Norton, supra note 115, at 491.}

In the same arbitral decision, Judge Holtzmann soundly refuted Judge Lagergren's statement that in cases of "large scale" nationalizations full compensation need not be paid.\footnote[323]{See INA Corp. v. Iran, supra note 174, at 393.} The International Court of Justice has described such partial compensation settlements as being sui generis and as such, they are no guide under international law.\footnote[324]{See BARCELONA TRACTION, LIGHT AND POWER CO., LTD. (BELG. v. SPAIN), 1970 I.C.J. 3, 40.} Other international tribunals have made consistent statements. For example, in TOPCO/CALASIATIC, the arbitral tribunal stated that "the amicable settlements which have taken place [have been inspired basically by considerations of expediency and not of legality.]" See TOPCO/CALASIATIC\footnote[325]{See supra note 165, at 488.} supra note 165, at 488. In Sedco, the arbitral tribunal decision stated that partial compensation lump-sum settlements between states and foreign companies:
can be so greatly inspired by non-judicial considerations - e.g., resumption of diplomatic or trading relations - that it is extremely difficult to draw from them conclusions as to opinio juris, i.e., the determination that the content of such settlements was thought by the States involved to be required by international law . . . [and] . . . the International Court of Justice and international arbitral tribunals have cast serious doubts on the value of such settlements of custom.\footnote[326]{DAMES & MOORE v. REGAN, 453 U.S. 654, 688 (1981) (stating with respect to an agreement entered into with Iran, "We do not decide that the President possesses plenary power to}

Moreover, a country that claims it may pay partial compensation to those it has financially injured also violates the international legal principle of nemo judex in re sua.\footnote[327]{WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 154 (1977).} Professor Wortley states:

[A] State may exercise the liberty to accept less than is due to it or its nationals, should it so decide. In order to further peaceful relations, States have often done that. But the exercise of liberty by the creditor State is a different matter from saying that the debtor has a right to fix the terms of which he will be free from liability, especially when the seizure takes place in circumstances which themselves constitute an illegality.\footnote[328]{"[N]o one can be judge in his own suit" see Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Iraq and Turkey), 1925 P.C.I.J. (ser. B) No. 12, at 32 (Advisory Opinion of Nov. 21).} The U.S. Executive Branch may, within limits that are not fully clear, settle the claims of its citizens against a foreign country.\footnote[329]{INA Corp. v. Iran, supra note 174.} If the

\footnote[321]{Id. at 390.}
\footnote[322]{Norton, supra note 115, at 491.}
\footnote[323]{See INA Corp. v. Iran, supra note 174, at 393.}
\footnote[324]{Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 40.}
\footnote[325]{See supra note 165, at 488.}
\footnote[326]{DAMES & MOORE v. REGAN, 453 U.S. 654, 688 (1981) (stating with respect to an agreement entered into with Iran, "We do not decide that the President possesses plenary power to}
President were to enter into a partial compensation agreement, the U.S. government may then become liable to its citizens because of the Fifth Amendment protection of property interests. The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Supreme Court referred to the "self-executing" character of the Fifth Amendment provision requiring compensation when a governmental taking of property has occurred. In its discussion of the obligations imposed upon government by the Fifth Amendment, the Court held that this provision does not "prohibit the taking of property, but instead places a condition on the exercise of that power." The Court reasoned:

This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicated the "constitutional obligation" to pay just compensation.

If the United States were to settle the claims of its citizens against Cuba, those claimants would be left with no existing property interests with respect to that nation. Any uncompensated portions of their claims would be canceled against Cuba and thus rendered valueless. *Armstrong v. United States* provides a similar fact pattern, in which the federal government terminated a shipbuilding contract, thereby acquiring all the materials purchased by the shipbuilder to perform the contract. The suppliers to the shipbuilder were, upon the govern-

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238 U.S. CONST. amend. V. See also *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AJIL 68, 84 (1985) (asserting that "it is by no means settled that the Government's relinquishment of private claims to further national interests, without providing compensation, does not violate the due process and 'taking without just compensation' clauses of the Fifth Amendment").


240 Id. at 315.

241 Id. There is no question that U.S. citizens who possess claims certified against the government of Cuba have constitutionally protected property interests in those claims. *Shanghai Power Company v. United States*, 4 Cl Ct. 237, 240 (1983) (plaintiff's claim certified by the FCSC against the People's Republic of China for losses resulting from the confiscation of its assets in Shanghai held to constitute a property interest). See also *In Re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982) (arguing that "there is no question that claims for compensation are property interests that cannot be taken for public use without compensation") (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) and *Gray v. United States*, 21 Ct. Cl. 340 (1886)).


244 Id. at 41.
ment's action, left with unenforceable liens against those materials because of the federal government's sovereign immunity. The Supreme Court held that the government's action constituted a “taking” of the liens because the value of the liens was destroyed.

