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Florida International University College of Law, jose.gabilondo@fiu.edu

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ECONOMIC COERCION AND THE LIMITS OF SOVEREIGNTY: CUBA'S EMBARGO CLAIMS AGAINST THE UNITED STATES

José Gabilondo[1]

TABLE OF CONTENTS

I. INTRODUCTION 52
II. ECONOMIC AND POLICY ANTECEDENTS 60
  A. *First Moves: The Construction of Socialist Economy and Bilateral Retaliation* 60
  B. *Taking Sides: Cold War Containment and the Sovietization of the Cuban Economy* 65
  C. *Austerity and Regime Change* 70
  D. *Raul Castro, Economic Reforms, and Diplomatic Normalization* 74
III. THE CUBAN VIEW 76
  A. *Claims Before the United Nations* 77
  B. *Domestic Legal Actions for Harms to National Security and the Economy* 79
IV. A FRAMEWORK FOR SOVEREIGN LIABILITY 83
  A. *U.S. Liability for Economic Coercion* 83
    1. Proximate Causation 83
    2. Violation of the Principle of Nonintervention 84
    3. Departure from International Norms About Economic Aggression 85
    4. Regime Change Cuban-Style 88
  B. *Other Legal Issues* 90
    1. Agreeing on a Forum and Jurisdiction 90
    2. Theorizing Valuation 90
    3. Fashioning a Meaningful Remedy 92
V. FROM NATIONAL MITOSIS TO SYNTHESIS 95

[1] College of Law, Florida International University, gabilond@fiu.edu, +1 305 710 5656. I presented parts of this argument at the 2016 Annual Meeting of the Association for the Study of the Cuban Economy (Miami), the 2016 meeting of the Association of American Jurists (Havana), the Cuban Ministry of Foreign Relation's XV conference on Cuba in U.S. foreign policy (Havana), the faculty colloquium series at the University of Miami Law School, and the XI Conference of Cuban and Cuban-American Studies at Florida International University. The feedback at these events contributed to my argument. I am grateful for the feedback received on earlier drafts from William LeoGrande, Rafael-Andrés Velázquez Pérez, Howard Wasserman, and Megan Fairlie. My research assistant Nina Roca provided wonderful research assistance. Let me also express my appreciation to the editors and staff of the Harvard Latino Law Review for their editorial contributions and general support in this project. All errors are my own.

I. INTRODUCTION

Beginning in 1959, the Cuban government expropriated the property of Cuban nationals, U.S. companies and individuals, and foreign investors from other countries. U.S. individuals and corporations subject to U.S. jurisdiction at the time of the expropriations filed property claims requesting indemnification with the U.S. Foreign Claims Settlement Commission, which certified 5,913 claims.[2] Expropriation involves political risk because an economic loss arises not from a market outcome but, instead, results from state action. These political risk claims remain outstanding at a value (with interest) of about $8 billion, although many claimants have already recovered some or all of their investment through deductions on their federal income tax returns.[3] Much ink has been spilled on these certified claims.[4] For example, the American Bar Association's Section on Taxation has argued that any future recoveries on these claims should not be taxable, in contravention of tax benefit principles that require inclusion in gross income of recovered items formerly deducted.[5]

When Cuba first expropriated the property of U.S. nationals after the Revolution, President Eisenhower cut the island's sugar import quota and imposed a partial trade embargo.[6] Expanded by President Kennedy, subsequent presidents, and Congress, these sanctions — a form of economic coercion — have now continued for 57 years.[7] The sanctions limit the way that persons subject to U.S. jurisdiction must refrain from travel to and involvement with Cuba. In so doing, these sanctions also create political risk because they create uncertainty about whether an individual or corporation will

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[2] The U.S. Department of Justice publishes a list identifying the original owner and the face value of each claim. *See* U.S. DOJ, FOREIGN CLAIM SETTLEMENT COMMISSION OF THE UNITED STATES CUBAN CLAIMS PROGRAM CERTIFIED CLAIMANT LIST (2009), https://www.justice.gov/sites/default/files/fcsc/docs/ccp-listofclaims.pdf, *archived at* https://perma.cc/NRP8-ZGDH.

[3] *See* Thomas L. Wolfe and John B. White, *Income Tax Consequences of Cuban Expropriations to Cuban Resident Aliens*, 19 U. MIAMI L. REV. 591, 614 (1965).

[4] A general Lexis search for law review articles on the subject turns up over fifty articles. Journalists have also covered the issue extensively. *See, e.g.*, Nick Miroff, *The 20 Largest U.S. Property Claims in Cuba*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/12/08/the-20-largest-u-s-property-claims-in-cuba/?utm_term=.317d4ba0cbe3, *archived at* https://perma.cc/97D7-WY3Q; Richard Feinberg, *Reconciling U.S. Property Claims in Cuba: Transforming Trauma Into Opportunity*, BROOKINGS INST. (2015), *available at* https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf, *archived at* https://perma.cc/7XLK-HVMN.

[5] *See* Letter from George Howell, Chair, Tax'n Sec., to Mary Mcleod, Principal Deputy Legal Advisor, United States Dep't of St. (Feb. 17, 2016), http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/021716comments.authcheckdam.pdf, *archived at* https://perma.cc/529X-ZRZG; Timothy Ashby and Tania Mastrapa, *Taxation of Cuban Confiscated Assets After Property Claims Settlement: Issues for Taxpayers and the U.S. Government*, *in* 15 ASS'N FOR THE STUDY OF THE CUBAN ECON., CUBA IN TRANSITION 157, 160 (2005), *available at* http://www.ascecuba.org/c/wp-content/uploads/2014/09/v15-ashbymastrapa.pdf, *archived at* https://perma.cc/VTA5-PAXW.

[6] *See infra* text accompanying notes 59–60.

[7] *See infra* text accompanying notes 95–101.

be punished for not obeying sanctions. These authorities are complex, overlapping, and ambiguous, reflecting several decades of executive rule-making and, more recently, Congressional action.[8] Over time, these sanctions have morphed into a progressively more aggressive intervention in Cuba's domestic and international economic activities.[9] Without formally declaring war on Cuba, the United States has also carried out covert operations designed to oust the sitting Cuban government.[10]

The United States is the world's most active user of unilateral economic sanctions, but the scope and structure of those against Cuba are without peer.[11] These sanctions have been condemned by several U.N. entities, including the General Assembly, the High Commissioner for Human Rights, the Food and Agriculture Organization, the Children's Fund, UNESCO, and the World Health Organization.[12] In particular, international health organizations have criticized the way that sanctions have compromised the health of Cubans by limiting access to pharmaceuticals, food, water treatment chemicals, and medical equipment, which became direly needed after Congress began assuming more control over sanctions.[13] Not only have sanctions on Cuba lasted longer than any other in modern history, but they have also been enforced with exceptional rigor. Since 2009, six of the largest thirteen fines imposed on foreign banks for violating U.S. sanctions have involved Cuba, although the banks in question also provided banking services to other sanctioned countries.[14] Four of these Cuba-related fines exceeded $500 million,

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[8] The legal authority for U.S. sanctions on Cuba derives from a blend of federal statute, executive decisions, and administrative policies. Federal statutes like the Foreign Aid Appropriation Act of 1961, the Export Control Act, and the Trading with The Enemy Act conferred discretionary authority on the President to impose additional economic sanctions designed by the executive branch. The Congressional Research Service has an excellent report that comprehensively charts the legal authorities that undergird U.S. sanctions on Cuba. *See* DIANNE E. RENNACK AND MARK P. SULLIVAN, CONG. RESEARCH SERV., R43888, CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS (2017).

[9] *See generally* LA SOCIEDAD CUBANA DE DERECHO INTERNACIONAL, AGRESIONES DE ESTADOS UNIDOS A CUBA REVOLUCIONARIA: ANUARIO 1989 (1989) (comprehensively examining military, social, economic, and ideological efforts of the United States to intervene in Cuban society); NICANOR LEÓN COTAYO, SIN RAMO DE OLIVO: LAS RELACIONES CUBANO-ESTADOUNIDENSES BAJO EL GOBIERNO DE RONALD REAGAN (1988); JANE FRANKLIN, CUBA ESTADOS UNIDOS: CRONOLOGÍA DE UNA HISTORIA (2015).

[10] These include the invasion of *Playa Girón* (Bay of Pigs), activities of the Central Intelligence Agency, and the actions of non-state actors deemed to be supported by the U.S. government. *See infra* note 33; *see also infra* text accompanying note 229.

[11] These include the following: Afghanistan, Belarus, Burma, Burundi, the Central African Republic, the Ivory Coast, the Democratic Republic of Congo, Iran, Iraq, Lebanon, Libya, North Korea, Russia, Somalia, Sudan, Syria, Venezuela, Yemen, and Zimbabwe. *See* Steve Eisner, *Export Controlled or Embargoed Countries, Entities and Persons*, STANFORD UNIV. (Dec. 15, 2016), https://doresearch.stanford.edu/research-scholarship/export-controls/export-controlled-or-embargoed-countries-entities-and-persons#countries, *archived at* https://perma.cc/3T84-8SJP.

[12] *See* NIGEL D. WHITE, THE CUBAN EMBARGO UNDER INTERNATIONAL LAW: EL BLOQUEO, 119–120 (2015) [hereinafter EL BLOQUEO].

[13] *See id.* at 121–22.

[14] BNP Paribas was fined 8.9 billion for banking services provided to Cuba, Sudan, and Iran (2014); both ING (619 million, 2012) and Credit Suisse (536 million, 2009) were fined for dealing with Cuba and Iran; ABN Amaro (500 million, 2010) and HSBC (375 billion,

with one bank being fined almost $9 billion.[15] This attempt to isolate Cuba has taken place during a period in which global markets went in the other direction, becoming more interdependent.[16]

This article examines Cuba's claim for damages against the United States for its hostile policies towards the island, including economic sanctions. In a 2016 report to the United Nations, Cuba estimated the value of its forgone revenues due to U.S. policy at over $125 billion.[17] This amount represented an increase of more than $4.5 billion from the previous year.[18] In effect, these claims for damages act as a political risk counterclaim to the certified claims, in addition to the more than $270 million in Cuban assets frozen in the United States as a result of sanctions.[19] In 1999, a Cuban court also heard two separate legal actions against the United States for harms caused by sanctions. One complaint was a mass tort action estimating the cost of wrongful death, physical injury, and consequential damages caused by the attempts of the U.S. government to interfere with national security.[20] A second complaint focuses on harm to the economy from U.S. sanctions.[21]

2012) were each fined for transacting with Cuba, Iran, Libya, and Sudan; and the Royal Bank of Scotland was fined 100 million for serving Cuba, Iran, Sudan, and Burma. *See* JONATHAN MASTERS, COUNCIL ON FOREIGN RELATIONS, WHAT ARE ECONOMIC SANCTIONS? (2017), *available at* https://www.cfr.org/backgrounder/what-are-economic-sanctions, *archived at* https://perma.cc/RLL7-DDLS.

[15] *Id.*

[16] *See infra* text accompanying notes 236–243.

[17] Cuba's estimates distinguish between patrimonial harm (which represents a diminution in the value of property) and damages, which measure foregone revenues. Cuba seeks compensation only for the lost revenues, not the patrimonial losses. *See* INFORME DE CUBA SOBRE LA RESOLUCIÓN 70/5 DE LA ASAMBLEA GENERAL DE LAS NACIONES UNIDAS, TITULADA "NECESIDAD DE PONER FIN AL BLOQUEO ECONÓMICO, COMERCIAL Y FINANCIERO IMPUESTO POR LOS ESTADOS UNIDOS DE AMÉRICA CONTRA CUBA," 21–29 (June 2016) [hereinafter 2016 CUBA REPORT], *available at* http://www.cubadebate.cu/wp-content/uploads/2016/09/Necesidad-de-poner-fin-al-bloqueo-econ%C3%B3mico-comercial-y-financiero-impuesto-por-los-Estados-Unidos-de-Am%C3%A9rica-contra-Cuba.pdf, *archived at* https://perma.cc/5ADF-USVW (analyzing the ongoing impact of U.S. sanctions after President Obama's 2016 visit to Cuba).

[18] Nevertheless, the 2016 figure reflected a decrease of over $80 billion in patrimonial harm from the previous year. *See* INFORME DE CUBA SOBRE LA RESOLUCIÓN 69/5 DE LA ASAMBLEA GENERAL DE LAS NACIONES UNIDAS, TITULADA "NECESIDAD DE PONER FIN AL BLOQUEO ECONÓMICO, COMERCIAL Y FINANCIERO IMPUESTO POR LOS ESTADOS UNIDOS DE AMÉRICA CONTRA CUBA," (June 2015) [hereinafter 2015 CUBA REPORT], *available at* http://www.cubavsbloqueo.cu/sites/default/files/INFORME%20BLOQUEO%202015%20Esp.pdf, *archived at* https://perma.cc/UMZ3-YTRX (analyzing sanctions harms after the beginning of diplomatic normalization on December 17, 2014).

[19] *Id.* at 31.

[20] Juan Mendoza Díaz, et al., *Demanda del Pueblo de Cuba al Gobrieno de Estados Unidos por Daños Humanos*, La Sala de lo Civil y de lo Administrativo del Tribunal Provincial Popular de Cuidad de la Habana (May 31, 1999) [hereinafter *Security Complaint*].

[21] Mirna Nides Domínguez, et al., *Demanda del Pueblo Cubano al Gobrieno de los Estados Unidos por Daños Economicos Ocasionados a Cuba,* La Sala de lo Civil y de lo Administrativo del Tribunal Provincial Popular de Cuidad de la Habana (Jan. 3, 2000) [hereinafter *Economic Complaint*].

As of yet, though, the U.S. legal literature has ignored Cuba's claim against the United States.[22] No coincidence, this omission is itself a product of U.S. sanctions, which restrain not only economic ties with the island but also the production of knowledge about Cuba. Before the Revolution, the two countries enjoyed robust academic and professional exchange. Cubans came to the United States to study medicine, engineering, business, dentistry, finance, and agronomy.[23] U.S. scientists traveled to Cuba to perform field research in botany, archaeology, and meteorology.[24] This ended after the U.S. broke off diplomatic relations with Cuba and has never been restored, resulting in a kind of national academic segregation with prominent exception of the robust Cuban studies activities of the Latin American Studies Association.[25]

When does economic coercion through sanctions violate another country's sovereignty?[26] What remedies does a country subjected to long-standing economic coercion have against the offending country? It is on these questions that the future of Cuba's embargo claims rests. Public international law permits a country to unilaterally impose economic sanctions on another country for a variety of reasons, including self-help in response to aggression.[27] In some circumstances, a country can even violate traditional limits on sovereignty in order to protect the human rights.[28] The United States defends its sanctions by saying that they promote the freedom and human rights of the "Cuban people," a notion central to U.S. policy on Cuba.[29] Cuba and the General Assembly of the United Nations disagree, deeming U.S. sanctions an illegal blockade under public international law.[30]

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[22] I examined it briefly in an earlier essay linking property claims to tensions in Cuban-American identity. *See* Jose M. Gabilondo, *Cuban Claims: Embargoed Identities and the Cuban-American Oedipal Conflict (el grito de la Yuma)*, 9 RUTGERS RACE & L. REV. 335 (2008) [hereinafter *Cuban Claims*].

[23] LATIN AM. WORKING GROUP EDUC. FUND, RETREAT FROM REASON: U.S.-CUBAN ACADEMIC RELATIONS AND THE BUSH ADMINISTRATION 12 (2006).

[24] *Id.*

[25] *Id.* at 15.

[26] Eminent Cuban jurist Rodolfo Dávalos has written the most comprehensive analysis of the legality and legitimacy under public international law of U.S. sanctions on Cuba. *See* RODOLFO DÁVALOS FERNANDEZ, EMBARGO O BLOQUÉO? LA INSTRUMENTACIÓN DE UN CRIMEN CONTRA CUBA (2012) [hereinafter EMBARGO O BLOQUÉO]. Nigel White has also published an extended analysis of the legality of U.S. sanctions against Cuba and the island's 's claim for embargo losses. *See* EL BLOQUEO, *supra* note 12.

[27] J. Vurtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 Wash. & Lee L. Rev. 167 (1986); Helen Osieja, Economic Sanctions as an Instrument of U.S. Foreign Policy 63 (Aug. 2005) (unpublished Ph.D. dissertation, American University of London).

[28] See *infra* text accompanying notes 224–230.

[29] Ambassador Ronald D. Godard, U.S. Mission to the U.N., Speech to the U.N. General Assembly (Oct. 30, 2014), available at https://www.humanrights.gov/dyn/explanation-of-vote-on-the-cuba-resolution-in-the-general-assembly-hall.html, *archived at* https://perma.cc/RQB5-VTW9 (explaining U.S. vote against the U.N. resolution).