The *Armstrong* rule can be applied in an international context to a partial compensation agreement between Cuba and the United States. The court in *Dames & Moore v. Regan* upheld the President's action in dismissing pending litigation by U.S. companies against Iran for, among other things, property expropriations in that country, stating “[t]hough we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States.” Justice Powell, concurring in part and dissenting in part, stated “[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.”

In *Shanghai Power Co. v. United States*, the Claims Court found that the U.S. government's settlement of a U.S. citizen's claim against the People's Republic of China for partial value did not give rise to a Fifth Amendment obligation to compensate the claimant for its uncompensated losses. However, within a year of the decision in *Shanghai Power*, the U.S. Court of Appeals for the Federal Circuit in *Langenegger v. United States* held that

The Claims Court [in *Langenegger*] below incorrectly held that appellants' claim was nonjustifiable and that the extinguishment of a claim under international law cannot amount to a taking; the court relied on *Shanghai Power Co. v. United States*... We note that the lower court's *Shanghai Power* decision does not present an absolute rule that the extinguishment of a claim under international law can never amount to a taking.

The *Langenegger* case reinforced well-settled law that requires each takings issue be resolved on a case-by-case basis. Several factual dif-
ferences existed between the settlement with the People's Republic of China and a potential settlement with Cuba in the post-Cold War era. Such a willingness readily distinguishes China at the time of the Shanghai Power decision from Cuba, since property rights and private investment go hand in hand.

The Supreme Court has recently affirmed the constitutional commitment to property rights. Chief Justice Rehnquist stated in *Dolan v. City of Tigard* that "we see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." The Environmental Protection Agency must comply with similar restraints mandating that the EPA provide full compensation for its takings and for its declaring private property unusable for various environmental purposes.

If the United States were to settle its citizens' claims against Cuba for less than their full value, the U.S. government could be held liable for the difference. In the current environment of budget cutting and deficit reduction, it is unlikely that the U.S. government would subject itself to such liability. Thus, the United States would be unwise to encourage such a settlement because the potentially enormous liability of the U.S. government would invariably cast a cloud over any progress in U.S.-Cuban relations.

**D. Investor Confidence Considerations**

Foreign investors are essential to the economic growth of developing states. Investors are more likely to invest in a country when they are confident that they will capture the expected future returns from their investment. Consistent with this theme of investor confidence...
is the protection of property rights.262 The protection of property rights entails both a guarantee to pay full compensation for any property that may be expropriated in the future and the guarantee of rights to compensation for previously expropriated property.

The developing countries' need for foreign investment seriously impairs the validity of any partial compensation standard for potentially expropriated property.263 A partial compensation standard would only deter the necessary foreign investment264 because investors are more likely to invest in a state if the state can take the investors' assets only with the payment of compensation.265

The denial of rights to compensation for previously expropriated property also weakens a state's ability to attract foreign investment.266 Denial of compensation would expose investors to additional uncertainty by providing a dangerous precedent that their property rights may not be respected.

V. Validity of the Embargo

This section will examine the U.S. embargo as a valid measure against Cuba under international law to derive compensation for confiscated properties. This section discusses Cuba's violation of international law and the general legality of embargoes under international law. This section also includes an explanation of alternative viewpoints with respect to the Cuban embargo, concluding with an analysis of their inability to provide an appropriate solution to the current U.S.-Cuban stalemate.

A. Cuba's Violation of International Law

Cuba has violated international law by taking U.S. property in a discriminatory manner and without justly compensating the owners.267 Cuba's sale of confiscated properties and goods produced on such properties constitutes a further violation of international law.268

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262 Id.
263 Norton, supra note 115, at 496.
264 Id. See also Petersmann, supra note 260, at 336 n.39 and accompanying text.
265 Norton, supra note 115, at 497.
266 Petersmann, supra note 260, at 335. See also Nell Jessup Newton, Compensation, Reparations, and Restitution: Indian Property Claims in the United States, 28 GA. L. Rev. 453, 459 (1994) (discussing, in part, the favorable climate of restitution in Eastern Europe).
267 See infra notes 269-303 and accompanying text.
268 See infra notes 304-307 and accompanying text.
1. Legal and Illegal Takings of Property

Section 712 of the Restatement (Third) provides a cogent summary of the international law of takings:

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that
(a) is not for a public purpose, or
(b) is discriminatory, or
(c) is not accompanied by a provision for just compensation;

For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.269

The Restatement (Third) articulates the standard that has been set forth by established principles of international law. The principles in Section 712 “have been challenged in recent years, but this Restatement reaffirms that they continue to be valid and effective principles of international law.”270

Although the public purpose prong is of little utility,271 Cuba has violated both the discrimination prong and the lack of just compensation prong.272 Cuba’s confiscation of U.S. property, since the enactment of the Nationalization Law in 1960, has been blatantly