[30] *See* Press Release, General Assembly, As General Assembly Demands End to Cuba Blockade for Twenty-Third Consecutive Year, Country's Foreign Minister Cites Losses Exceeding $1 Trillion, U.N. Press Release GA/11574 (Oct. 28, 2014); *Security Complaint*, *supra* note 20; *Economic Compliant*, *supra* note 21; Until recently, Cuba's claims against the United

In this view, U.S. sanctions on Cuba violate limits on acceptable forms of bilateral economic aggression.

Much is at stake in recognizing Cuba's right to damages for embargo losses, including the possible resolution of the certified property claims against Cuba.[31] At present, Cuba lacks the liquidity necessary to settle any property claims, but a transfer payment from the United States under the rubric of consolidated claims settlement would make it possible for the U.S. holders of certified claims to recover. This would occur by netting Cuba's claim against the United States with the outstanding certified claims as part of consolidated claims settlement. So, the U.S. holders of certified claims against Cuba might also favor recognition by the United States of liability for embargo losses.[32]

This Article concludes that U.S. sanctions violate public international law, hence creating sovereign liability in favor of Cuba. My conclusion rejects the view — dominant in Congress and elsewhere — that Cuba's sovereignty is somehow impaired or compromised because of the Cuban Revolution or actions taken by Fidel Castro, Raul Castro, or the Cuban government, including actions deemed antidemocratic. Urging — as this Article does — that the United States assume financial responsibility for its improper harms to the island affirms the sovereignty of the Cuba *as it is now*, whether the island's government and state structure remain exactly as they are today or whether changes someday follow. In doing so, this Article ends the scholarly silence in the U.S. legal literature about this important topic.

In particular, this Article argues that the United States has liability for these sanctions because they have promoted regime change in Cuba in ways that violate contemporary notions of sovereignty. In his meticulous history of negotiations between Cuba and the United States, William LeoGrande argues that promoting regime change in Cuba has been the goal of U.S. foreign policy continuously since 1959.[33] While true, this Article divides

States seemed moot to most because the two countries broke off diplomatic relations in 1961. That changed suddenly on December 17, 2014, when U.S. President Barack Obama and Cuban President Raul Castro announced that the two countries would resume diplomatic ties. Diplomatic normalization makes more likely that the two countries will work towards settling their offsetting political risk claims. Indeed, already negotiators for the United States and Cuba have begun discussing the issue. *See* WILLIAM M. LEOGRANDE & PETER KORNBLUH, BACK CHANNEL TO CUBA: THE HIDDEN HISTORY OF NEGOTIATIONS BETWEEN WASHINGTON AND HAVANA 449–53 (2015) [hereinafter BACK CHANNEL].

[31] José Gabilondo, *Making Sense of Today's Cuban Economy: Promises in the Making*, HUFFINGTON POST (June 8, 2015), available at http://www.huffingtonpost.com/jose-gabilondo/making-sense-of-todays-cuban-economy-promises-in-the-making_b_7527380.html, *archived at* https://perma.cc/E9DC-F823 (urging concerted action to reduce political risk in the Cuban economy).

[32] *Cuban Claims, supra* note 22, at 119–121.

[33] See Back Channel, *supra* note 30, at 356; *see also* William M. LeoGrande, *The End of the Bogeyman: The Political Repercussions of the U.S.-Cuban Rapprochement, in* A NEW CHAPTER IN US-CUBA RELATIONS: SOCIAL, POLITICAL, AND ECONOMIC IMPLICATIONS 53 (Erich Hershberg & William M. LeoGrande eds., 2016).

sanctions on Cuba into three discrete periods during which U.S. policy pursued regime change differently.

During the first period, regime change remained a covert objective, disguised behind an explicit policy of nonintervention, despite bilateral retaliation through economic sanctions. Beginning immediately after the Cuba Revolution, ousting Fidel Castro was discussed and supported within the U.S. government, but it sought regime change only covertly. Public communications emphasized that sanctions sought to punish Cuba for expropriating the property of U.S. nationals and to coerce the island into settling expropriation claims. Disingenuously, U.S. policy purported to be based on bilateral retaliation, justified on a country's sovereign right to decide its trade policy. During this period, Cuba laid down the structural foundations of its command economy and socialist state.

In the second period, regime change continued as a covert objective, but this time masked by a formal policy of Cold War containment. After early U.S efforts to oust Fidel Castro failed and the Soviet Union became Cuba's Great Power patron, the United States subsumed its policy on Cuba as part of the Cold War. The rationale for sanctions became limiting the spread of Cuban-style ideology and socialism to Latin America and elsewhere. Efforts to oust the Cuban government continued through covert terrorism sponsored by the Central Intelligence Agency. During this period, Cuba's most important export and import markets were the Soviet Union and its economic satellites, whose terms of trade guaranteed Cuba an important subsidy.

Only during the third period (beginning in the 1990s) did ousting the Cuban government become an explicit aim of U.S. foreign policy. When the Cold War ended, sanctions on Cuba entered an age of integrity because Congress declared statutorily that regime change was a central goal of U.S. policy. Putative codification by Congress in the 1990s dramatically extended the extraterritorial reach of U.S. sanctions and made regime change a central rather than collateral goal.

To put these questions about sovereignty, regime change, and liability in context, this Article proceeds in three major parts before concluding. Part II examines two separate but linked historical processes that developed in tandem — Cuba's construction of a domestic socialist economy and the imposition by the United States of economic sanctions on the island. During the past half-century, Cuba has built and maintained a command economy based on socialist principles. Post-Revolutionary Cuba enjoyed its most prosperous years as an economic satellite of the Soviet Union, but the demise of the Soviet Council for Mutual Economic Assistance stranded the island in a regional economy that was remaking itself along the neoliberal axioms of the Washington Consensus.[34] Meanwhile, the United States ex-

[34] During the Reagan administration, economist John Williamson put together the neoliberal axioms that came to be known as the Washington consensus, an insightful package of policy goals designed to grow the economies in Latin America. These goals included increas-

perimented with different ways of pursuing regime change, pursuing it primarily as a covert policy until the 1990s. How these two processes — Cuba's economic planning and the sanctions policy of the United States — unfolded sets the stage for resolving the question of liability.

Part III examines how Cuba has presented its claim against the United States at the United Nations and in Cuba. Every year, Cuba prepares a comprehensive report to the United Nations itemizing the harms caused by U.S. policy. The report critically analyzes the legal structure of U.S. sanctions and provides a compelling account of how these sanctions constrain the state's ability to provide a social safety net, increase the cost of imports, limit the island's export markets, and, generally, worsen the standard of living on the island. In 1999, a Cuban court heard two legal actions against the United States — one for liability arising from state-sponsored terrorism and a separate one for liability caused by economic sanctions.[35] These actions set out the legal frame for Cuba's claim against the United States and provide a granular history of U.S. sanctions and their impact on Cuba. Read together, these U.N. reports and the lawsuits provide the legal and economic arguments that make up Cuba's claim against the United States.

Part IV takes up several necessary but unsettled legal questions about the notion of sovereignty raised by Cuba's claim. Public international law does recognize that a country can promote regime change in another country to protect human rights, but U.S. sanctions — as designed and implemented — do not conform to this extraordinary and limited exception to the general mandate of sovereignty. To prevail, Cuba must show that U.S. sanctions proximately harmed the island's economy, no mean feat given that Cuba — exercising its sovereign prerogatives — has pursued economic planning policies of questionable value for certain sectors. The Cuban reports and lawsuits concede little on this front, but doing so results in a more balanced argument. After all, these sanctions violate the principle of nonintervention in another country's affairs. These sanctions also depart from international norms on economic aggression that seek to respect the sovereignty of other countries, protect civilians from harm, and limit the extraterritorial reach of any particular country's actions.

Settling the political risk between Cuba and United States requires finding a forum whose jurisdiction both countries recognize, a difficult task given the geopolitical distance between them. The unique circumstances of U.S. sanctions and the Cuban economy raise important questions about how to value damages to the economy and how to model economic causation.

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ing fiscal discipline, reordering priorities for public expenditures, changing the tax system, managing interest and exchange rates, liberalizing trade and foreign investment, privatizing public sector businesses, promoting deregulation, and enhancing property rights. *See* John Williamson, Senior Fellow, Peterson Inst. for Int'l Econ., Speech at the Center for Strategic & International Studies: Did the Washington Consensus Fail? (Nov. 6, 2002), *available at* https://piie.com/commentary/speeches-papers/did-washington-consensus-fail, *archived at* https://perma.cc/9Y8S-F679 (analyzing why neoliberal policy reforms did not work as expected in Latin America).

[35] *See Security Complaint*, *supra* note 20; *Economic Complaint*, *supra* note 21.

Finally, fashioning an appropriate remedy requires taking into account how the structure of international trade has changed since sanctions were first imposed. Part V concludes with some observations on what resolution of this dispute between Cuba and the United States means, not only for the two countries but also for Cuban-Americans, Cubans in diaspora and those who remain on the island.

The first word on these questions rather than the last, this Article offers thinking tools for international law, macroeconomics, global trade, and United States-Cuba relations. First, the Article analyzes how the United States steadily (and unsuccessfully) tried to subvert the Cuban government through three different policy frameworks — covertly through bilateral retaliation, covertly through Cold War containment, and, finally, overtly through a formal policy of regime change. In so doing, it holds a mirror to structural features of U.S. policy for Latin America less apparent in countries that succumb to rather than resist U.S. influence. Second, the Article is a case history of an economy — Cuba's — that has resisted the shift towards neoliberalism, deregulation, and globalization. Indeed, as part of Cuba's recent economic reforms, the Cuban Communist Party affirmed its overriding commitment to socialism, making the island holdout a counterpoint to a world economy that has capitulated to capitalism. Its economic history makes Cuba a fascinating laboratory for those interested in economics, particularly debates about the role of the state in regulating market institutions.[36] Third, the Article examines the difficulty of proving proximate causation for macroeconomic harms that are always already overdetermined by separate causes, some due to state action (itself a contestable notion) and others a result of market movements. As national economies have become more globalized, countries and firms encounter each other more frequently as a routine business matter. This form of economic interdependence calls for new ways to think about duty, injury, liability, and remedies, themes that resonate in the story of the Cuban economy.

Finally, the Article puts Cuba's claim and its potential resolution in the context of evolving notions of Cuban and Cuban-American identities. U.S. certified property claims, Cuba's claims against the United States, Cuban-American communities, and Cuban identity all emanate from the same geopolitical Big Bang — one country's revolution and another country's response. Taking into account these different ethnic perspectives on the Cuban nation helps to transcend the tired binaries that have kept these disputes frozen for half a century.

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[36] The island's seeming reinsertion into the new international economy is also an opportunity to reflect on how the neoliberal market has worked. Though heralded as a tool of development, value chains also involve inequality between countries, expressed this time in terms of access to the chain and the relative contribution or extraction of value from the chain. The island conserves statist values and command practices that most of the rest of the world abandoned decades ago. As it reengages with the market economy, Cuba is sure to change; but so too should market societies consider potential changes.

II. Economic and Policy Antecedents

Resolving the current contention about U.S. liability means starting with the early layers of this sedimentary history. U.S. interest in controlling Cuba predated the Revolution, but the ensuing relationship between the two countries provides a valuable record of this interest.[37] The following discussion identifies four major phases in the history of these sanctions. During the first phase, Cuba's government began reconfiguring the island's economy, society, and legal institutions along socialist lines. As Cuba's first iteration of a socialist economy took form, so too did U.S. sanctions. When this process began, President Eisenhower first imposed sanctions, ostensibly to express the disapproval of the United States for actions taken by the government. Soon, however, the main rationale for sanctions changed, as President Kennedy expanded these sanctions and subsumed them into the more general Cold War framework. During this period, Cuba shifted its economy towards the Soviet Union and its satellites, who coordinated their trade policies through the Council for Mutual Economic Assistance ("COMECON").

After the Soviet Union and its trading system collapsed in the early 1990s, Cuba entered the *período especial*, a difficult period of austerity and structural adjustment to the loss of its most important counterparties. Convinced that these economic hardships would make the Cuban government vulnerable to collapse, the United States ramped up its sanctions against Cuba (and against third parties who traded with Cuba). During this period, the U.S. Congress tried to displace the Executive branch as the locus of discretion over Cuba sanctions. The history of the present begins with Raul Castro replacing his brother, Fidel Castro. This period has seen a substantial number of economic reforms and the resumption of diplomatic relations between the two countries.

A. *First Moves: The Construction of Socialist Economy and Bilateral Retaliation*

After Cuba won its independence from Spain in 1898, the United States became increasingly active in the island's economy.[38] As a condition of ending its first occupation of Cuba (1898–1901), the United States required Cuba to adopt changes to its Constitution authorizing interventions to secure

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[37] *See* Embargo o Bloquéo, *supra* note 26, at 118–29 (analyzing conceptual and legal developments in U.S. foreign policy that served as precursors to U.S. sanctions on Cuba). The instinct to determine the government in Cuba predated the Cuban Revolution. The U.S. resolution on Cuba of 1902 makes clear its interest in the island. The Roosevelt Corollary to the Monroe Doctrine asserted that the U.S. had an international police power that justified its intervening throughout the Western Hemisphere. The Platt Amendment to the Cuban Constitution refined this goal by making explicit that the U.S. could intervene in Cuba's internal affairs to protect U.S. security or commercial interests. *Id.*

[38] *Cuban Claims, supra* note 22, at 97–98.

U.S. interests on the island, including commercial interests. In 1903, the two countries signed three treaties that formalized the neocolonial structure of their relations: the Permanent Treaty enacted the terms of the Platt Amendment; the Reciprocity Treaty gave each country's goods preferential access as imports; and the Lease Agreements gave the United States access to Guantanamo and other Cuban territory.[39] Under the authority of the Platt Amendment, the United States occupied the island a second time from 1906–1909.[40]

By 1909, the U.S. market absorbed over 87% of Cuban exports.[41] The Cuban sugar industry in particular benefitted from favored access to the United States. During the first five years of the Reciprocity Treaty, sugar exports to the United States increased over 35%.[42] As trade between Cuba and the United States grew, the island enjoyed economic growth and prosperity, although the economy depended heavily on a single export — sugar.[43] When the world price for sugar dropped precipitously in 1920, the island entered a financial crisis, revealing the risk of overdependence on a single export.

As a satellite market of its neighbor to the north, the Cuban economy became a dependent variable of economic interests in the United States. Diversifying its agricultural production would reduce the Cuban economy's exposure to cyclical downturns in commodity prices. Because rice was such a staple of the Cuban diet, it made sense to increase the production of rice, thereby increasing the island's self-sufficiency for that product, creating new jobs, and reducing rice imports.[44] In the decades leading up to the Revolution, however, pursuing diversification became hostage to the island's economic dependency on the United States. The issue came to a head as the island's successful diversification by promoting rice production led to backlash from the U.S.

It was a conflict between the political interests underlying two competing export markets.[45] Cuba's sugar industry relied on ongoing demand from the U.S. market, which absorbed the lion's share of sugar exports. At the same time, Cuba was also the largest consumer of U.S. rice exports. Indeed, U.S. rice exporters needed the Cuban market as much as Cuban sugar exporters needed the U.S. market. In the 1950s, the Cuban government began to encourage rice production through subsidies and low-interest loans. As

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[39] EMILIO ROIG DE LEUCHSENRING, HISTORIA DE LA ENMIENDA PLATT 273–302 (1973).

[40] *Id.*

[41] INSTITUTO DE HISTORIA DE CUBA, LA NEOCOLONIA: ORGANIZACIÓN Y CRISIS DESDE 1899-1940, at 153–54 (2002).

[42] *Id.*

[43] MARTHA PON, BREVE HISTORIA DE CUBA 42–43 (2010).

[44] *See* Louis Pérez, Univ. of N.C., Chapel Hill, "Sin azúcar no hay país:" Rethinking the Political-Economy of Hegemony, panel presentation at the Eleventh Conference on Cuban and Cuban-American Studies at Florida International University, (Feb. 24, 2017). In the 1950s, annually Cubans consumed 137 pounds of rice compared with six pounds by those in the United States. *Id.*

[45] *Id.*

rice production grew, U.S. rice growers perceived the risk of losing their largest export market. Through their representatives in Congress, the rice interests threatened to end the preferential access of Cuban sugar into the United States.[46] The U.S. and sugar lobby responded by protecting their preferential access.[47] In the end, the Cuban government abandoned its successful efforts to diversify through rice production.

As primarily a single-export country, Cuba would remain exposed to the cyclical commodity risk of sugar. Nevertheless, between the two World Wars Cuba experienced economic growth that created a new Cuban entrepreneurial class, one that would eventually threaten U.S. influence over the island's economy.[48] In the years immediately before the Revolution, the Cuban economy suffered from major weaknesses and a low standard of living for most residents. Between 1950 and 1958, much financial capital left the island through repatriation of profits earned by foreign investors — especially from the United States — and through other outflows, causing a large deficit in the capital account of the balance of payments.[49] During this same period, Cuba foreign reserves shrank by more than 80%, from $510 million to less than $85 million.[50] While many who lived in Cuba's cities enjoyed a middle class standard of living, a large segment of the population lived in poverty in rural areas.[51]

Building a command economy started with a series of nationalizations that concentrated economic power in the government, displaced foreign control over key sectors like sugar and oil, and created new governance institutions to make and implement economic policy to further the socialist model. As part of the Agrarian Reform in May 1959, the government nationalized rural property, some of it owned by U.S. investors.[52] This incident became one of the first overt examples of growing animosity between the governments of Cuba and the United States.

Recognizing that dependency on sugar left the economy vulnerable to economic instability, government planning in the early 1960s also promoted industrialization and diversification into other agricultural goods, thereby increasing self-sufficiency and — it was hoped — curbing the island's need

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[46] In a similar vein, several decades later President Eisenhower would kick off trade hostilities with Cuba by threatening to reduce the sugar quota. *See* BACK CHANNEL, *supra* note 30, at 22.

[47] Insofar as U.S. interests controlled sugar production in Cuba, the conflict was between U.S. rice growers and U.S. investors in Cuban sugar production. *Id.*

[48] LOUIS PÉREZ, CUBA UNDER THE PLATT AMENDMENT 1902-1934, at 230–32 (University of Pittsburgh ed., 1986).

[49] BANCO NACIONAL DE CUBA, LA ECONOMÍA CUBANA DURANTE EL PERÍODO ESPECIAL 1990-2000, at 2 (2001).

[50] *Id.*

[51] *Id.* at 3.

[52] FRANCISCO E. GARCÍA HENRÍQUEZ, YARELIS MARTÍNEZ LORENZO, AND JHOSVANY MARTÍNEZ BARREIRO, COMPENDIO DE DISPOSICIONES LEGALES SOBRE NACIONALIZACIÓN Y CONFISCACIÓN 25–28 (2004) (listing Cuban statutes, resolutions, and agreements regarding post-Revolutionary nationalizations).

for imports.[53] After these policies failed, the government restored the economic focus on sugar, illustrated in 1970 by a national campaign to produce a ten-million-ton harvest.[54]

In 1961, the Revolutionary government began to de-dollarize the Cuban economy, starting with an exchange of pre-Revolutionary pesos for new currency. Informal dollar markets developed and the Cuban government maintained dollar reserves, but the dollar ceased serving as legal tender and private dollar holdings were penalized. State enterprises emerged to absorb many of the businesses that were nationalized, but the new state system could not replace the foregone private sector, including a network of more than 3,700 urban street vendors that had contributed to the island's distribution network for food.[55]

In addition to these economic reforms, several important social formations emerged during this period to consolidate the elite and to mobilize masses as part of an emerging institutional arrangement. By 1965, the Cuban Communist Party (including its Central Committee), Committees for the Defense of the Revolution, militias, and the Federation of Cuban Women had already emerged as structural elements in Cuban society.[56]

In 1960, refineries owned by U.S. commercial interests (Texaco, Esso, and Shell) refused to process Soviet crude oil at the suggestion of the United States.[57] Citing a 1938 Cuban law requiring refineries to process state, Cuba nationalized these refineries.[58] Ostensibly because of the failure to agree to compensation for expropriated property of U.S. nationals, then-President Dwight D. Eisenhower announced on July 6, 1960 that the U.S. would not buy that year's allocated quota of Cuban sugar.[59] In response, Cuba nationalized all property of U.S. companies and citizens.

Later that year, Eisenhower imposed a partial trade embargo on Cuba that exempted exports to the island of food, medicines, and medical supplies.[60] The initial stated goal of these sanctions was retaliation for Cuba's nationalization of property owned by U.S. companies and individuals. At the time, Eisenhower identified three rationales for the first sanctions: (i) strict nonintervention in the island's domestic affairs; (ii) recognition of the Cuban government's right to make internal reforms, consistent with international law; and (iii) resolution of disputes in which Cuba had abridged the rights of U.S. citizens.[61] In this account, sanctions sought to prod Cuba to offer settlement terms that were more acceptable to the U.S. government. In

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[53] LOUIS A. PEREZ, JR., CUBA BETWEEN REFORM AND REVOLUTION 337–38 (1988).

[54] Id. at 338–40. At 8,500,000 tons, the 1970 harvest fell short of the goal, though it did set a new record for the island. *Id.*

[55] *Id.*

[56] MARIFELI PEREZ-STABLE, THE CUBAN REVOLUTION, ORIGINS, COURSE, AND LEGACY 99 (2d ed. 1999).

[57] BACK CHANNEL, *supra* note 30, at 36–37.

[58] *Economic Complaint, supra* note 21, at 4.

[59] BACK CHANNEL, *supra* note 30, at 36–37.

[60] *Id.*

[61] Osieja, *supra* note 27, at 36–37.

1961, President Eisenhower placed Cuba under export controls contained in the Export Control Act of 1949.[62]

During this period, both Cuba and the United States exercised sovereign prerogatives with relative freedom. Cuba conducted several expropriation programs. The United States first imposed sanctions to express disapproval of the Cuban government by interfering with a discrete and limited aspect of the economic relationship between the two countries. Granted, suspending the sugar quota in 1960 might have foreseeably caused harm to civilians, but any such harm was an unintended collateral harm of the policy.

Nevertheless, the U.S. government also experimented with other policies that presaged the radicalization of regime change, including the extraterritoriality that would become a signature feature of U.S. sanctions in the 1990s. In October 1959, President Eisenhower approved a program of covert action by the State Department and the Central Intelligence Agency to promote political subversion on the island.[63] As early as November 1959, the United States exercised pressure on Great Britain and other countries to stop selling armaments to Cuba.[64] In March 1960, President Eisenhower approved a proposal by the Central Intelligence Agency ("CIA") to pursue destabilization of the Cuban government.[65] In September 1960, the State Department drafted a paper outlining an economic strategy to oust Fidel Castro.[66] Relations between the two countries deteriorated further, reaching a low when President Eisenhower broke diplomatic relations with the island on January 3, 1961.[67] The following year, the U.S. government began pursuing Project Cuba, a comprehensive plan designed by the CIA to oust the Cuban government.[68]

The United States also started trying to exclude Cuba from multilateral organizations. In 1962, U.S. officials secured the suspension Cuba from the Organization of American States and the Inter-American Bank for reconstruction and development, entities in which Cuba wanted to remain.[69] In general, post-Revolutionary Cuba sought an active role on the multilateral stage, including in UNCTAD. By remaining part of the GATT, Cuba was later able to join the World Trade Organization. Cuba's withdrawal from the International Monetary Fund and International Bank for Reconstruction and Development is a prominent exception to its general policy of strong multilateral engagement.[70]

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[62] BACK CHANNEL, *supra* note 30, at 36–37.
[63] *Economic Complaint, supra* note 21, Art. 1, at 2.
[64] *See* EMBARGO O BLOQUÉO, *supra* note 26, at 329; *Economic Complaint, supra* note 21, Art.11, at 15.
[65] *Security Complaint, supra* note 20, Art. 11, at 14.
[66] Osieja, *supra* note 27, at 38–39.
[67] BACK CHANNEL, *supra* note 30, at 38.
[68] *Security Complaint, supra* note 20, Art. 8, at 23–24.
[69] *Economic Complaint, supra* note 21, at 6.
[70] *Id.* at 7.

B. Taking Sides: Cold War Containment and the Sovietization of the Cuban Economy

By the early 1960s, the island's economy reflected the impact of having lost access to U.S. markets. Consider the change in the terms of trade between the two countries. In the decade before the Cuban Revolution, the United States was Cuba's chief trading partner for both exports and imports: on average, Cuba got 75% of its imports from the United States and placed more than 60% of its exports there.[71] After two years of sanctions, Cuba had redirected its trade to the Soviet Union and its trading allies, which accounted for 76% of its exports.[72]

In part a response to the Marshall Plan for the reconstruction of Western Europe after World War II, the Soviet Union organized the Council for Mutual Economic Assistance ("COMECON"), an alternative economic group that would come to include several Eastern European countries, including Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and East Germany.[73] COMECON sought to coordinate economic planning and foreign trade between these countries. Cuba joined the group in 1972.

This trading system would be Cuba's most important market for exports and imports until the dissolution of the Soviet trading block in the 1990s. During the previous sixty years, nearly all of the machinery and supplies used in Cuban industries had come from the U.S.; as the island lost access to supplies and spare parts, production and transportation began to break down.[74] The island began adapting its infrastructure to new trading partners, but this led to losses, shortages, and delays as ports, warehouses, and transportation networks were adapted to trade with China, eastern bloc countries, and other substitute markets.[75] Trade with the Soviet Union and other socialist countries began to increase during this period as the island sought substitute markets for the U.S.[76] In addition to buying Cuban exports and providing imports, the Soviet Union also provided technical assistance to help the island build its expertise in a variety of sectors.[77]

The island's entry into COMECON in 1972 further institutionalized the adoption of Soviet economic models.[78] Most of the trade dislocation caused by the loss of U.S. imports and the U.S. markets for Cuban exports took place through Cuba's participation in the COMECON. During this period,

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[71] Osieja, *supra* note 27, at 30–31.
[72] *Id.* at 74.
[73] PEREZ, JR., *supra* note 53, at 378.
[74] PEREZ, JR., *supra* note 53, at 346–47.
[75] Id. at 347.
[76] Id. 355.
[77] Id. at 356.
[78] At the beginning, Cuban socialism differed from the Soviet model, which favored a more incremental and conservative approach to spreading socialism. Nevertheless, during this period Cubans began to study the Soviet Union's approach to ideology, markets, and state structure. *See, e.g.*, P.N. FEDOSEEV ET AL., COMUNISMO CIENTÍFICO (1989) (developing a Marxist-Leninist analysis of capitalism, socialism, and revolutionary change).

the Soviet Union supported the economy by letting Cuba import Soviet goods on credit, and letting the island accumulate a debt estimated at 15 million rubles (roughly $23 billion in 1990 dollars).[79] More importantly, the terms of trade gave Cuba a substantial subsidy. The Soviet Union paid Cuba a premium over the world price for sugar and nickel exports while letting the island buy oil at a discount over market prices.[80] The subsidy consisted of the spread between these two prices.

Not only did Cuba capture this spread on its own products, it also increased its subsidized trade with the Soviet Union using foreign products priced at open market levels. Cuba bought sugar at market prices from other countries and sold this imported sugar to the Soviet Union at the premium price. Similarly, Cuba exported oil products that it had obtained from the Soviet Union at a discount. Cuba earned hard currency on its oil reexports, but the Soviet Union settled its trade with Cuba with nonconvertible rubles that could be used to pay for Soviet goods but which could not be used generally with other countries.[81] Sovietization spread from the economic sphere to the political one in 1976, when Cuba adopted a new Constitution based in large measure on the Soviet Constitution of 1936.[82]

This period of relative prosperity also saw Cuba play a leadership role in the developing world, much of which viewed Fidel Castro as a hero. In particular, Castro played a globally prominent role in calling for forgiveness of the foreign debt incurred by many developing countries, in particular through Cuba's participation as a leader within the Group of 77.[83] Given its size and resources, Cuba played an outsized role in multilateral policy.

These shifts Sovietized the standard of living for average Cubans.[84] U.S. products that had long been a mainstay of daily life disappeared from the shelves, to be replaced with different products from the Soviet Union, China, and COMECON members. The trading restrictions severely impacted the healthcare sector. Before the Revolution, the U.S. provided the lion's share of imported medicines. The island had its first post-Revolutionary trade surplus in 1974.[85] Benefitted by high sugar crisis and cheap credit, the island experienced its greatest post-Revolutionary growth and prosperity between 1981–1985.[86] Indeed, Cuba was one of only two Latin American countries that ended the 1980s with a higher per capita income than in the

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[79] A. R. M. Ritter, *The Cuban Economy in the 1990s: External Challenges and Policy Imperatives*, 32 J. INTERAM. STUD. & WORLD AFF. 117, 124–27 (1990).

[80] Id. at 128–31.

[81] Id. at 129.

[82] LEONEL DE LA CUESTA, CONSTITUCIONES CUBANAS 136–40 (2007).

[83] *See, e.g.*, FIDEL CASTRO, LA CANCELACIÓN DE LA DEUDA EXTERNA Y EL NUEVO ORDEN ECONÓMICO INTERNACIONAL COMO ÚNICA ALTERNATIVA (1985).

[84] The Cuban exile community followed these developments on the island and generated an off-shore literature critical of these economic developments. *See, e.g.*, LUIS CONTE, AGUERO, DOCTRINA DE LA CONTRA INTERVENCION: SOVIETIZACIÓN DE LA ECONOMÍA CUBANA (1962) (elaborating on economic critique of Cuban government).

[85] PEREZ, JR., *supra* note 53, at 354.

[86] CINCUENTA AÑOS DE LA ECONOMIA CUBANA 1–24, 12 (Omar Everleny Pérez Villanueva ed., 2010).

preceding decade.[87] Along with other Latin American countries, though, Cuba also became heavily indebted to external creditors. While the Brady Plan helped other countries to restructure their debt with the support of the U.S. Treasury, Cuba did not participate. In 1986, Cuba defaulted on its roughly $8 billion in foreign debt to public and private creditors.[88]

Before the Revolution, Cuba's trade with China and COMECON countries amounted to 2.2% of its gross trade; by 1967, this figure had risen to over 79%.[89] Substituting less convenient markets for the U.S. increased shipping costs.[90] For example, before the Revolution, Cuba paid $1.10 per metric ton for oil from Venezuela. This price increased more than five-fold to $6.50 when the Soviet Union became the island's chief trading partner.[91] Also, the size of shipments increased, which meant building larger warehouses to hold larger volumes of goods. The cost of trade also increased because U.S. sanctions prohibited Cuba's use of the dollar and limited its access to credit. Often, Cuba had to prepay purchases using confirmed letters of credit, which increased financing costs.[92]

As it became clear that the Cuban Revolution would persist, the policy goals of the United States shifted. By the time of President Johnson, the administration concluded that Fidel Castro had consolidated his power such that regime change as previously imagined was unlikely.[93] Contemporaneous State Department documents that emphasize the need to isolate (rather than only destabilize Cuba) confirm this important policy shift.[94] In particular, the United States sought to contain the spread of Cuba's ideology and influence in Latin America and Africa.

Under the logic of the Cold War, the United States expressed its animosity towards the Soviet Union diplomatically but avoided armed conflict. In effect, this involved bipolar hegemony in which the United States and the Soviet Union split global dominance between a capitalist West and a socialist East. In 1962, President John F. Kennedy imposed a more comprehensive trade embargo on the island.[95] Retaliation for unsettled claims remained a goal, but Cuba sanctions were subsumed into the Cold War program of export controls already imposed on the Soviet Union.[96] Its goal, he said, was

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[87] Colombia was the other country. THE CUBAN ECONOMY AT THE START OF THE TWENTY-FIRST CENTURY xvii (Jorge I. Dominguez et al. eds., 2004).

[88] CINCUENTA AÑOS DE LA ECONOMIA CUBANA, *supra* note 86, at 13.

[89] Osieja, *supra* note 27, at 76.

[90] *Id.* at 75.

[91] *Id.* at 76.

[92] *Id.*

[93] *See* BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 11173, FOREIGN RELATIONS OF THE UNITED STATES, 1964–1968, VOLUME XXXII: DOMINICAN REPUBLIC; CUBA; HAITI; GUYANA 620 (2005), *available at* https://s3.amazonaws.com/static.history.state.gov/frus/frus1964-68v32/pdf/frus1964-68v32.pdf, *archived at* https://perma.cc/5BU9-SVGY (describing George Ball's speech before the North Atlantic Council on March 23, 1964).

[94] U.S. DEP'T OF STATE, INTER-AMERICAN SERIES 88, PUB. NO. 7690, U.S. POLICY TOWARDS CUBA (1964) (emphasizing risks of Communist contagion, particularly in Latin America).

[95] Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962).

[96] Osieja, *supra* note 27, at 24.

to promote "security by isolating the present Government of Cuba and. . .reducing the threat posed by . . . alignment with the communist powers."[97]

The major structural elements of U.S. sanctions on Cuba took shape during this period, which spans from John F. Kennedy to George W. Bush. The President delegated his statutory authority (then derived primarily from the Trading With the Enemy Act) to the Treasury's Office of Foreign Assets Control ("OFAC"), which became the seat of the Cuban embargo.[98] In 1962, the Treasury issued the Cuban Import Regulations, which banned all imports from the island.[99] The following year, the Treasury issued a more extensive body of regulations, the first iteration of the Cuban Assets Control Regulations ("CACR").[100] Codified at 31 C.F.R. pt. 515, the CACR remain the principal source of embargo relations, though they have been amended many times.[101]

These regulations establish the boundary of permitted contact with the island by prohibiting a variety of Cuba-related transactions and generally licensing certain activities, including humanitarian projects, certain academic activities, and family visits.[102] OFAC can also grant special licenses for activity not otherwise covered by the general licenses.[103] OFAC rulemaking is subject to the Administrative Procedure Act (APA).[104] The Department of Commerce imposed its own limits on trade with Cuba, in particular involving requiring licenses for exports or imports between the two countries.[105]

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[97] Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962).