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269 Restatement (Third), supra note 116, § 712.
270 Id. cmt. b (emphasis added).
271 See Restatement (Third), supra note 116, § 712 cmt. e. The public purpose prong has not figured prominently in international claims, perhaps because the concept of public purpose is broad and not subject to reexamination by other states. Id. See also Walter Fletcher Smith, 2 R. Int’l Arb. Awards 913 (1929); Burns H. Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth, 75 A.J.I.L. 437, 438 (1981); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). There is nonetheless evidence that Castro did not take the property for a public purpose, as Castro may have been motivated to enhance his own personal gain. For example, the U.S. Embassy in Havana reported that Castro “was willing to sacrifice Cuban interests to his greater ambition of humiliating the United States, wrecking the inter-American system, and taking over leadership in Latin America.” Memorandum of Discussion at the 451st Meeting of the National Security Council (July 15, 1960), in Foreign Relations of the U.S.: Cuba, supra note 17, at 1014-15 (emphasis added). The U.S. Ambassador to Cuba noted that Castro “does not care what happens to Cuba and that, in effect, he looks upon Cuba as sacrificial lamb which he can use to defeat and humiliate [the United States] in its efforts to isolate him.” See Telegram 2, supra note 77, 995 (emphasis added). Although this analysis is not intended to be conclusive, it nonetheless provides evidence that the public policy prong has not been met. See id.
272 Article 1 provides:
The President of the Republic and the Prime Minister are authorized to order jointly by means of resolutions, whenever they may deem it convenient in defense of the national interest, the nationalization through expropriation, of the properties or concerns belonging to natural or juridical persons nationals of the United States of America or the concerns in which said persons have a majority interest or participation even though they be organized under the laws of Cuba.

Nationalization Law, supra note 60, art. 1 (emphasis added).
Article 1 of the Nationalization Law explicitly isolated the U.S. property owners as the targets of expropriations. Cuba clearly intended to retaliate against U.S. nationals for acts of their government. Cuba's subsequent practice in dealing with expropriated property indicates that Cuba's treatment of the United States continues to be discriminatory. For example, Cuba has provided compensation for other foreign owners whose property was expropriated under the Agrarian Reform Law.

Furthermore, although Cuba provided provisions for compensation, the illusory nature of the provisions rendered them unjust. The compensation provisions under the Agrarian Reform Law and the Nationalization Law could not have compensated the U.S. owners. Predictably, Cuba has not provided any compensation to U.S. owners. As a result of the discriminatory intent and unjust provisions for compensation, Cuba's taking of U.S.-owned property is in violation of international law.

2. Opinio Juris

Opinio juris is an alternative way of establishing Cuba's violation of international law. Opinio juris stands for the principle that (1) a state

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273 See id.
274 Id.

The attitude assumed by the Government and legislative power of the United States of America of constant aggression for political purposes against the fundamental interests of the Cuban economy, emphatically evidenced by the amendment recently passed by the Congress of said country to the Sugar Act at the request of the executive power, by which the President of that nation is granted exceptional powers to reduce the participation of Cuban sugar in the sugar market of that country, as an arm of political action against Cuba, obliges the Revolutionary Government to adopt without hesitation, also the measures that it may deem pertinent for the defense of the national sovereignty and the free economic development of our country.

Nationalization Law, supra note 60, Pmbl.


277 For an analysis of the illusory nature of the Agrarian Reform Law see supra notes 27-38 and accompanying text. For a discussion of the illusory nature of the Nationalization Law see supra notes 65-74 and accompanying text.

278 See Testimony, supra note 92.
regards a particular practice as a norm of customary international law; and (2) a state believes that the practice is obligatory under international law. A state is thus bound to an international rule once it shows that it intends to adhere to the international rule.

The International Court of Justice (hereinafter "I.C.J.") in Nicaragua v. United States, expounded upon the principle of opinio juris. Nicaragua had instituted proceedings in the I.C.J. against the United States for carrying out military activities in Nicaragua in violation of Article 2(4) of the U.N. Charter. The United States challenged I.C.J. jurisdiction, arguing that the I.C.J. does not have jurisdiction to hear cases concerning the application of the U.N. Charter. The I.C.J. held that the United States was nonetheless bound to Article 2(4) prohibition on the use of force. The I.C.J. reasoned that since the United States and Nicaragua agreed to incorporate the Article into the U.N. Charter, this agreement made that rule "binding upon them." Thus, the United States and Nicaragua satisfied the first prong of opinio juris by regarding Article 2(4) as a principle of international law.

The I.C.J. then determined that both countries believed Article 2(4) was obligatory under international law, thus satisfying the second opinio juris prong. The I.C.J. examined U.S. and Nicaraguan practice and concluded that "both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law . . . [and] . . . therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force . . . ." The I.C.J. concluded that the United States and Nicaragua expressed an opinio juris respecting Article 2(4) and were therefore bound.

The opinio juris principle is also applicable to the conflict between the United States and Cuba. Both the United States and Cuba (1) regard compensation for expropriated property as a norm of customary international law; and (2) believe that the practice is obligatory under international law. There is considerable similarity in practice between the two countries to support this proposition.