[98] Like other Treasury departments, OFAC is headed by a political appointee and staffed with lawyers, economists, and other professionals who are civil servants.

[99] Amendment of Foreign Asset Control Regulations, 27 Fed. Reg. 1116 (Feb. 7, 1962) (to be codified at 31 C.F.R. pt. 500).

[100] Amendment to Cuban Import Regulations, 27 Fed. Reg. 2765–2766 (March 24, 1962) (to be codified at 31 C.F.R. pt. 515).

[101] Certain activities, importing and exporting for example, are banned outright. Travel by individuals is not prohibited outright. Instead, the regulations generally financial transactions that are a necessary part of travel to Cuba. The regulations also grant general licenses that do not require prior approval and authorize additional licenses granted at the discretion of the Office of Foreign Assets Control, a unit of the U.S. Treasury.

[102] *See generally*, STAFF OF H. COMM. ON WAYS AND MEANS, 109TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTE PART I OF II (Comm. Print 2005), *available at* https://www.gpo.gov/fdsys/pkg/CPRT-111WPRT63130/pdf/CPRT-111WPRT63130.pdf, *archived at* https://perma.cc/G6N6-W4D7; U.S. DEP'T OF THE TREASURY, FREQUENTLY ASKED QUESTIONS RELATED TO CUBA (Jan. 6, 2017), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf, *archived at* https://perma.cc/UJ3Q-LANT.

[103] *Id.*

[104] A coalition of parties unsuccessfully challenged the Constitutionality of OFAC's limits on academic travel as well as the propriety of these rules under the APA. *See* Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 6 (D.C. Cir. 2008) (affirming dismissal of claims brought under the Constitution and APA).

[105] *See* Export Administration Act of 1979 § 4; 50 U.S.C. § 4603 (2012); Exec. Order No. 12,002, 42 Fed. Reg. 35,623 (July 7, 1977) (delegating authority under the Export Administration Act, including issuing export and import licenses, to the Secretary of Commerce).

The basic licensing framework has remained constant, but the scope of allowable activity has changed with the vagaries of executive policy. For example, the scope of permitted sales of food and medicine changed frequently during this period. The licensing of family remittances and travel has also undergone important shift. In 1975, foreign subsidiaries of U.S. corporations were exempted from many of bans on commerce with Cuba, although Congress would later restore these prohibitions.[106] In 1977, the U.S. and Cuba resumed limited diplomatic relationships by establishing interest sections in the embassies of other countries.

Establishing remedies for those whose property had been expropriated by the Cuban government was another critical aspect of institutionalizing sanctions. Cuba's internal law governs the settlement of expropriation claims of its citizens. The claims of foreigners, however, enjoy a different legal status because they involve a dispute between two sovereigns: the expropriating country and the other country whose citizens lose property.[107] Cuba settled its expropriation claims with Switzerland, France, the United Kingdom, Spain, Mexico, and Italy, but not those asserted by the United States with respect to its nationals.[108] This is a decisive yet murky chapter in U.S.-Cuba relations.[109] It seems that the dispute turned on the standard used to determine the value of the takings. Capital-importing countries — like Cuba — and capital-exporting countries — like the United States — generally disagree on how to determine compensation for expropriation.[110] Capital-exporting countries tend to insist on the Hull formula, which emphasizes fair market value, even though it may result in foreigners being treated more favorably than the expropriating country's citizens.[111] In contrast, capital-importing countries prefer to treat foreigners and citizens equally, drawing on the Calvo doctrine.[112]

Consequently, the U.S. Foreign Claims Settlement Commission ("Claims Commission") established a Cuba program to consider the claims to restitution of companies and individuals that were U.S. nationals at the time of the expropriation.[113] With respect to these claims, the Claims Commission conducted two Cuban Claims Programs, which have certified 5,913

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[106] KENNETH RODMAN, SANCTIONS BEYOND BORDERS: MULTINATIONAL SANCTIONS AND U.S. STATECRAFT 115–116 (2001).

[107] *See* José Gabilondo, *Cuba: Cutting Property Claims Down to Size*, HUFFINGTON POST (Sep. 22, 2016), http://www.huffingtonpost.com/jose-gabilondo/cuba-keeping-property-cla_b_8160264.html, *archived at* https://perma.cc/KM7U-588Q (putting certified claims in context of political risk and property law).

[108] *See* EMBARGO O BLOQUÉO, *supra* note 26, at 54–58.

[109] BACK CHANNEL, *supra* note 30, at 165–66.

[110] *See* EMBARGO O BLOQUÉO, *supra* note 26, at 74–103 (discussing how the Drago, Calvo, Carranza, and Cárdenas doctrines relied on in Latin America resulted in equal treatment of foreign and domestic investors).

[111] *Id.*

[112] *Id.*

[113] *See Cuba Claims Program Overview*, FOREIGN CLAIMS SETTLEMENT COMM'N OF THE U.S. DEP'T OF JUST. (Feb. 3, 2015), https://www.justice.gov/fcsc/claims-against-cuba, *archived at* https://perma.cc/N2K8-WDPV.

restitutionary claims with a market value — including interest — of about $6–8 billion. U.S. corporations own less than a fifth of these claims, but these are large dollar claims that represent about 85% of the face value of the certified claims.[114] Many corporate owners of these claims have no interest in pursuing them; instead, these corporations would swap their claims for commercial rights to conduct business in Cuba. The remaining 15% of claims value is divided among roughly 5,000 individuals; of the 48 largest claims, all but five belong to corporations.[115] The United States also has a small creditor claim against Cuba arising from a loan by the U.S. Export-Import Bank.[116]

The United States also tipped its hand on its previously covert attempts to oust Fidel Castro. In 1961, the U.S. government worked with emigrated Cubans to launch an armed invasion of the island in *Playa Girón*.[117] Though unsuccessful, the incident made overt the interest of the United States in destabilizing the Cuban government. As a formal matter, the U.S. government respected Cuban sovereignty, but covert attempts to destabilize the government continued.

C. Austerity and Regime Change

In 1991, the Soviet trading system dissolved after the political transformation of the Soviet Union. COMECON's break-up left Cuba in an economically precarious position, styled as "the special period in times of peace" (*el período especial*). Bereft of former allies, facing a future without the favorable funding spread from previous terms of trade, and forced to find new sources of investment and commerce, Cuba took halting steps to open its economy to foreign capital and market forces.

Under the guidance of Carlos Lage Dávila as Vice President of the Council of State, Cuba in the early 1990s undertook modest economic reforms. In 1992, Cuba amended its Constitution, to broaden notions of personal property and slightly reduce statist control over the economy.[118] In 1993, the government began to authorize self-employment in certain sec-

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[114] *See generally* RICHARD E. FEINBERG, BROOKINGS INST., RECONCILING U.S. PROPERTY CLAIMS IN CUBA (2015), *available at* https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf, *archived at* https://perma.cc/PCV7-7WLT.

[115] Rolando Anillo-Badia, *Outstanding Claims to Expropriated Property in Cuba*, *in* 21 ASS'N FOR THE STUDY OF THE CUBAN ECON., CUBA IN TRANSITION 83, 88 (2011), *available at* http://www.ascecuba.org/c/wp-content/uploads/2014/09/v21-anillo.pdf, *archived at* https://perma.cc/UVJ8-93KC.

[116] In addition to the claims certified by the U.S. Foreign Claims Settlement Commission, the United States has its own small creditor claim against Cuba in connection with credit issued by the U.S. Export-Import Bank. *See* José Gabilondo, *Sending the Right Signals: Using Rent-Seeking Theory to Analyze the Cuban Central Bank*, 27 HOUS. J. INT'L L. 483, 506–07 (2005) [hereinafter *Central Bank*].

[117] BACK CHANNEL, *supra* note 30, at 42–43.

[118] CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1976).

tors.[119] That same year, small-scale agricultural markets and cooperatives were authorized.[120] During this period, the government also adopted a foreign investment law, decriminalized the use of the U.S. dollar, and established a central bank — all adjustment strategies towards greater economic freedom.[121] Cuba also authorized free trade zones and industrial parks.[122] The Cuban Central Bank also introduced a convertible peso, which is still part of the island's complex monetary system.[123] It is during this period that tourism to Cuba grew, increasing six-fold between 1990 to 2000.[124]

Nevertheless, these modest reforms could not stop the economy's free fall. Between 1989 and 1993, Cuba reduced its imports by almost 80% and its gross domestic product shrank by nearly 35%.[125] An extensive literature documents how people on the island suffered acutely during the special period.[126] For example, during this period, nutritional standards fell below the minimum recommended by the United Nations Food and Agricultural Organization.[127] By the mid 2000s, the worst of Cuba's structural adjustment was over and the standard of living for average Cubans began to improve. In time, Venezuela came to provide some of the economic support that the Soviet Union had formerly provided.

The fall of the Berlin Wall and the disintegration of the Soviet Union raised the hopes of Cuba's enemies because they assumed that the island would now be more vulnerable to economic aggression. Other factors made it more politically correct to take a hard line with Cuba. First, the neoliberal

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[119] *See* El Decreto-Ley No. 141 Sobre El Ejercicio del Tabajo por Cuenta Propia, 5 GAC. OF. 11 (Cuba 1995).

[120] *See* El Decreto-Ley No. 142 Sobre los Unidades Basicas de Produccion Cooperativa, 6 GAC. OF. 15 (Cuba 1995).

[121] *See* El Decreto-Ley No. 192 De los Tratados Internacionales, 12 GAC. OF. 193 (Cuba 1999); El Decreto-Ley No. 192 De la Administracion Financiera del Estado, 20 GAC. OF. 323 (Cuba 1999); *Central Bank, supra* note 116, at 499–501.

[122] *See* El Decreto-Ley No. 165 De las Zonas Francas y Parques Industriales, 26 GAC. OF. 410 (Cuba 1996).

[123] In addition to having two domestic currencies – the national peso (CUP) and the convertible peso (CUC) – Cuba has multiple CUP:CUC exchange rates, including market rates determined by private activity and policy rates set by governmental fiat. In general, these policy rates inflate the value of the CUP by accounting for intra-governmental transactions with exchange rates as high as 1 CUC:1 CUP. The distortions caused by these multiple rates make it very difficult to determine the relative profitability of government ventures. Neither the CUC nor the CUP trade off the island, hence Cuba has domestic money but nothing that serves as money in international transactions. Rather than using explicit subsidies, taxes, and tariffs to conduct industrial policy, Cuba uses varying CUC:CUP exchange rates to incentivize different sectors of the economy. *See* José Gabilondo, *What Happens When Cuba Devalues Its Peso?*, HUFFINGTON POST (Sep. 15, 2015), http://www.huffingtonpost.com/jose-gabilondo/making-sense-of-todays-cuban-economy-promises-in-the-making_b_7527380.html, *archived at* https://perma.cc/Q9RA-ASWC.

[124] CUBAN CENTRAL BANK, LA ECONOMÍA CUBANA EN EL PERÍODO ESPECIAL 1990–2000, at 8 (Aug. 20, 2003), *available at* http://www.bc.gob.cu/Anteriores/Otros/economia%20cubana.pdf, *archived at* https://perma.cc/TRT8-HUQU.

[125] Id. at 7.

[126] *See, e.g.*, CRISIS, CAMBIOS ECONÓMICOS Y SUBJETIVIDAD DE LAS CUBANAS (Felix Varela 2004) (analyzing impact of special period austerity on women).

[127] Jorge I. Domínguez, *Introductory Analysis*, *in* THE CUBAN ECONOMY AT THE START OF THE TWENTY-FIRST CENTURY 1, 4 (Jorge I. Domínguez et al. eds., 2004).

revolution in the United States led by Ronald Reagan and movement conservatives provided moral clarity about the superiority of capitalism, justifying sharp-elbowed treatment of socialist holdouts. Second, a maturing Cuban-American political class learned to leverage their financial and political clout to escalate hostilities against the island.

This escalation took two important forms. First, Congress tried to move the locus of administrative discretion over these sanctions away from the Executive by enacting statutes that "codified" the previous Presidential actions. Until the 1990s, the Cuban embargo grew through discretionary executive actions taken by U.S. presidents using statutory authorities. With some exceptions, U.S. presidents and Congress had generally been aligned on the need to maintain the economic embargo on Cuba.[128] However, some in Congress knew that this might one day change. Since virtually all of the prohibitions in the Cuba sanctions flowed from regulations — which could be rescinded by a president — conservatives in Congress sought to shift the locus of political discretion over Cuba sanctions to itself.

To that end, Congress attempted to codify some of the executive pronouncements and regulatory actions that had imposed sanctions on Cuba. In 1992, Congress adopted the Cuban Democracy Act ("CDA"), which imposed more restraints on trade between the two countries, including the reimposition of bans on foreign subsidiaries of U.S. companies.[129] The CDA also attempted to expand the extraterritorial reach of U.S. sanctions by advising (but not requiring) the President to cut off foreign financial assistance to countries that helped Cuba.[130] That same year, Cuba would succeed in having the United Nations approve a motion condemning U.S. sanctions on the island.

Four years later, Congress enacted the Cuban Liberty and Democratic Solidarity Act of 1996 ("Helms-Burton"), which purported to codify the embargo through federal statute.[131] Helms-Burton introduced a new wrinkle into Cuba sanctions. By threatening to impose liability on foreign purchasers of Cuban property subject to the potential claims of U.S. citizens, the statute dramatically expanded the extraterritorial reach of U.S. foreign policy, raising the hackles of allies.

In response to the Helms-Burton Act, in 1996 Cuba adopted its own claims program in Statute #80 (Reaffirmation of Cuban Dignity and Sovereignty).[132] This statute authorized natural people (not legal persons like corporations) to bring claims against the U.S. for personal or property harms

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[128] For example, Secretary of State Henry Kissinger explored a possible détente with the Cuban government in the 1970's, but President Richard Nixon put an end to the process. *See* BACK CHANNEL, *supra* note 30, at 119–23.

[129] Cuban Democracy Act of 1992, Pub. L. No. 102-484, § 1706, 106 Stat. 2315 (1992).

[130] *Id.* § 1704.

[131] Cuban Liberty and Democratic Solidarity (LIBERTAD) (Helms-Burton) Act of 1996, Pub. L. 104-114, 110 Stat. 785 (1996). For a general overview of Helms-Burton, see generally RICARDO ALARCÓN DE QUESADA, HELMS-BURTON: SLAVERY LAW (1997).

[132] El Ley No. 80 Ley de Reafirmacion de la Dignidad y Soberama Cubanas, 2 GAC. OF. 299 (Cuba 1996).

caused by U.S. actions since January 1, 1959.[133] The Cuban government has yet to establish the formal program to file and adjudicate these claims, but the legal authority is in place.

In a previous era, the Platt Amendment to the Cuban Constitution established the prerequisites for the United States to end its first military occupation of the island.[134] In a similar vein, Helms-Burton laid down the bright line requirements that Cuba would have to meet in order for Congress to lift the embargo. Chief among these requirements was settlement of the claims certified by the U.S. Foreign Claims Settlement Commission.[135] The focus on regime change later peaked during the administration of President George W. Bush, who had the "unabashed aim of subverting the Cuban government by economic strangulation."[136] Going against this direction, in 2000 Congress authorized limited agricultural exports to Cuba in the Trade Sanctions Reform and Export Enhancement Act.[137] In 2004, President George W. Bush tightened restrictions on remittances and travel to the island by Cuban-Americans visiting family.[138]

The second major way in which U.S. sanctions became more severe was by making regime change on the island a central goal, rather than a de facto one pursued surreptitiously while seeking plausible deniability. After the fall of the Berlin Wall and the dissolution of the Soviet Union, the Cold War ended, depriving Cuba hawks of the *raison d'étre* for these policies. The OFAC machinery kept running smoothly thanks to the cumulative construction of these sanctions through six U.S. presidents (Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter), but a new animating goal was needed. In response, promoting regime change in Cuba became the formal stated objective of U.S. foreign policy. As noted, influencing and — at times — selecting Cuba's leaders had long figured in the U.S. foreign policy, but officials had refrained from explicitly committing themselves to it. Much like the 1959 Chevrolets still on the road in Cuba, OFAC's Cold War machine could now be retooled to more explicitly destabilize the island.

Since 1996, the United States has spent over $260 million to promote activities — including covert activities — on the island designed to destabilize the incumbent government.[139] The Government Accountability Office has published several public reports finding mismanagement and irregularities in the way that U.S.A.I.D has conducted some of its "democracy

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[133] *Id.*

[134] *See Cuban Claims*, *supra* note 22, at 96–99 (recounting history of the Platt Amendment). The United States occupied Cuba a second time from 1906 to 1909. *Id.*

[135] *See* Helms-Burton § 204.

[136] BACK CHANNEL, *supra* note 30, at 356.

[137] Trade Sanctions Reform and Export Enhancement Act of 2000, P.L. 106-387, § 908, 114 Stat 1549 (2000).

[138] BACK CHANNEL, *supra* note 30, at 356.

[139] Editorial, *In Cuba, Misadventures in Regime Change*, N.Y. TIMES (Nov. 9, 2014), *available at* https://www.nytimes.com/2014/11/10/opinion/in-cuba-misadventures-in-regime-change.html, *archived at* https://perma.cc/X43A-6DH3.

promotion" programs in Cuba.[140] In 2009, a U.S.A.I.D. contractor — Alan Gross — repeatedly smuggled contraband communication equipment into Cuba.[141] It is not clear whether Gross was acting as an independent contrabandist or under the aegis of the federal agency, whose covert activities on the island were implemented with plausible deniability.

D. Raul Castro, Economic Reforms, and Diplomatic Normalization

In 2008, Raul Castro became President as his brother Fidel entered the final stage of his participation in Cuba. Beginning in 2011, the government of Raul Castro began what is undeniably the period of most substantive reforms of the economy and, in general, Cuban society. Recognizing the need to make structural changes to the former, the last two Congresses of the Cuban Communist Party (the governing policy body) have affirmed a blueprint of structural reforms designed to make the economy more dynamic.[142]

Reforms have targeted the economy. In November 2011, Decree Law 287 abolished the Ministry of Sugar and replaced it with a holding company with a streamlined organizational structure.[143] That same month, the purchase and sale of residential real estate became legal, kicking off the property market.[144] Quickly thereafter, the island's banks were authorized to make loans to small businesses and farmers.[145] In 2012, the government increased the amount of land that could be leased by farmers and made the leases more transferable.[146] On January 1, 2013, a new income tax took effect, with marginal rates from 15% to 50%.[147] In 2015, Cuba reached an agreement with its Paris Club creditors to reschedule the debt owed to offi-

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[140] A 2006 audit by the Government Accountability Office (GAO) found that "democracy assistance" programs lacked internal controls, did not ensure that disbursed funds were spent properly, and could not guarantee that recipients of funds complied with applicable laws and regulations. GAO, REP. NO. GAO-07-147, FOREIGN ASSISTANCE: U.S. DEMOCRACY ASSISTANCE FOR CUBA NEEDS BETTER MANAGEMENT AND OVERSIGHT 44 (2006). A follow up report two years later noted some program improvements but found ongoing weaknesses in internal controls and oversight of grantees. GAO, REP. NO. GAO-09-165, FOREIGN ASSISTANCE: CONTINUED EFFORTS NEEDED TO STRENGTHEN USAID'S OVERSIGHT OF U.S. DEMOCRACY ASSISTANCE FOR CUBA 24 (2008). As recently as 2013, the GAO continued to find shortcomings in these programs. GAO, GAO-13-285, CUBA DEMOCRACY ASSISTANCE: USAID'S PROGRAM IS IMPROVED, BUT STATE COULD BETTER MONITOR ITS IMPLEMENTING PARTNERS 39–40 (2013).

[141] *See* Editorial, *supra* note 139.

[142] *See generally* CONGRESO PCC, CONCEPTUALIZACIÓN DEL MODELO ECONÓMICO Y SOCIAL CUBANO DE DESARROLLO SOCIALISTA (2016), *available at* http://www.granma.cu/file/pdf/gaceta/Copia%20para%20el%20Sitio%20Web.pdf, *archived at* https://perma.cc/R9CC-KD99.

[143] MARC FRANK, CUBAN REVELATIONS 265 (2013).

[144] *Id.* at 257.

[145] *Id.* at 264.

[146] *Id.* at 263.

[147] *Id.* at 268.

cial creditors.[148] Other reforms have increased mass access to the internet, improved relations with religious authorities, and made it easier for Cubans to get passports and leave the island temporarily or for good.[149] Indeed, reforming the island's monetary structure remains a high priority economic reform.[150]

The Party recognizes that these reforms have not come as quickly as hoped.[151] As part of the process, economists on the island — including officials who work at state agencies — have critically examined the island's economic structure. A recent book by island economists encouraging reforms to promote innovation and productivity offers a nuanced account of the structural problem with Cuba's economy.[152] While recognizing that U.S. sanctions plays a decisive role in limiting economic development, the book also considers other causes, including the lasting harms of having participated in COMECON.[153] It argues for policies to promote better participation in global value chains.[154] Increasing its exports is crucial to the island's success.[155]

Most recently, the island's economic problems have worsened because Venezuela has had to cut back on (subsidized) trading with the island because of the declining price of oil and the reduced production of PDVSA, the state oil company.[156] In effect, Venezuela's own social problems have left it unable to continue its previous role of white knight. As a result, the Cuban government has imposed austerity measures including brown outs, blackouts, and some price controls for basic foodstuffs.[157]

President Obama substantially changed sanctions. In April of 2009, he rescinded limits on family travel and remittances to Cuba; he also authorized U.S. telecommunications companies to enter the Cuban market.[158] In 2011, OFAC relaxed prohibitions on academic exchange and people-to-people travel.[159] After the two countries announced the imminent resumption of

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[148] How the island will resolve its outstanding debt to private creditors in the London Club remains to be seen.

[149] Those who claim that Raul Castro has changed little can say so only by assiduously avoiding any contact with the island.

[150] *See* Gabilondo, *supra* note 123 (analyzing implications to state balance sheets of devaluation).

[151] Nevertheless, I am bullish on the prospects for Cuba and its economy. *See* José Gabilondo, *Reimagining Financial Capitalism: Promoting Socially-Responsible Investment in Cuba*, HUFFINGTON POST (Oct. 21, 2015), http://www.huffingtonpost.com/jose-gabilondo/reimagining-financial-capital_b_8330120.html, *archived at* https://perma.cc/55TF-T9RE (analyzing latent investment markets in Cuba).

[152] *See* Ileana Díaz Fernández, *La Competitividad en la Empresa Cubana, in* CUBA: LA RUTA NECESARIA DEL CAMBIO ECONOMICO 122–142 (Omar E. Perez Villanueva & Ricardo Torres Perez eds., 2013).

[153] *Id.* at 127, 132.

[154] *Id.* at 127.

[155] *See generally* ISIS LILA MAÑALICH, EXPORTAR PARA CRECER: UNA NECESIDAD IMPERANTE EN LA ECONOMÍA CUBANA (2014).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

diplomatic relations on December 14, 2014, the Obama administration began rolling back long-standing regulatory limits on economic exchange and cultural contact between the two countries.[160] In 2015, the State Department removed Cuba from the list of countries that sponsor terrorism, an important step towards normalization.[161] That same year, however, President Obama renewed the declaration of a state of emergency with Cuba under the Trading with the Enemy Act, a decision that continued certain sanctions.[162]

On March 15, 2016, other substantial changes to the regulation took place, including the announcement by OFAC that U.S. banks could open accounts for Cuban nationals and that the Cuban government could use the U.S. dollar in its international transactions. That same month, President Obama became the first U.S. president to visit Cuba since Calvin Coolidge.[163] In October 2016, as part of several changes in sanctions policies the Departments of Treasury and Commerce announced the lifting of bans involving pharmaceuticals, humanitarian travel, and Cuban imports.[164] These changes have created a sense of momentum and possibility both on the island, in Miami, and in the United States.[165] Potential foreign investors, in particular, remain interested in the Cuban market.[166]

III. The Cuban View

Cuba has long estimated the economic harm of U.S. sanctions. Part A analyzes the island's annual report to the United Nations, which contains the most economic analysis of these harms. The legal actions brought in a Cu-

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[160] The Obama administration also made other major changes to its Cuba policy in areas other than trade and the economy. *See* Mark P. Sullivan, Cong. Res. Serv., R43024, Cuba: U.S. Policy and Issues for the 113th Congress 25–28 (2014). For example, on May 29, 2015, the Secretary of State removed Cuba from a list of countries with ties to terrorism, long a bone of contention with the Cuban government. Press Release, U.S. Dep't of State, Rescission of Cuba as a State Sponsor of Terrorism (May 29, 2015). Since this Article focuses on economic sanctions, I do not analyze the entirety of the relationship between the two countries.

[161] *Id.*

[162] Press Release, The White House, Notice — Continuation of the National Emergency with Respect to Cuba (Feb. 25, 2015), *available at* https://obamawhitehouse.archives.gov/the-press-office/2015/02/25/notice-continuation-national-emergency-respect-cuba, *archived at* https://perma.cc/C62R-LTKQ.

[163] Dan Roberts, *Obama Lands in Cuba as First U.S. President to Visit un Nearly a Century*, The Guardian (Mar. 21, 2016), https://www.theguardian.com/world/2016/mar/20/barack-obama-cuba-visit-us-politics-shift-public-opinion-diplomacy, *archived at* https://perma.cc/2SRJ-8VUW.

[164] In total, the Obama administration made six different sets of changes to licensing policy.

[165] José Gabilondo, *Voices: In Cuba, Economic Contradictions Amid Change*, NBC News Latino Blog, (Aug. 21, 2014), http://www.nbcnews.com/news/latino/voices-cuba-economic-contradictions-amid-change-n181616, *archived at* https://perma.cc/5SDT-A48L (discussing economic changes on the island).

[166] For a good general overview of legal issues faced by foreign investors see Sinrelex Dominicana Abogados Consultores SRL's, Foreign Investment in Cuba (2015).

ban court in 1999 set out more of the legal framework for the claim.[167] Part B examines these two actions.

A. Claims Before the United Nations

In preparation for the annual vote on a United Nations resolution opposing sanctions, Cuba prepares a comprehensive report itemizing the harms to its economy caused by U.S. sanctions. A scrupulously detailed accounting of interference with exports, imports, financing, and economic development, it is the single best source for understanding Cuba's claims against the United States. Focused on macroeconomics, trade, and development, the report does not address the counterintelligence and covert operations analyzed in the Security Complaint. The 2016 report has five major parts that review the legal structure of U.S. sanctions, their impact on the Cuban economy, the human rights and sovereign prerogatives harmed by these sanctions, and the near universal opposition to these measures. The report does not say much about the claim's legal theory, a theme developed more fully in the domestic lawsuits.

The discussion starts with a detailed snapshot of the state of U.S. sanctions between April 2015 and April 2016.[168] The tenor here is mixed, praising the removal of Cuba from the U.S. list of state sponsors of terrorism but criticizing the President's decision to renew sanctions under the Trading With the Enemy Act.[169] The Obama administration broke with the past half-century of U.S. foreign policy, but compared with the enormity of U.S. sanctions these recent reforms represent marginal rather than structural advances. The single most complete two pages on the issue, the report outlines the current U.S. legal authority for Cuba sanctions.[170] While conceding that statutes limit the President's authority to end sanctions on the island, the report asserts—as I have as well—that President Obama failed to exercise the full measure of his discretion to normalize economic relations with the island.[171]

The report starts with twenty-seven specific examples of failed transactions which illustrate how (during the one year post-normalization interval of the report) U.S. sanctions interfere with the ability of Cuba and its nationals to make international payments, arrange trade financing, receive wire transfers, open and operate bank accounts, and settle trade obligations.[172] Several of these examples relate to fines in excess of $100 million imposed

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[167] *See generally Security Complaint*, *supra* note 20; *Economic Complaint*, *supra* note 21.

[168] 2016 CUBA REPORT, *supra* note 17, at 1–12.

[169] *Id.* at 1.

[170] *Id.* at 2–5.

[171] *Id.* at 6–7. Elsewhere, I have argued that because of these Constitutional defects in Helms-Burton, the Presidency has more power to abolish the embargo than it has claimed to date. José Gabilondo, *Can Obama Unilaterally End the Cuba Embargo?*, WORLD POST (Aug. 31, 2016), http://www.huffingtonpost.com/jose-gabilondo/can-obama-end-longtime-cuba-embargo_b_8059762.html, *archived at* https://perma.cc/4YHH-2BE8.

[172] 2016 CUBA REPORT, *supra* note 17, at 8–12.

by OFAC on U.S. and foreign financial and commercial institutions.[173] Other examples involve relatively minor transactions.[174] During this reporting period, the United States imposed 61 separate sanctions on foreign banks, which resulted in problems with issuing or confirming letters of credit, setting up correspondent banking services, using SWIFT, and carrying out foreign exchange transactions.[175]

In addition to the negative impact on financial transactions, the report suggests three major kinds of harm resulting from U.S. sanctions. First, sanctions compromise the state's ability to provide for the general welfare of those on the island by interfering with efforts to provide public health, public nutrition, education, sports, and culture.[176] Second, sanctions have constrained the island's general industrial development and that of certain strategic sectors, including biotechnology, tourism, transportation, mining, and telecommunications.[177] It is in this context that the report points out how sanctions have increased the costs of securing needed imports.[178] Finally, sanctions severely limit the island's ability to promote its exports, including health goods and services, agricultural products, tobacco, cobalt, nickel, rum, and tourism services generally.[179] The report estimates that forgone export revenues for 2016 exceed $4 billion.[180]

The report lists over a dozen specific examples of how the extraterritorial reach of U.S. sanctions harm not only Cuba, but also third parties.[181] The examples suggest how pervasively U.S. sanctions influence how other countries and private firms relate to Cuba.[182] The report superbly documents the tidal wave of opposition to U.S. sanctions within the United States and globally.[183]

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[173] During this period, OFAC imposed fines for Cuba-related activities on French bank Crédit Agricole ($1.1 billion), U.S. insurer Navigators Insurance Company ($271 million), German bank Commerzbank ($1.7 billion), U.S. firm Halliburton Atlantic Limited ($304 million), U.S. design firm WATG Holdings ($140 million), and French company CGG Services S.A. ($614 million). *Id.* at 8–10.

[174] For example, in November 2015, PayPal blocked the payment of a German company for tickets to a Cuban musical. A German court ordered PayPal to make the payment or face a substantial fine. *Id.* at 9.

[175] *Id.* at 28–31.

[176] *Id.* at 12–17.

[177] *Id.* at 18–22.

[178] *Id.*

[179] *Id.* at 23–27.

[180] *Id.* at 23.

[181] *Id.* at 31–35.

[182] Consider these examples: in July 2015, a Lebanese bank canceled the account of the Cuban news agency after being warned by OFAC about a possible violation of sanctions, *id.* at 33; in September 2015, a British supermarket with U.S. investors began blocking all Cuban products from its stores, *id.*; Cuba incurs additional freight and insurance expenses for all marine transport because OFAC sanctions vessels that trade with the island, *id.* at 22; in December 2015 the Royal Bank of Canada closed a Eurodollar account held by Cubana Aviación to avoid sanction by OFAC, *id.* at 31; citing U.S. sanctions, a Danish transportation company in September 2015 refused to transport the property of Cuban diplomats to the Danish embassy, *id.*

[183] *Id.* at 35–42.

The report includes financial estimates of two kinds of harms caused by U.S. sanctions — asset impairment (as would show up on a balance sheet) and forgone receipts (as would be reflected on an income statement as annual losses or negative income). The asset impairment figure is over $750 billion.[184] This estimate reflects harms to capital assets owned by the state, infrastructure (e.g., highways, ports, and buildings), and sovereign intangibles in the nature of goodwill that — though not liquid — represent forms of value. The revenue loss figure is about $125 billion.[185] This estimate includes inflows forgone because of sanctions, e.g., estimates of export earnings and other forms of profit. Assets can be restated in terms of cash flows and, vice versa, earnings streams can be capitalized and expressed as assets; hence these two kinds of harms may represent alternative ways of measuring related losses.

Asset impairment can increase or decrease each year based on how asset values fluctuate in a dynamic market. For example, the 2016 estimate of asset loss is lower than the 2015 estimate.[186] This makes sense insofar as the increase in asset value reflects the way that diplomatic normalization results in a more optimistic assessment about Cuba's financial prospects going forward. In contrast, estimates of forgone receipts (i.e., revenues and consequential damages) are necessarily cumulative because each year's lost revenue is stacked on top of the accumulated lost revenue. Therefore the 2016 estimate of foregone receipts exceeds the previous year by about $4,500,000,000.[187]

B. Domestic Legal Actions for Harms to National Security and the Economy

In 1999, Cuban plaintiffs filed two legal actions against the United States in the Provincial Court of Havana (*Tribunal Provincial Popular*), one a mass tort action for harms caused by U.S. covert operations ("Security Complaint") and the other an action for economic harms caused by sanctions ("Economic Complaint").[188] Both actions rest on provisions of three sources of Cuban law: the Constitution;[189] the Law of Civil, Administrative,

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[184] *Id.* at 4.

[185] *Id.*

[186] The prior year estimate for asset loss was over $80 billion higher. 2015 CUBA REPORT, *supra* note 18, at 4.