The United State’s emphasis on the inviolable quality of private


\[\text{\footnotesize\textsuperscript{281}}\] Id. § 15.

\[\text{\footnotesize\textsuperscript{282}}\] U.N. CHARTER art. 2, para. 4 ("All Members shall 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.").

\[\text{\footnotesize\textsuperscript{283}}\] Id. § 10.

\[\text{\footnotesize\textsuperscript{284}}\] Id. § 188.

\[\text{\footnotesize\textsuperscript{285}}\] Id. § 184.

\[\text{\footnotesize\textsuperscript{286}}\] Id. § 188.

\[\text{\footnotesize\textsuperscript{287}}\] Id.
property rights is well established. The Fifth Amendment of the U.S. Constitution provides that “private property [shall not] be taken for public use, without just compensation.” The history of compensation for property takings is also firmly rooted in Anglo-American law.

Cuba has also developed the principle of compensation for expropriated property. The 1901 Cuban Constitution provides that foreigners residing in Cuba shall enjoy the same legal protection as Cuban citizens, that the government shall not deprive an individual of his or her property without proper cause and indemnification, and that government shall not impose the penalty of confiscation of property under any circumstances. The 1940 Cuban Constitution confirmed that an individual’s property right is a fundamental right requiring state protection. In 1948, Cuba reaffirmed this view by signing the Economic Agreement of Bogota. Article 25 of the agreement provides that a state will not take discriminatory actions against a foreign national’s property; if such taking must occur, com-

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288 U.S. CONST. amend. V.

289 The “just compensation” clause is deeply rooted in Anglo-American history. See FRED BOSSELMAN ET AL., THE TAKING ISSUE 56 (1973). This right first appeared in the Magna Carta. Id. King John sealed in Chapter 39: “No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, not send against him, unless by the lawful judgment of his peers and by the law of the land.” Id. (emphasis added). The British citizens who settled in North America adopted this principle. Id. at 80. Thus, property rights left an enduring imprint on the development of colonial legislatures. DAVID HAWKE, THE COLONIAL EXPERIENCE 62 (1966). James Madison ultimately embraced these broad rights in the Fifth Amendment, making explicit the bar on uncompensated takings. William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 710 (1984). History reveals that the right became an established principle of Anglo-American legal tradition. Id. at 715. The United States has reinforced this right with the Second Hickenlooper Amendment, Pub. L. 89-171, 79 Stat. 653 (1964), 22 U.S.C. § 2370(e)(2), which prevents application of the act of state doctrine to cases involving claims to property, thereby permitting a U.S. court to proceed with an adjudication against a foreign state on a takings issue unless the President of the United States officially states that such an adjudication in the particular case would embarrass the conduct of foreign policy. S. Rep. No. 1188, pt. I, 88th Cong., 2d Sess. 24 (1964). This Amendment clearly shows that the U.S. government is committed to protecting the property rights of U.S. citizens.


291 CUBA CONST. (Constitution of Cuba, 1901), art. 10(1); reprinted in Rodriguez, 2 INT’L BUREAU OF THE AM. REPUBS., AMERICAN CONSTITUTIONS 112 (José Ignacio Rodriguez trans. 1907).

292 Id. art. 32.

293 Id. art. 33.


Compensation is due in a "prompt, adequate and effective manner."\(^{296}\) The Declaration of the Delegation of Cuba affirmed Article 25, stating that the "prompt, adequate, and effective" compensation provision is consistent with the Cuban Constitution.\(^{297}\)

Furthermore, Article 25 of the Cuban Constitution of 1992 reiterates this principle: "Expropriation of assets is authorized for reasons of public purpose or social benefit, and with due compensation."\(^{298}\) This Article is significant because private property now exists in Cuba and this property enjoys constitutional protection. For example, Article 15 provides that state property may be conveyed "to natural persons or bodies corporate [in] special cases wherein the partial or total transfer of any economic object is intended for purposes of the country's development."\(^{299}\) Article 23 states that Cuba "recognizes the property owned by mixed enterprises, and by economic partnerships and associations established according to law."\(^{300}\)

Cuba's domestic law indicates that Cuba has recognized the international law of compensation for expropriation. The provision requiring compensation has been a consistent part of the Cuban Constitution.\(^{301}\) Cuba has also been a signatory to international agreements upholding full compensation.\(^{302}\) In addition, Cuba has entered into agreements to compensate foreigners from whom it expropriated property.\(^{303}\)

The above discussion indicates that both the United States and Cuba regard and believe that compensation for expropriated property is a norm of customary international law. Opinio juris dictates that they are bound. Cuba must therefore be held responsible for its violations of customary international law by not compensating former U.S. owners of Cuban property.