[187] The prior year estimate for forgone receipts was $121,192,000,000. *Id.* at 4.

[188] The other action also makes some allegations about harms caused by the covert security operations of the United States. *See Economic Complaint*, *supra* note 21, at clauses 20–26, 30.

[189] These sources include the following: Article 1, which lists political liberty, social justice, individual and collective wellbeing, and solidarity as guiding values; Article 12, which asserts the primacy of sovereignty, autonomy, and self-determination as central to Cuba's anti-imperialist nature; Article 14, which establishes socialist property and principles of redistribution; and Chapter VII (Articles 45–66), which sets out the rights and duties of individuals. *Economic Complaint*, *supra* note 21.

and Labor Procedures;[190] and the Civil Code.[191] The Economic Complaint also relies on public international law.[192] The plaintiffs are a coalition of law professors and lawyers representing eight large federations: the Cuban Workers Guild (*Central de Trabajadores de Cuba*, CTC), the National Association of Small Farmers (*Asociación Nacional de Agricultores Pequeños*, ANAP), the Federation of Cuban Women (*Federación de Mujeres Cubanas*, FMC); the Federation of University Students (*Federación Estudiantil Universitaria*, FEU), the Federation of Secondary School Teachers (*Federación de Estudiantes de Enseñanza Media*, FEEM), the José Martí Pioneers Organization (*Organización de Pioneros José Marti*, OPJM), the Committee for the Defense of the Revolution (*Comités de Defensa de la Revolución*, CDR), and the Association of Veterans of the Cuban Revolution (*Asociación de Combatientes de la Revolución Cubana*, ACRC).

Are these plaintiffs state actors? At this point in the evolution of Cuban society, the answer is probably "yes," although one should keep an open mind about the extent to which non-state expectations animate these federations. These federations are comprised primarily of private individuals but, to varying degrees, each one operates as a para-state entity because their leadership tends to follow official policy. Nevertheless, the rank and file membership tends to be entirely voluntary, suggesting the private choice associated with U.S. notions of civil society. Determining whether these federations are private parties, public instrumentalities, or an admixture of both can be difficult because civil society in a socialist country does not map neatly onto the U.S. paradigm in which it is relatively easy to distinguish between private and public entities.

In both actions, the court held for the plaintiffs.[193] However, these decisions have not been enforced against the United States. The United States

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[190] Cited Articles include the following: Article 6, establishing the subject matter jurisdiction of the court; Articles 8–10, which establish proper venue; Article 146, which establishes the remedy; Articles 223 et seq., which set out the procedural requirements for the Complaint and its annexes; and Articles 229, 230, and 170, which set out the standards for service of process. *Id.*

[191] These provisions include the following: Article 16, which governs the choice of law for the action; Articles 39–52, which establishes the standing to sue of the plaintiffs; Articles 81-83, 111, and 47, which set out the standards for economic damages; Articles 85–87, which provides for awards of consequential damages and legal costs; Article 95, which establishes a general duty of care; Transitional Provisions, which determine the temporal applicability of previous provisions; and Article 414, which addresses the qualifications of plaintiff's counsel. *Id.*

[192] The Complaint cites several sources, including the following: Org. of American States [OAS] Charter art. 15; G.A. Res. 626 (VII) (Dec. 21, 1952); the International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; G.A. Res. 2625 (XXV) (Oct. 24, 1970); G.A. Res. 3281 (XXIX) (Dec. 12, 1974). *Id.*

[193] *See* Tribunal Popular Provincial de Ciudad de la Habana [Provincial Court of Havana] Expediente Civil No. 1/2000, May 5, 2000, Sentencia No. 47 (Cuba), *reprinted in* SENTENCIA DEL TRIBUUNAL PROVINCIAL POPULAR DE CIUDAD DE LA HABANA EN EL PROCESO POR LA DEMANDA DEL PUEBLO DE CUBA CONTRA EL GOBIERNO DE ESTADOS UNIDOS POR LOS DAÑOS ECONOMICOS OCASIONADOS A CUBA 98–99 (Editora Política, 2000).

did not appear in the proceeding; hence the action lacks the adversarial opposition that sharpens how issues are presented. Nonetheless, the theory of liability that underlies these actions provides a basic frame for understanding Cuba's claim against the United States for embargo losses.

The Security Complaint itemizes damages from death, personal injury, and consequential damages. The calculation estimates damages for wrongful death as a result of the embargo, physical disabilities attributed to the embargo, and related damages from death or disability. The complaint tallies 3,478 persons killed and 2,099 persons suffering disabling physical injury as a result of U.S. sanctions.[194] The dollar figures assigned to each item are not as important as the attempt to make concrete the national interest that has been harmed.

The Economic Complaint presents twenty-three substantive statements of fact that address how U.S. sanctions have harmed Cuba.[195] Parts of the Complaint include specific line items for discrete harms. For example, the additional defense and security costs are grouped under a single line item. In addition to general damage estimates, the Complaint mentions harms to particular sectors of the Cuban economy, including sugar, oil, electricity, nickel, food, telecommunications, and agriculture generally.[196] Harms to the fishing sector are separately itemized.[197] Several entries address healthcare, including the increased marginal costs of obtaining pharmaceuticals and

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[194] These damages are based on $30,000,000 for each wrongful death and $10,000,000 in other damages. The disability damage estimates assign $15,000,000 per person plus $5,000,000 in other damages. Though not separately itemized, the other damages can be seen as substitutes for compensatory damages and punitive damages. *See Security Complaint, supra* note 20.

[195] Each of the twenty three subsections examines an aspect of how U.S. sanctions have adversely impacted the Cuban economy and society: (a) provides overall legal and historical frame for Complaint; (b) sets out illegal nature of U.S. sanctions under public international law; (c) analyzes the political contexts in the United States and Cuba when sanctions were first imposed; (d) asserts that Cuba's responses to U.S. sanctions are legal exercises of sovereignty; (e) analyzes how U.S. sanctions impact Cuban exports and imports of medical supplies; (f) addresses U.S. sanctions from the presidency of Jimmy Carter until the early 1990s; (g) examines impact of Helms-Burton; (h) reviews the U.N. General Assembly's resolutions against U.S. sanctions; (i) focuses on how U.S. sanctions have impacted the health of those who live in Cuba; (j) emphasizes the broad impact that sanctions have had on standard of living and the Cuban economy overall; (k) puts U.S. sanctions in the historical context of U.S. hegemonic interests in Cuba before the Cuban Revolution; (l) discusses U.S. attempts to promote political subversion on the island; (m) analyzes how the United States has promoted guerrilla activities on the island; (n) examines early U.S. plans to overthrow the Cuban government after the Revolution; (o) analyzes U.S. involvement in naval and air terrorism in Cuba; (p) focuses on how U.S. sanctions adversely impact Cuban agriculture and fisheries; (q) analyzes how U.S. sanctions have harmed Cuban industry; (r) reviews how Cuban transportation and infrastructure have suffered harms from U.S. sanctions; (s) analyzes the impact of U.S. sanctions on education and human capital; (t) reviews the efforts of the U.S. Central Intelligence Agency to subvert the Cuban government; (u) links U.S. sanctions to biological warfare by arguing that scarcity of pesticides and other supplies on health; (v) reviews U.S. media efforts to influence public opinion on the island; and (w) analyzes how U.S. sanctions have obligated Cuba to incur additional defense and security costs. *See Economic Complaint, supra* note 21.

[196] *Economic Complaint, supra* note 21, at 11–13.

[197] *Id.* at 24.

medical supplies formerly obtained from the U.S.[198] Costs for additional transportation and warehousing costs for pharmaceuticals and medical supplies are separately itemized.[199] Additionally, the action estimates the cost of adapting health care infrastructure on the island to function without access to U.S. goods.[200]

The Economic Complaint estimates the economic value of harms to civilian mortality from nutritional disorders, dengue and other illnesses whose treatment was compromised by U.S. restrictions on insecticides.[201] The Complaint also itemizes particular maladies that have affected the island's agriculture and livestock, including sigatoka plague (bananas), *tristeza del cítrico*, *pulgón negro*, and hemorrhagic fever in rabbits.[202] The Complaint also estimates the additional financing costs attributed to sanctions, including increased foreign exchange costs due to the inability to use the dollar, hardship in negotiating with external creditors, and increased costs of credit.[203]

The Economic Complaint would benefit from more elaboration and substantiation of these claims. Some entries are hard to understand because the particular harm is not specified fully, for example as in the chilling effect of the embargo on counterparties.[204] Some items would benefit from more exposition, such as damages attributable to the embargo's restraint on travel by U.S. citizens and residents subject to these limits.[205] Much of the damage reflects general harms to foreign trade. These costs include higher customs duties, additional transportation expenses, extra postal costs, and other transaction costs in general.[206] Rather than valuing each harm individually, the Economic Complaint aggregates these harms into a single number, making it harder to appreciate the relative significance of the component harms. For example, the costs of technology transfer, brain drain, and impaired export markets are grouped together.[207]

As noted below, determining proximate causation for these harms also means considering the extent to which the actions of the Cuban government have contributed to these economic conditions. Doing so would not weaken the basic claim for redress. Quite the contrary, it would make the argument richer, more objective, and credible to a wider audience. In general, more substantiation of the losses and explicit discussion of the assumptions behind the valuation would be helpful.

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[198] *Id.* at 10.
[199] *Id.*
[200] *Id.* at 11.
[201] *Id.*
[202] *Id.* at 32.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.* at 11–13.
[207] *Id.*

IV. A Framework For Sovereign Liability

Supportive of Cuba's claims against the United States, this article seeks to supplement and qualify the arguments made in the Economic Complaint. To that end, Part A suggests factors relevant to determining how Cuba can show that U.S. sanctions have proximately caused harm to its economy. Part B considers other legal issues raised by Cuba's claim.

A. U.S. Liability for Economic Coercion

Liability assumes breach of a duty and causation of harm. In the case of economic coercion through sanctions, assigning proximate causation for over-determined macroeconomic conditions influenced by half a century of reciprocal hostilities is complex. This analysis starts by considering some of the more challenging causation issues, including the extent to which Cuba's harms may reflect the consequences of unsuccessful economic planning. The rest of the analysis examines factors that argue for imposing sovereign liability on the United States. First, sanctions since the 1990s violate nonintervention duties found in treaty obligations undertaken by the United States. Second, U.S. sanctions depart from other international standards for economic aggression. Finally, and perhaps most seriously, as pursued by the U.S. in Cuba, pursuing regime change in Cuba transgresses fundamental notions of sovereignty.

1. Proximate Causation

The complex economic conditions that form the predicate for Cuba's claim against the United States are over-determined in that the vast majority of economic outcomes have multiple causes. How can proximate cause be allocated between the competing causes-in-fact? Proving causation requires imagining how the economy might have been without these sanctions, admittedly a speculative endeavor. For Cuba's damages claim to prosper, it must show that the sanctions have proximately caused damages to the Cuban economy.[208]

Consider some of the preliminary economic issues raised by the question. Part of the answer is empirical, i.e., how was trade and the economy displaced because of the embargo? This involves asking several related questions about the sanctions influenced the island's trade structure. To what extent did the sanctioned country redirect trade into an alternative market? How comparable were the alternative market to the U.S. market? Did Cuba incur higher transportation and transaction costs? Did the substitute markets

[208] Analytical methods that could be used to establish causation do exist, however. *See, e.g.*, Claudio E. Montenegro & Raimundo Soto, *How Distorted is Cuba's Trade? Evidence and Predictions from a Gravity Model*, 5 J. of Int'l Trade & Econ. Dev. 45 (1996); U.S. Agricultural Sales to Cuba: Certain Economic Effects of U.S. Restrictions, Inv. No. 332-489, USITC Pub. 3932 (July 2007) (Final).

have comparable demand for the sanctioned country's products? Another part of the enquiry is necessarily more speculative because it involves a counterfactual question: How would an economy have behaved without sanctions? Any answer to this question will be based on an economic model. A third set of questions about causation raises even more contestable issues. To what extent did Cuba's own actions cause or contribute to any of these economic harms?

After all, Cuba has taken actions that may have contributed to the harms caused by U.S. sanctions, so assigning proximate cause requires determining the island's role in its own economic problems. Though it is relatively easy to show that U.S. sanctions have harmed the Cuban economy, assigning primary responsibility for Cuba's economic problems to U.S. policy ignores the actions of the Cuban state in contributing to these economic problems. This does not refer to actions taken by Cuba that purport to justify U.S. policy. Instead, some of the proximate cause for the island's economic development must belong to state policies. Cuba's participation in the Council for Mutual Economic Assistance (the Soviet trading bloc) should be taken into account. Did participation in the Soviet trading system help or hurt Cuban trade? Probably there is no simple answer, but this issue has a bearing on how U.S. sanctions impacted Cuba's trade. For this reason, determining proximate cause requires considering Cuba's role in contributing to its economic problems.

2. Violation of the Principle of Nonintervention

As a member state of multilateral organizations, the United States has promised to refrain from intervention in the affairs of other countries, a logical corollary of respecting the sovereignty of other countries. Although the United Nations Charter does not use the notion of nonintervention, respect for the principle is a necessary corollary of several Charter provisions.[209] Also, as a member of the Organization of American States, the United States has undertaken to avoid intervention in the exercise of self-determination by member states.[210] The United States succeeded in having Cuba suspended from the organization, but sanctions on Cuba impair the self-determination of other member states that do want to interact with the island.

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[209] *See* Müge Kinaciğlu, *The Principle of Non-intervention at the United Nations: The Charter Framework and the Legal Debate*, PERCEPTIONS, Summer 2005, at 15, 38 (analyzing the legal basis for the principle of nonintervention).

[210] The Preamble to the Inter-American Democratic Charter cites respect for the principle of nonintervention as one of the primordial purposes of the Organization of American States. Org. of American States [OAS] Inter-American Democratic Charter pmbl. ¶ 1, 14 (Sep. 11, 2001), http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm, *archived at* https://perma.cc/J526-AT43; *see also* Organization of American States, Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance art. 2, July 26, 1975, O.A.S.T.S. No. 46, 61, *available at* https://www.oas.org/Juridico/english/treaties/b-29(1).html, *archived at* https://perma.cc/E6LL-9ZJA ("Nothing stipulated in this Treaty shall be interpreted as limiting or impairing in any way the principle of non-intervention and the right of all States to choose freely their political, economic and social organization.").

3. Departure from International Norms About Economic Aggression

During the twentieth century, the consensus within the international community emerged that individual states should generally avoid sanctioning other states, unless it is on behalf of the international community.[211] Its charter grants the United Nations legal authority to promote global peace by punishing an aggressor state that is ignoring or violating an international law obligation.[212] Under Article 41, the U.N. Security Council decides when to subject a member country to economic sanctions, which other member countries are expected to obey.[213] If economic sanctions do not remedy the aggression or breach of peace, Article 42 allows the Security Council to use military force.[214]

At present, economic sanctions are a fairly routine aspect of the international system, as evidenced by the many Article 41 sanctions that have been imposed.[215] Indeed, the United Nations maintains a database of nearly 1,000 entities and individuals subject to sanctions of the Security Council.[216] For example, between 1990 and 1991, the Security Council passed two resolutions (Resolution 661 of 1990 and Resolution 687 of 1991) which imposed an economic embargo on Iraq's oil trade. Ordinary Iraqis suffered profoundly. As a result, the United Nations started to emphasize harms to civilian populations caused by economic sanctions. These efforts culminated in the publication of the Bossuyt Report, which analyzed the human rights implications of economic sanctions.[217] Even so, U.N. sanctions can impose substantial hardships on countries, including their civilian populations.

When the United Nations imposes sanctions, it must follow explicit criteria that promote "smart" sanctions, in the sense that they are rationally related to a legitimate end, likely to bring about the intended result, and implemented so as to visit minimal harm to third parties, including civilian members of the sanctioned state.[218] Many of the criteria examine the ratio-

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[211] *See* Paul Szasz, *The Law of Economic Sanctions*, *in* 71 INT'L L. STUD. 455, 458 (Michael N. Schmitt & Leslie C. Green eds., 1998).

[212] U.N. Charter art. 39.

[213] These sanctions "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." U.N. Charter art. 41.

[214] Use of force may include "demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations." U.N. Charter art. 42.

[215] These include the following: Rhodesia (1965); South Africa (1977-1994); Iraq (1990); Yugoslavia (1991-1996); Somalia (1992); Libya (1992); Liberia (1992); Haiti (1993); Angola (1993); Rwanda (1994); Sudan (1996); and Sierra Leone (1997). *See Consolidated United Nations Security Council Sanctions List*, U.N.S.C. SUBSIDIARY ORGANS, https://scsanctions.un.org/consolidated/, *archived at* https://perma.cc/CB8A-BS2E.

[216] *Id.*

[217] *See generally* U.N. Econ. & Soc. Council, Comm. on Human Rights, The Adverse Consequences of Econ. Sanctions on the Enjoyment of Human Rights, Working Paper Prepared by Marc Bossuyt, U.N. Doc. E/CN.4/Sub.2/2000/33 (2000).

[218] *See* SEC. COUNCIL REPORT, UN SANCTIONS 6 (2013), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf, *archived at* https://perma.cc/8H2Z-W9FM.

nale for sanctions and their design. For example, before imposing sanctions the U.N. considers the nature of the international wrong that triggered the sanctions and the intended outcome of the sanctions. In general, the U.N. will impose sanctions to compel a member country to comply with the directives of the Security Council. Whether or not sanctions will be effective in seeking the desired harm matters too. Sanctions should also be limited in scope so as to target only the intended harm. These best practices in sanctions evidence the way that the U.N. has taken to heart lessons from the harms caused by economic sanctions

According to these norms, sanctions should avoid harm to the civilian population, especially starvation. Moreover, sanctions should also enjoy some degree of support from the civilian population of the sanctioned country.[219] Other criteria apply to the implementation of sanctions. They should be monitored periodically and reviewable to determine their ongoing relevance. Sanctions should also minimize any adverse impact to third parties, such as other governments or private entities. Moreover, the civilian population of a sanctioned country figures prominently in the assessment of the United Nations as to whether sanctions are feasible. Nevertheless, despite the attempt to impose economic sanctions surgically, under the best of circumstances they will visit harms on innocent third parties, especially the civilian population.

In their current form, U.S. sanctions on Cuba deviate substantially from the criteria applied to multinational sanctions. First, the justification for these unilateral sanctions was not an international wrong but an unresolved dispute about claims valuation and settlement between the U.S. and Cuba. Second, insofar as they promote regime change through an internal revolt, the sanctions promote harm to civilians as one the intended outcomes of U.S. sanctions since it is through such harm that enough social unrest can be stirred up to propel a regime change. Based on my experience, there is very little support on the island for U.S. sanctions.[220] Granted, it may be difficult to meaningfully assess majority preferences in Cuba, in part because of its history with a strong security establishment and a weak media environment. In terms of efficacy, U.S. sanctions have not secured regime change, but they have accomplished the intermediate goal of promoting economic deprivation for the civilian population. To the extent that U.S. sanctions intend harm to civilians, these sanctions merit punishment to signal the unacceptability of this type of state violence.

These sanctions should be evaluated in the context of the unique economic position of the United States, whose commercial and financial advantages make it an unrivaled trading counterparty. As one of the world's two

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[219] *See* Senator Robert G. Torricelli, Remarks at the Council on Foreign Relations Great Debate Series: Sanctions Against Rogue States: Do They Work? (May 20, 1998) (on file with author); Anna Segall, *Economic Sanctions: Legal and Policy Constraints*, 81 INT'L REV. OF THE RED CROSS 763, 776 (1999).

[220] During the more than twenty-five years that I have been visiting Cuba, I have yet to find one person who supports continuing these sanctions.

largest markets for imports, access to the United States is crucial for any country eager to trade.[221] The United States is also one of world's two largest export markets, hence importing countries may be unable to find substitute products in other countries. The U.S. dollar is the world's most important currency, so access to the dollar as an international reserve asset and a payment instrument is valuable. As a financial Great Power, the United States has jurisdiction over many of the world's largest sources of credit and bank. It is also a country that exports substantial capital through foreign direct investment. In terms of its geopolitical influence, the United States has an unrivaled network of allies on which it can lean in furtherance of its policies.[222] When focused on isolating a country, these advantages make the United States an enemy without peer.

U.S. sanctions deviate from international practice in other ways as well. In terms of rationality review by an independent authority, there seems to be none for U.S. sanctions against Cuba. State action taken under the Trading with the Enemy Act can be arbitrary and capricious. In other words, a federal court considering the Constitutionality of action taken against an enemy has no legal hook to overturn the sanctions.

Moreover, U.S. sanctions interfere not only with Cuba's economy but also with those of other countries that favor economic activity with the island. These sanctions involve an unprecedented degree of extraterritoriality on the part of U.S. foreign policy insofar as they purport to punish other countries and their nationals for engaging in prohibited transactions with the island. In doing so, the Cuba sanctions interfere with the freedom of action of these third parties to the unresolved dispute between Cuba and the United States. While a licit embargo limits bilateral trade relationship between the sanctioning and the sanctioned country, a blockade reaches much farther because it attempts to limit the sanctioned country's access to third parties, including other countries. In an earlier era, one country would block physical access by surrounding the ports of the sanctioned country with warships. Today, countries have other ways of accomplishing the same thing.

Especially since the enactment of the Helms-Burton Act, several countries have complained about the attempted extraterritorial reach of these sanctions. After the passage of Helms-Burton, several U.S. allies adopted statutory countermeasures to Helms-Burton to protest the purported extraterritorial reach of the U.S statute.[223] At the time, many doubted whether Congress had Constitutional authority to enact several of the provisions in

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[221] *See* Anders Grath, THE HANDBOOK OF INTERNATIONAL TRADE AND FINANCE 3 (2014) (listing leading importing and exporting countries).

[222] For example, the U.S. Commerce Department enforces anti-boycott regulations that prohibit private companies from participating in economic boycotts in which the United States does not participate. *See* Kim Strosnider & Christine Minarich, *U.S. Antiboycott Laws: Overview and Compliance Strategies*, WORLD ECR, Apr. 2012, at 1, *available at* https://www.cov.com/~/media/files/corporate/publications/2012/04/us_antiboycott_laws_overview_compliance_strategies.pdf, *archived at* https://perma.cc/WB3U-7USS.

[223] *See* EMBARGO O BLOQUÉO, *supra* note 26, 242–49 (discussing countermeasures to Helms-Burton taken by Canada, the European Union, Mexico, and Spain).

Helms-Burton, because the jurisdiction of the executive branch over foreign affairs is different from that of the legislative branch.

One argument against recognizing U.S. liability for embargo losses is that doing so would create a new international duty that would be difficult to apply but that could generate liability widely. Though a reasonable concern, the facts surrounding U.S. sanctions are so distinctive that even other examples of sanctions are unlikely to rise to the level of economic interference that Cuba has suffered.

4. Regime Change Cuban-Style

International law does recognize one important justification for pursuing regime change: to secure human rights that an incumbent government is abusing.[224] If the abuse is serious enough, the international community will come together in a show of support for a regime change, even when pursued unilaterally without the prior approval of the United Nations or other countries.[225] W. Michael Reisman suggests several criteria for evaluating the lawfulness under international law of attempts to carry out regime change of a foreign country.[226] First, the incumbent government must be generally condemned as pathological. Second, the goal of the regime change cannot be to increase the influence of the intervening state in the country or region. Third, the change must be feasible and implementable within a reasonable period. Finally, in the long run the regime change promotes order in the target state.

Measured against these criteria, U.S. sanctions fare poorly. Not only is Cuba not widely condemned but, too many, the island's resistance to the United States has made it a beacon of nationalist self-determination, including for many Third World countries for whom Fidel Castro was a global leader.[227] Given the history of hegemonic grasping in the region by the United States, Cuba sanctions on Cuba seem consistent with these geopolitical aspirations. That these sanctions have lasted for so long and that — if anything — they have helped to consolidate the targeted regime suggests that the stated outcome was not a plausible outcome. That said, Cuba's hands are not entirely clean when it comes to protesting the regime change

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[224] W. MICHAEL REISMAN, YALE LAW SCH. FACULTY SCHOLARSHIP SERIES, PAPER NO. 1003, WHY REGIME CHANGE IS (ALMOST ALWAYS) A BAD IDEA 1 (2004), *available at* http://digitalcommons.law.yale.edu/fss_papers/1003, *archived at* https://perma.cc/VEK8-LVV9.

[225] Reisman gives three examples of such unilateral interventions (all from 1979) which met with substantial approval in the international community: Tanzania's incursion into Uganda to expel Idi Amin; France's intervention in the Central African Republic to imprison its emperor, Jean Bedel Bokassa; and Vietnam's invasion of Cambodia to expel the Khmer Rouge. *Id.* at 518.

[226] *Id.* at 520.

[227] *See Fidel Castro's Death - World Reactions*, AL JAZEERA NEWS (Nov. 26, 2016), http://www.aljazeera.com/news/2016/11/fidel-castro-death-world-reactions-161126095542185.html, *archived at* https://perma.cc/8V3T-UN27 ("In Venezuela, a long-time ally of Cuba and staunch opponent of the political stance of the United States, President Nicolas Maduro said Castro had inspired, and would continue to inspire, his country.").

polices of the United States. Earlier in its history, Cuba's foreign policy supported the export of violent revolution to other countries, captured famously in Che Guevara's exhortation to create "two, three, or many Vietnams."[228]

The U.S. formula for regime change in Cuba differs from the standard formula. Regime change tends to refer to an armed intervention of a sovereign state by one or more foreign powers, typically in response to allegations of human rights abuses.[229] However, in the case of Cuba, the United States intends no such intervention. Instead, the goal of U.S. sanctions is to mobilize forces on the island to carry out or at least initiate a regime change. So, this iteration of regime change assumes that either the military or civilians will succeed in driving out the incumbent Cuban government. A peaceful protest is unlikely to serve this purpose. Similarly, an altercation that the government succeeds in putting down — *el Maleconazo* of 1994, for example — merely reinforces the impression of government power, that way discouraging future such forms of resistance.[230] Given the possibility of failure, the imagined insurgents must be willing to suffer not only death in combat but reprisal at the hands of the government. Moreover, if the scenario unfolds as contemplated, social control may break down, making it harder to chart a stable path towards reconstruction.

The intent to deploy civilians in ways that expose them to risk, violence, and, perhaps, death argues strongly for imposing liability on the United States for its policies. Granted, many of the sanctions strategies against Cuba pursued by the United States have de facto harmed civilians. Suspending the sugar quota in 1960 might have foreseeably caused harm to civilians, but any such harm can be seen as an unintended collateral harm of the policy. Similarly, Cold War containment also negatively impacted Cu-

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[228] *Che Predicts "Two, Three, Many Vietnams"*, HERB: RESOURCES FOR TEACHERS, https://herb.ashp.cuny.edu/items/show/518, *archived at* https://perma.cc/8K3X-SVH5 (last visited Apr. 28, 2017) (quoting ROBERT H. HOLDEN & ERIC ZOLOV, LATIN AMERICA AND THE UNITED STATES: A DOCUMENTARY HISTORY 242–43 (2000)) ("What a luminous, near future would be visible to us if *two, three, or many Vietnams* flourished throughout the world with their share of death and their immense tragedies, their everyday heroism and their repeated blows against imperialism obliging it to disperse its forces under the attack and the increasing hatred of all the peoples of the earth!") (emphasis added).

[229] In W. Michael Reisman's review of thirteen recent examples of regime change, all but one involved a formal intervention by a country's armed forces. *See* REISMAN, *supra* note 224, at 1 (mentioning regime change in Afghanistan, East Timor, Haiti, Iraq, Kosovo, Lebanon, Namibia, Panama, Sierra Leone, Uganda, Vietnam, and former Yugoslavia). The one exception is Nicaragua, in which the United States covertly supported the Contras, a para-military brigade. This attempt at regime change gave rise to a decision by the World Court finding against the United States. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 292 (June 27), *available at* http://www.worldlii.org/int/cases/ICJ/1986/1.html, *archived at* https://perma.cc/2EB7-L6HK.

[230] On August 5 and August 6 of 1994, a group of Cubans (at least a hundred) gathered on *el Malecón* to express their objections to the Cuban government. Cuban security forces put down the protest and detained many of the protestors. For footage of the event, *see* Net for Cuba Videos, *El Maleconazo en Cuba — 1994 (Archivo histórico)*, YOUTUBE (July 23, 2011), https://www.youtube.com/watch?v=aot-DDJGIRw, *archived at* https://perma.cc/JDC2-W8YY.

ban civilians because they remained unable to access the goods and services on which the standard of living had been based before the Revolution. However, de facto harm differs from the premeditated use of civilians to strategically destabilize an authoritarian regime.

B. Other Legal Issues

Assuming that an adequate theory of sovereign liability exists, Cuba's claim presents several preliminary issues that impact its viability: (i) identifying a forum, (ii) reckoning with complex valuation issues, and (iii) fashioning a relevant remedy.

1. Agreeing on a Forum and Jurisdiction

The Cuban lawsuit examined in Part III took place in a domestic court on the island, but permanent resolution of this issue will require a mechanism whose jurisdiction is recognized by both countries. Otherwise, a country can ignore an unfavorable international judgment. The paradigm example is the refusal by the United State to obey an International Court of Justice decision awarding damages to Nicaragua for U.S. involvement in supporting armed insurrection in Nicaraguan territory.[231] After this decision, the United States withdrew from the International Court of Justice. The Iran-U.S. Claims Tribunal may be a good model for this dispute.[232] Thankfully, since the resumption of diplomatic relations the United States and Cuba have created new bilateral mechanisms for discussing questions of mutual interest.

2. Theorizing Valuation

In its reports to the United Nations, Cuba has quantified the value of harms suffered as a result of U.S. sanctions. Although assigning a dollar value to these harms makes them seem more concrete, any consensual settlement of these issues requires agreement — admittedly at a certain level of generality — on the kinds of injuries that give rise to liability. So, theorizing valuation must precede any actual attempt to monetize the liability. After suggesting four general interests worthy of protection through liability, the discussion below acknowledges some of the special challenges of valuation.

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[231] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 292 (June 27), *available at* http://www.worldlii.org/int/cases/ICJ/1986/1.html, *archived at* https://perma.cc/2EB7-L6HK. The United States was able to block enforcement of the judgment by the United Nations Security Council. *See* U.N. SCOR, 41st Sess., 2718th mtg. at 43, U.N. Doc. S/PV.2718 (Oct. 28, 1986).

[232] *See About the Tribunal*, IRAN-U.S. CLAIMS TRIBUNAL, https://www.iusct.net/Pages/Public/A-About.aspx, *archived at* https://perma.cc/M9JM-F383 (last visited Apr. 28, 2017).

First, as U.S. sanctions have caused damage to the island's economic infrastructure a recovery should compensate Cuba for the cost of rebuilding structural elements in its economy. This includes not only physical infrastructure like highways and ports but, importantly, intangibles that give rise to economic advantage just as they do with private corporations. For example, access to the global value chains analyzed in the previous Part is a basic intangible that today serves as a prerequisite for any substantial foreign trade. Insofar as U.S. sanctions have caused relational harms that impede the island's ability to compete for chain access a recovery should indemnify the island for these harms. This argument understands the Cuban economy as a balance sheet with physical and intangible assets.

Second, insofar as U.S. sanctions have reduced profits — in particular those giving rise to foreign exchange — a recovery should compensate the island for these lost earnings. To a certain extent, this damage reflects harms to economic infrastructure, but lost profits can be analyzed in a more granular way by looking at particular commodities — like sugar and nickel — and service exports, like tourism. This argument sees the Cuban economy in terms of its periodic profits and losses.

Third, injury to Cubans on the island whose fundamental rights have been violated by sanctions should give rise to liability. For example, the mass tort action analyzed above estimates the human capital costs of wrongful death, physical harms, and consequential damages caused by sanctions.

Fourth, to the extent that U.S. sanctions have involved gross violations of international standards of justice and fair play, the U.S. should incur exemplary punitive damages to signal moral and multilateral disapproval of its actions towards the island. Like punitive damages generally, this argument looks not primarily at the Cuban economy but, instead, at the culpability of U.S. actions.

Finally, interest is appropriate given how much time has elapsed. Picking a discount rate to deal with inflation and the consequences of the passage of time, however, is complicated because of the extraordinary duration of U.S. sanctions on Cuba.

Assuming that Cuba and the United States can agree on the sovereign interests worthy of compensation, quantifying the harm faces several challenges. Finding comparable economic information about Cuba and other countries can be difficult because many important datasets do not have balance of payments and other macroeconomic data about the island.[233] Even if this data were available, though, there is no numerically meaningful way to reduce these harms to a single monetary value, in part because the harms involve sovereign interests that are heavily intangible for which there are no

[233] For example, the World Bank maintains a useful dataset that expresses a country's exports as a percent of its gross domestic product, but Cuba is not covered. *See Exports of goods and services (% of GDP)*, WORLD BANK (2017), https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS, *archived at* https://perma.cc/2VH8-PB8H.

real market proxies. Moreover, the passage of time makes any single number even less meaningful.