3. Selling Stolen Goods

Cuba is further violating international law by selling confiscated property or interests in those properties to new foreign investors. A government that acquires confiscated property does not acquire good title.\(^{304}\) A buyer of stolen property with knowledge of a defective title

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\(^{296}\) Id. at 209.  
\(^{297}\) Id. at 216.  
\(^{298}\) CUBA CONST. (Constitution of the Republic, 1992) art. 25.  
\(^{299}\) Id. art. 15.  
\(^{300}\) Id. art. 23.  
\(^{301}\) The Cuban Constitutions all maintained the compensation provision before and throughout the Castro regime. See supra notes 290-300 and accompanying text.  
\(^{302}\) Upon taking control, Castro said that "all international agreements will be upheld in force." Memorandum, supra note 19, at 347.  
\(^{303}\) See supra note 276 and accompanying text.  
\(^{304}\) Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), [1953] 1 W.L.R. 246 (Aden Sup. Ct.), reprinted in 20 I.L.R. 316 (discussing the position that title to a cargo of oil does not pass to government upon illegal confiscation) [hereinafter The Rose Mary].
does not become a *bona fide* purchaser and therefore acquires no better title than the confiscating government.\(^{305}\) Title to any natural resource grown or extracted from the confiscated property does not pass to the government upon illegal nationalization.\(^{306}\) Furthermore, any investor who acquires confiscated property may be liable for trespass, unjust enrichment, rent, waste, or damage to property.\(^{307}\)

**B. Justification for the Embargo under International Law**

The frequent use of embargoes and other economic sanctions by many countries constitutes persuasive evidence that no clear norm exists against them in customary international law.\(^{308}\) In *Nicaragua v. United States*,\(^{309}\) Nicaragua asserted that the United States had violated the principle of nonintervention by cutting economic aid, by reducing Nicaragua's sugar quota by 90 percent, and by imposing a comprehensive trade embargo.\(^{310}\) While the Court ruled that the United States had violated customary international law by training and arming the anti-government contras, the majority nevertheless concluded on the economic sanctions: "[T]he Court has merely to say that it is *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."\(^{311}\)

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\(^{305}\) Brice M. Claggett, Public International Legal Standards Applicable to Property Expropriation in Cuba 12-13, Address Before the ABA Annual Meeting (Aug. 9, 1994) (discussing, in part, the rights of U.S. property owners in Cuba).


\(^{307}\) Brice B. Claggett, Public International Legal Standards Applicable to Property Expropriation in Cuba 13, Address Before the ABA Annual Meeting (Aug. 9, 1994).


\(^{309}\) See Nicaragua v. United States, *supra* note 280.


\(^{311}\) Nicaragua v. United States, *supra* note 280, at 116 (emphasis added).

Restatement (Third) § 905 provides an alternative legal framework for which a state can respond unilaterally respond to another state's violation of international law:

1. Subject to Subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures (a) are *necessary* to terminate the violation or
In an attempt to negotiate compensation for expropriated property, the United States has resorted to economic sanctions nine times since World War II.312 The United States has been successful in eight of these instances,313 with the continuing effort against Cuba being the only unsuccessful case.

C. Current Developments

1. Alternative Views

There are three common views concerning the U.S. approach to Cuban foreign policy. The first view is the "liberal" view, which advocates that the embargo is a relic of the Cold War and the United States should remove the embargo for humanitarian reasons. The "free trade" view argues that the United States should lift the embargo and flood Cuba with U.S. investment and influence, thus precipitating political change. In contrast, the conservative "isolationist" view asserts that there should be no liberalization of relations until Cuba makes changes consistent with the principles of democracy and free enterprise. Each of these approaches toward Cuba is misguided because they all distort the central rationale of the embargo: to derive compensation for confiscated property.

There is an increasing chorus of advocates for the "liberal" view. Former President Jimmy Carter stated that "[i]t’s time for us [the United States] to begin discussions on how we can alleviate this crisis which has caused tremendous suffering among the people of Cuba and has distorted this hemisphere’s concept of freedom and democ-

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racy." Professor Andrew Zimbalist suggests the United States lift the embargo all at once, stating that the United States may retain leverage over Cuba by, *inter alia*, waiving compensation for confiscated property. Professor Rudi Dornbusch suggests that in a post-Castro Cuba, "[w]hether and when financial compensation should be offered can be discussed in time," since Cuba's resources should be kept free for reconstruction. U.S. Representative Charles Rangel (D-N.Y.) has proposed that the United States unilaterally lift the embargo against Cuba, urging the President to take steps to settle the property claims of U.S. citizens after lifting the embargo. Several other commentators have similarly condemned the embargo.

These arguments confuse the true rationale of the embargo and advocate a course of action that is detrimental to Cuba. The property dimension of the embargo has been fully established, and successful resolution of the property issue is necessary to for a climate of investor confidence in the Cuban economy.

Former President Richard Nixon and the *Wall Street Journal* have advocated the "free trade" view. The *Wall Street Journal*, comparing the situation in Cuba to China's recent pattern of development, argues that lifting the embargo would benefit "precisely those forces that are most likely to liberalize Cuba's economic and political power structure."

Lifting the embargo, without resolving the property issue, will not bring about the desired change. It is clear that foreign direct investment is widely accepted as essential to developing economies. Without respect for property rights, the flow of foreign investment is likely to be insignificant and limited to short-term get-rich-quick schemes. Furthermore, if Cuba is to develop like China, Cuba must do precisely what China did: resolve the property issue.

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315 Andrew Zimbalist, *Give Castro a Carrot*, *N.Y. Times*, Feb. 17, 1994, at A23. Professor Zimbalist argues that the only reason that the embargo is still in place is because of the political influence of the Cuban-American National Foundation [hereinafter "CANF"], a powerful and conservative Cuban-American organization. On the issue of how to achieve a peaceful transition in Cuba, Professor Zimbalist has stated that "engagement rather than isolation has proven to be a better policy." *Id.* Although CANF has been influential in recent policy making, the underlying foundation of private property has existed since the inception of the embargo. Stokes, *infra* note 225, at 2144.
319 See *infra* part II.
320 See *infra* part IV.D.
323 *See* Shanghai Power v. United States, 4 Cl. Ct. 237, 249 (1983). China resolved out-
The conservative "isolationist" view is equally problematic. Advocates encourage a "hard-line" approach and then expect to transform Cuba into a capitalist model after Castro falls out of power. The priority of compensation for confiscated property is unclear. This view is laden with outdated Cold War political rhetoric and is counterproductive. Isolationists are a very strong political force in the United States, and have recently showed their strength by lobbying successfully for the Cuban Democracy Act.

2. The Cuban Democracy Act

In October of 1992, the U.S. Congress passed the Cuban Democracy Act (hereinafter "CDA"). Under the CDA's authority, subsidiaries of U.S. companies based abroad that have traded with Cuba in the past could be prosecuted under U.S. law for doing so in the future. Moreover, the U.S. government would prohibit ships from entering the United States from Cuban ports for a period of 180 days and would prohibit ships from entering the United States that carry goods or passengers to or from Cuba in which any Cuban national has an interest.

The United States can waive these economic sanctions if Cuba meets certain requirements. However, none of the requirements in-
cludes compensation for the confiscated property.\textsuperscript{331} The legislative history of the CDA is equally devoid of any reference to compensation for the confiscations.\textsuperscript{332} Because it is inconsistent with prior U.S. policy on the embargo, the CDA is a flawed measure.\textsuperscript{333} The U.S. embargo, as properly construed, is a legal measure to derive compensation for the confiscated property. Therefore, the CDA is an aberration from this traditional purpose.

3. Cuba's Challenge to the Cuban Democracy Act

The United Nations and several commentators have challenged the legality of the CDA.\textsuperscript{334} Cuba has successfully encouraged the United Nations to pass Resolutions 47/19\textsuperscript{335} and 48/16,\textsuperscript{336} both of which condemn the CDA. In challenging the embargo before the United Nations, Cuba relied on Article 4 of Resolution 3281, which provides in pertinent part:

Every State has the right to engage in international trade and other forms of economic cooperation irrespective of any differences in polit-

\textsuperscript{331} Section 6007 of the U.S. Code provides that the executive branch may lift sanctions against Cuba if the President determines that the government of Cuba "is moving toward establishing a free market economic system." Id. § 6007(a)(4). Because property rights and free market economics are mutually dependent, property rights are implicit. \textit{See supra} part IV.D.

\textsuperscript{332} However, the illegality of selling goods from confiscated property was brought to the attention of the committee. \textit{Consideration of the Cuban Democracy Act of 1992; Hearings on H.R. 4168 and H.R. 5323 Before the Committee on Foreign Affairs}, 102nd Cong., 2nd Sess. 244-47 (1992) (testimony of Mr. Roger D. Chesley, Vice President and General Counsel, Amstar Corporation). One author asserts that the United States used the confiscations as justification for the CDA. Berta Esperanza Hernandez Truyol, \textit{Out in Left Field: Cuba's Post-Cold War Strikeout}, 18 FORDHAM INT'L J. 15, 40 (1994). Moreover, when the Cuban Democracy Act came under fire in the United Nations General Assembly, U.N. Votes against U.S. on Embargo of Cuba, \textit{St. Petersburg Times}, Nov. 25, 1992, at Al. Watson stated that the United States "chooses not to trade with Cuba ... [because] the government of Cuba, in violation of international law, expropriated billions of dollars worth of private property belonging to U.S. individuals and has refused to make reasonable restitution." \textit{Id.}

\textsuperscript{333} See \textit{supra} part II.B. Congress' express inclusion of property in the recently passed Libertad Act remedies this deficiency in the CDA and further continues the basis of resolving the property issue before liberalizing relations. \textit{See Libertad Act, supra} note 110 and accompanying text.


Cuba further argues that the CDA is an "extreme and unjustified interference with the U.S. sovereign decision to maintain normal trade and shipping relations with Cuba." Economic sanctions are a completely legal measure under international law to resolve an international difference. The United States has not imposed the embargo solely because Cuba has a different political, economic, and social system. Even if the CDA targets the political differences, the traditional rationale for the embargo is based on the violation of property rights under international law. Therefore, U.S. economic sanctions are not based "solely" on the differences in the political systems.

Cuba's principal arguments against the CDA include that the U.S. embargo is extraterritorial and economically coercive. While the merit of each argument is questionable, an analysis of the legality of

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537 See Resolution 3201, supra note 144, art. 4.
538 MICHAEL KRINSKY & DAVID GOLOVE, UNITED STATES ECONOMIC MEASURES AGAINST CUBA 43 (1993). Mr. Krinsky and Mr. Golove are associated with the law firm that has represented the government of Cuba since 1960. Id. at 1.
539 See supra part V.B.
540 KRINSKY & GOLOVE, supra note 338. See also supra part IV.
541 See supra part V.
542 Section 402 of the Restatement (Third), states that the United States has jurisdiction to prescribe law with respect to:
(1) "conduct outside its territory that has or is intended to have substantial effect within its territory"; (2) the "activities, interests, status, or relations of its nations outside as well as within its territory"; and (3) "certain conduct outside its territory by persons not its nations that is directed against the security of the state."

RESTATEMENT (THIRD), supra note 116, § 402 (emphasis added).
Comment c states that the United States and other states have used this provision to assert jurisdiction over: (1) "goods or technology located abroad on the basis of their origin in the state exercising jurisdiction"; and (2) "companies outside their territory on the basis of the state's control over affiliates present in the territory." Id. Comment c. Section 403 of the Restatement (Third) provides some limitations on this ability to prescribe jurisdiction, stating that the exercise of jurisdiction must be "reasonable." Id. § 403(2). This Section includes "the importance of the regulation to the international political, legal, or economic system" as a factor in determining whether jurisdiction is appropriate. Id. (emphasis added). Because the embargo is a response to Cuba's violation of international law, and the U.S. enforcement of this embargo may ultimately benefit the international economic order by facilitating the international flow of capital and investment, the U.S. imposition of more harsh sanctions to bring about this change could be considered "reasonable." See supra Part V.

Cuba has also used paragraph 2 of G.A. Resolution 2131 in an attempt to condemn the CDA. KRINSKY & GOLOVE, supra note 338, at 42. Paragraph 2 provides of the resolution provides that: "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 advantages of any kind." Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR 1st Comm., 20th Sess., at 11 (1965). The traditional embargo is not designed to "subordinate" Cuba's sovereignty, but to derive compensation for confiscated property. Claims of economic "coercion" are subordinate to legitimate claims under international law for the compensation of wrongfully confiscated property. See generally supra notes 246-77 and accompanying text.

Cuba's attempt to recruit the United Nations to force the United States to lift the em-
the CDA is largely irrelevant. Rather, the inquiry is whether U.S. economic sanctions are necessary and proportionate.343 U.S. economic sanctions clearly meet this standard.344

VI. Recommended Approach

A. Practical Realities

International law requires Cuba either to return the property or to pay fair market value from time of taking plus interest compounded annually to all the owners. However, the Cuban economy has been devastated,345 thus challenging the implementation of a coherent compensation plan.346

B. Restitution

Restitution is the optimum remedy.347 Cuba’s restitution program should be “designed to right the wrongs of the past” thereby helping the new government build credibility as a “justice-administering state.”348 The appropriate restitution plan would also assist in Cuba’s attempts to privatize its economy through the placement of property in private hands.349

Other benefits of restitution include: (1) increasing levels of employment; (2) additional tax revenues; (3) an improvement in the balance of payment accounts; (4) a needed expansion of exports; (5) the introduction of new technology; and (6) a more diverse economy which is less dependent on sugar.350 The remedy of restitution will therefore provide the Cuban population with increasing levels of

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bargo contravenes the resolution it seeks to use for protection. See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA. Res. 2131, U.N. GAOR 1st Comm., 20th Sess. (1965). Outside of the questionable extraterritorial aspects of the CDA, the U.S. embargo is a justified domestic policy in response to Cuba’s violation of international law. Article 1 of Resolution 2131 states that “[n]o State has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.” Id. art. 1 (emphasis added). Thus, any external effects of the embargo must also be protected by the resolution.

In any case, resolutions of the General Assembly are not binding international law; therefore, a discussion of U.S.-Cuban relations based upon the authority of these resolutions is largely theoretical. See supra note 146 and accompanying text.

343 Restatement (Third), supra note 116, § 905 (asserting the need for “necessary” and “proportionate” responses in connection with violations of international law).

344 Because Section 905 of the Restatement (Third) allows the United States to take countermeasures that “might otherwise be illegal” if they are in response to Cuba’s violations of international law, the legality argument is irrelevant. Cuba’s violations are clearly established. See supra part VA.

345 For a comprehensive analysis of Cuba’s current economic crisis, see Truyol, supra note 332, at 52-70.

346 Id.

347 Note that this Article focuses on U.S. corporate property. For a discussion of the standard that is appropriate for residential property see infra note 355.

348 Newton, supra note 266, at 454.

349 Id.

350 José F. Alonso, An Economic Exercise in Restitution, Address Before the Future of
welfare.351

C. Full Compensation

Where restitution is not possible, Cuba should employ a system of full compensation for the property owners.352 However, the depleted Cuban treasury renders this approach infeasible. Thus, to compensate the owners of confiscated property that cannot be returned, an alternative approach to a full lump-sum payment system is necessary.

A bilateral investment treaty between the United States and Cuba would provide a framework for a long-term payment of the confiscated property. The BIT should acknowledge full compensation for past investments in confiscated property. Article XIII of the 1987 BIT Model Negotiating Text expressly provides that the BITs “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.”353 Several nations have adopted a provision stating that a BIT retroactively applies to previous investments.354

Any claimants to whom it is infeasible to return property would thus have recourse to gain long-term payment for their property. The BIT would create a separate tribunal, comparable to the Iran-U.S. Claims Tribunal, to deal exclusively with property claims. The tribunal would hear each case individually. In addition, owners may wish to negotiate directly with the government for a more efficient settlement. Some parties may opt for a partial-restitution, partial-compensation settlement if certain segments of their property have been unalterably changed, thus rendering complete restitution infeasible.355 This

the Sugar Industry in a Free Cuba Conference 10 (July 15, 1994) (transcript available from the National Association of Sugar Mill Owners of Cuba, Inc., Miami, FL).

351 Id. Restitution has had many pitfalls in Eastern Europe. The example of Eastern European countries' handling of the return of confiscated property is an excellent case of the dangers involved in such programs. Insufficient attention to the uncertainty introduced by complex restitution policies can bring serious difficulties to the best intentioned program. Also, different types of assets, such as real property and regulated utilities, require significantly differentiated treatment. Finally, related issues such as the valuation of foreign exchange, the role of foreign investments, and the desire for establishing a broad distribution of property rights must be considered within the same equity/efficiency paradox. Luis R. Luis, Lessons from Privatization in Eastern Europe and Latin America, Address Before the Cuba in Transition Conference (Aug. 15-17, 1991) (Association for the Study of the Cuban Economy, Florida International University, Miami, FL). See also Frances H. Foster, Post-Soviet Approaches to Restitution: Lessons for Cuba, Paper presented to the ABA Annual Meeting (Aug. 9, 1994) (discussing restitution in Estonia, Latvia, and Lithuania).

352 Note that this standard is the standard under international law, codified by Chorzów Factory, supra note 128, at 194.

353 See BIT Model Negotiating Text, supra note 196, at A-4.

354 Bangladesh, Turkey, and Poland have adopted retroactivity language. See Vandeveld, Policy and Practice, supra note 191, at 63-64.

355 Restitution of residential property may be problematic because many Cuban families now live in these residences. Thus, to compensate the residential property owners, a portion of each month's rent should be used to compensate the owner over a period of years. The standard for compensation for residential property would be the same as that for corporate property: fair market value at time of taking plus interest.
framework would provide the optimum resolution for each individual claim.

A BIT would also guarantee the future protection of property rights in Cuba. In addition to serving as a symbol that the Cuban government has embraced a pro-market economic policy, a BIT would ultimately attract greater private investment.\textsuperscript{356} Once enacted, a BIT would provide genuine protection for U.S. investment.\textsuperscript{357} A BIT also would serve to attract further investment in Cuba and gradually help Cuba obtain most favored nation status, thus further opening Cuba to U.S. investment.\textsuperscript{358} The treaty also would perform the educational function of informing government officials with little experience in operating a market economy of the kinds of policies considered necessary or advisable by private investors.\textsuperscript{359}

\section*{VII. Conclusion}

Cuba is clearly in violation of international law by discriminatorily confiscating U.S.-owned property and providing \textit{unjust} provisions for compensation. The United States is therefore justified in imposing the embargo as a necessary and proportionate remedy. Cuba must formally arrange to discharge itself from its international obligations before the United States considers the reestablishment of diplomatic and economic relations with Cuba. The U.S. government must ensure that the inviolable nature of private property is respected by the Cuban government before any progress is made in liberalizing U.S.-Cuban relations.

\begin{footnotesize}
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\item[\textsuperscript{356}] Vandevelde, \textit{The Second Wave}, supra note 189, at 634.
\item[\textsuperscript{357}] Id.
\item[\textsuperscript{358}] Id.
\item[\textsuperscript{359}] Id.
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