Moreover, the differences between socialist and capitalist property make valuation quite difficult. Although the Cuban government is the titular holder of these economic interests, to a large extent the government acts as a proxy for the island's people. Under Cuba's system of socialist property, the Cuban state holds national resources in trust on behalf of its people. Insofar as U.S. sanctions harm Cuban state property — including its trading advantages — they are, in effect, harming the economic interests of the private citizens, i.e., the beneficiaries of property held in trust by the Cuban government. It is as though the U.S. government expropriated the property of Cuban nationals.[234]

In general, though, expropriation refers to a country's taking of property within its jurisdiction, typically for some public policy purpose. Admittedly, the most serious harms caused by U.S. sanctions happen beyond the territorial jurisdiction of the U.S., e.g., those occurring on the island and with respect to other countries whose ability to deal with Cuba has been curtailed. So, analogizing U.S. sanctions to an expropriation is strongest for property within the territorial jurisdiction of the U.S. Nevertheless, U.S. power reaches far beyond its territorial limits and, to a certain extent, beyond its legal limits as recognized under public international law. This surplus of effective power exposes the U.S. to the equitable claim that its unilateral actions in isolating Cuba are as much an expropriation as the taking of property on U.S. soil.

3. Fashioning a Meaningful Remedy

What remedy makes sense to compensate for any harm done to the Cuban economy by virtue of U.S. sanctions? For many years, Cuba has been estimating the monetary value of these harms, expressed as U.S. dollars or Cuban pesos.[235] These estimates may help to establish the magnitude of these harms, but money damages may fall short because the most valuable losses include intangibles and public goods that money alone cannot restore.

Although U.S. sanctions have remained essentially the same, the structure of global trade and Cuba's economy has kept changing. Since the 1960s the structure of international trade has changed in response to deregulation, technology, and reduced transportation costs. When Eisenhower warned about the rise of an "industrial military complex" in his last speech as President in 1961, national conglomerates dominated much international trade. These conglomerates were based in one country but had a sprawling network of subsidiaries and affiliates joined through corporate and national affinity.[236]

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[234] This theory of liability is consistent with the claims program adopted by Cuba in 1996 in Statute #80. *See supra* Part II.C.

[235] *See, e.g.*, *Economic Complaint supra* note 21.

[236] It was an ironic message coming from a five-star general: "[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or

The operating context for today's multinationals differs from that for the national conglomerate in several important ways. First, transnational communication has become dramatically cheaper, especially through digital media. To a lesser extent, transportation costs have also declined. Hence the accidental location of resources is a less of constraint than it once was. Reduced transactions costs for global trade mean that a business can accomplish a similar degree of control over the production and distribution process without having to absorb foreign firms. Instead, using contracts and market power an ultimate consumer can direct the way that its upstream suppliers and related counterparties arrange their affairs through a value chain.[237]

Second, ideological shifts beginning in the 1980s have reduced the extent to which countries block access to their markets, reducing the link between country and conglomerate. This happened as neoliberal ideologies and deregulation took root in major Western powers, who tried to export these ideologies to other countries. In the case of Latin America, the Washington Consensus brought together a set of integrated policy reforms designed to promote trade in the region.[238]

As a result of these changes, many countries have reduced tariff barriers and surrendered control over their capital flows. Treaty-based multilateral organizations have worked together to promote a more standardized regulatory regime for cross-border trade. The International Monetary Fund has succeeded in getting many countries to surrender control over capital, including volatile streams of "hot money." Though several member countries objected consistently along the way, these organizations acted in essential alignment in promoting many of the economic policies that ushered in a more linked global trading system. Finally, geopolitical changes have rezoned trading markets.[239] After the Soviet Union's Council for Mutual Economic Assistance broke up in 1991, markets that had previously been limited to the Soviet cartel opened up. Also, during this period the European Union increased its membership and expanded the size of its common market.

Central to this form of industrial organization is the idea of *global value chains*, a strategic pattern of sequential processes that link steps from frag-

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unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists, and will persist." President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961).

[237] One implication is that to get a more accurate picture of a country's trade position, it is not enough to measure gross exports, because those exports may contain a substantial amount of imports from upstream members of the chain. So, it becomes necessary to identify how much domestic value has been added to a product before it is exported to the next link in the chain.

[238] *See* Williamson, *supra* note 34.

[239] Bucking the orthodoxies about comparative advantage in international trade, some countries like Peru and Brazil have succeeded in building domestic markets that reduce the country's exposure to global cycles. Alternative markets do exist, although they are, to some extent determined in reference to these value chains. For example, the ALBA represents perhaps the largest trading block explicitly outside of the liberal global trading system. Alejandro Foxley, *Regional Trade Blocs: The Way to the Future?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (2010).

mented and globally dispersed design, production, marketing, finance, and distribution processes.[240] Theorized by Harvard Business School professor Michael Porter, a value chain is a systematic way of mapping how an enterprise produces value through a sequential production process that involves upstream suppliers and downstream clients.[241] The chain is predicated on a market in which economic processes that were formerly aggregated into a single factory or operating unit fragmented into separate operating units. The chain captures value through efficiencies produced by its relationship with the chain's other links, which represent different parts of fragmented processes through which production, distribution, marketing, and financing take place. These chains are controlled by powerful multinational enterprises with few national loyalties.[242]

Today, these value chains operate as relatively stateless entities that establish and quickly reconfigure their operations in shifting patterns across states. According to the United Nations Conference on Trade and Development, over 80% of the world's trade is funneled through these chains.[243] Today the wealth of nations consists of access to these chains. It is not enough to have a good product. The country must be connected, much more than in a previous time because multinational firms exercise enormous influence over individual national governments.

To its detriment, however, Cuba generally remains outside of the chain economy. In part, this reflects its socialist orientation, however, U.S. sanctions have contributed to this economic exclusion. Insofar as the embargo blocks or reduces the relationships that make possible access into the value chain, the effect of the sanctions is more pronounced than in a market where relational bargaining determines the distribution and price outcomes. So, sanctions deprive the island not just of a particular import or export market but, more fundamentally, of the basic structure of international trade.

In order to make the remedy respond to the harm, the United States could affirmatively undertake to help situate Cuba in these trade and investment chains. So rather than just a transfer payment, it might be better for the United States to bring its substantial resources to bear to help the island

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[240] *See* Lázaro Peña, Presented at XV Edition of Conversations, Cuban Ministry of External Relations, Havana: Cadenas Globales de Valor en la Agroindustria y las Perspectivas de Inserción Para Cuba Después de Diciembre del 2014 (Dec. 15, 2016).

[241] MICHAEL PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE 33–61 (1998).

[242] The popularity of research on supply chains is perhaps the most visible example of the value chain, but the institution reaches more broadly into financing, distribution, marketing, and other business functions. Consider Walmart. As a dominant end-purchaser of products, Walmart has enough market power to mandate the business models that its suppliers should follow. Instead of having a vertically-integrated conglomerate with a holding company that owns the upstream and downstream entities relevant to production and distribution, Walmart uses contracts to fix its terms with suppliers. As the ultimate buyer, Walmart guards access to the value chain.

[243] U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS, at x, U.N. Sales No. E.13.II.D.5 (2013), *available at* http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf, *archived at* https://perma.cc/Z3K2-2SDH.

rebuild its export markets, obtain financing for trade and development, and shore up Cuba's economic infrastructure, including its price mechanism.

In the context of multilateral development lending coordinated by the World Bank and the International Monetary Fund, such reconstruction projects come with strings attached, so called "conditionality" in development parlance. Historically, the goal of these conditions was to make countries conform more closely to macroeconomic policies conducive to globalization. In the special case of Cuba, a different approach is in order. The Cuban Communist Party has committed to reforming the island's economic structure, but only as part of an ongoing commitment to socialist principles. In the interest of Cuba's self-determination, any plan for reconstruction or development should respect this commitment.

V. From National Mitosis To Synthesis

Advocacy in a heated and long-standing dispute, this Article has emphasized zero-sum arguments, opposing claims, and adverse interests. In closing, let me shift the perspective somewhat to consider what Cuba's claim against the United States and its resolution might mean for Cuban-Americans, Cubans on the island, and other Cubans in diaspora. To that end, the issue involves *transculturation.*

Cuban anthropologist Fernando Ortíz coined the concept of transculturation to refer to the blending of European, indigenous, African, mulatto, and creole cultures that took place in Cuba.[244] These same cultures came together in other Spanish colonial centers, but, at one level in Lima, these racial categories remained set off from each other. The best example of these racial demarcations is Latin American caste painting, a genre that classified racial outcomes pictorially in portraits of a couple and their child. These portraits would label the race of each parent and of the child, whose racial class was a function of the parents' races.[245]

Like a Mendelian chart of breeding outcomes, caste painting mapped how the laws of race produced a hermetic and predictable racial order (and, consequently, a social one too). The system was built on defined racial classes: *peninsulares* (Spaniards and other Europeans born abroad); *criollos* (Spaniards and Europeans born in the New World); *indios* (native Americans); *mestizos* (children of *indios* and Europeans); *cholos* (children of *indios* and *mestizos*); *mulatos* (children of African and European parents); and *zambos* (children of *indios* and Africans) among others.[246] In the system, the *peninsulares*, *indios*, and Africans were racially pure because every other category reflected a racial blend.

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[244] *See* Fernando Ortíz, Los Negros Curros 1–6 (1993).

[245] *See* Manuel Alvar, Lexico del Mestizaje en Hispanoamérica 23–28 (1987).

[246] Much as the forms of action rule us from the grave, so too do these racial caste categories continue to influence the popular imagination, as reflected in the slang use of some of these terms, e.g., *cholo*, *zambo*, and *mestizo*.

To a certain extent, caste painting projected and enforced a Cartesian ideal about racial purity, perhaps also reflecting an anxious attempt to impose order on mating practices that disrupted social ideals. Racial hybridity was particularly relevant in Cuba, where conditions encouraged racial blending. Ortíz called the process by which these hybrid racial mixtures emerged "transculturation," to emphasize the way that circumstances and socialization (rather than genes) could create new blends. It remains a quintessentially Cuban way of understanding hybridity, not only of race but, more generally, of categories.

After the Cuban Revolution, the Cuban nation underwent mitosis, splitting into two ethnic pools with the same cultural DNA but destined for radically different forms of expression. Most Cubans who came to the United States experienced the travails of diaspora, learning to adapt to a language, country, and culture that were not their own.[247] Some would never adapt and others would remain permanently ambivalent about a place that could never feel like home. Others took to the United States and, over time, became enthusiastically aligned with the place. In diaspora in the United States, these Cubans transformed as they integrated a new country with their identities.

Those who stayed in Cuba also underwent a transformation, starting with the social rupture caused when many Cubans left for the United States. The Socialist restructuring of society and the economy transformed those who stayed. Island Cubans would experience the United States quite differently from those in diaspora. The United States would loom large on the island, not only because of its physical proximity but because U.S. hostility towards Cuba would become a central pillar of government communications. At the same time, the negative impact of U.S. sanctions on Cuba would be felt widely.

Over time, these two ethnic pools (really sub-strains of the same nation) became deeply individuated, giving rise to two deeply situated ways of thinking about Cuba that reflect these two different transculturation processes: *exile-speak* and *island-speak*. Dueling Orwellian paradigms, each one shapes reality by denying some facts and emphasizing others.[248] Canonical, orthodox, and reductionist, both paradigms break with Cuban traditions of hybridity and amalgamation, the forces behind the transculturation that Fernando Ortíz signaled.

Consider how Cuba's complex political traditions fractured into two incomplete discourses after the Revolution. Many Cuban-Americans (especially those in Miami) became radicalized right-ward, drawing on the power of the United States to punish a former homeland and to stop the clock, existentially speaking. A similar process happened on the island, where val-

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[247] This is true as well for Cubans who emigrated elsewhere, but the Cuban experience of diaspora in the United States is distinctive because of its scale.

[248] Writing as a Cuban-American in Miami, Frank Valdes notes the difficulty of transcending this binary. *See* Francisco Valdes, *Diaspora and Deadlock, Miami and Havana: Coming To Terms With Dreams and Dogmas*, 55 FLA. L. REV. 283 (2003).

uable commitments to social equity hardened into rigid doctrines of social control. In both cases, the ecumenical expansiveness of Cuban social and political values disappeared, an absence one hears in the duel between exile-speak and island-speak.

Exile-speak reflects the preferences and values of many in the Cuban-American community who emigrated after the Cuban Revolution, remained profoundly identified with pre-Revolutionary Cuba, yet never returned. This register emphasizes that Cuban-Americans live in *exile* (because they were forced to leave the island) not in *diaspora* (which may involve a voluntary decision to leave). U.S. sanctions constitute a lawful *embargo* for legitimate state interests rather than a *blockade* whose extraterritorial reach violates international law and lacerates civilians on the island. In this discursive reality, U.S. policy toward Cuba is justified because it promotes *human rights* and *democracy*, each of which is loaded down with connotations. More than mere words, exile-speak implies a theory of causation about Cuba's harms, a particular historical account of what happened in Cuba, a self-concept as a virtuous and embattled exile community holding the high moral ground, and blames the problems with the Cuban economy on Fidel Castro, Raul Castro, and other Cuban officials. Exile-speak is the language of U.S. foreign policy. Exile-speak takes a special form for children and grandchildren of diaspora Cuban-Americans.[249]

In contrast, island-speak encodes the worldview of those whose identity remains tied to the lived social realities on the island. Most of them have never been to the United States, but that country's foreign policy looms large in their imagination because of its impact on the island's economy and society. This is the register of the Cuban government. In this view, Cuban-Americans and others who left the island did so voluntarily because they rejected the social values of the Cuban Revolution. The dominant themes in this discourse are *self-determination*, *freedom*, and *equality*, framed against the background of persecution by the world's largest Goliath. From this perspective, U.S. efforts to promote *democracy* involve clandestine and disingenuous attempts by a foreign power to mobilize island residents improperly, including by purchasing their loyalty.[250] Of special interest to

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[249] Many among these younger generations uncritically introject the traumatized perspectives of their parents and grandparents out of a sense of filial piety. The introject can then form the basis for rigidly-held views on Cuba. Elsewhere I have urged these younger generations to address the Cuban-American Oedipal conflict, in which routine intergenerational tensions play out on a geopolitical field. *See generally* CUBAN CLAIMS, *supra* 22.

[250] For example, some of the most vaunted examples of Cuba's human rights violations revolve around the Ladies in White (*Damas de Blanco*), an activist group composed originally of wives of former political prisoners styled after Argentina's Mothers of the Plaza de Mayo. In Miami, the Ladies in White enjoy totemic status as human rights martyrs. There is more here than meets the eye, however, because of their ties to the regime change machinations of the United States. *See generally* Lorraine Bayard de Volo, *Heroines With Friends In High Places: Cuba's Damas de Blanco*, N. AM. CONG. ON LATIN AM., Sept.–Oct. 2011, at 19, *available at* https://nacla.org/article/heroines-friends-high-places-cuba%E2%80%99s-damas-de-blanco, *archived at* https://perma.cc/F342-QLRW (noting the disavowal of the Ladies in White by a founder of the original Argentine group). There are legitimate groups on the island advocat-

my argument, this discursive frame blames many problems in the Cuban economy on U.S. sanctions.

Exile-speak maintains a weakening grasp on Miami, owns U.S. foreign policy on Cuba, and permeates much of the U.S. legal literature. Home to exile-speak's organic intellectuals, Miami's educational institutions have contributed to this condition. This Article does not try to refute the claims of exile-speak. Nor does it argue away the contradictions of island-speak or catalogue all aggressions of the United States toward Cuba which might give rise to liability.

For decades, these two ethnic pools Cubans would develop with respect to but virtually separate from each other, ironic given their physical proximity. Cuban-Americans, especially those in Miami, developed a distinctive identity. Island Cubans also developed a distinctive identity. The sense that something was changing began when Fidel Castro handed leadership of Cuba to his brother, Raul Castro. The younger brother began to make changes, especially after the publication in 2011 of the *Lineamientos*. On December 17, 2014, change became bilateral when the leaders of both countries announced that they would resume diplomatic relations, signaling the end of the status quo.

Fidel Castro's death in 2016 signaled a new phase. In Cuba, official media spoke not about his death but about his "physical disappearance," leaving clear that his role as totemic father of the Revolution would continue. In Miami, Cuban-Americans on Calle Ocho celebrated his death raucously, attracting the attention of a stunned world.[251] Soon thereafter, President Obama put an end to the special treatment that Cuban refugees had always received under the Cuban Adjustment Act.[252] Next year, Raul Castro leaves the Presidency, raising questions about how elections will be conducted and who will be his successor. Each of these events confirms the sense that a protracted chapter of the past is beginning to end.

These changes mean that a synthesis of these hitherto antagonistic identities becomes possible. For some, the long-standing segregation between Cuban-Americans grounded in the United States and Cubans rooted on the island is coming to an end. In my opinion, that synthesis should take place in Cuba without interference by meddlesome foreign powers, because the dialectic is essentially one between Cubans and Cuban-Americans. At present, what keeps Cuban-Americans and Cubans apart is the ongoing antago-

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ing for more political pluralism, but they are probably not the human rights celebrities backed by the U.S.A.I.D.

[251] I was in Havana when Fidel Castro died, so, happily, I missed the gruesome demonstrations of glee among Cuban-American exiles in Miami, scenes of which left many Cubans on the island feeling personally insulted. *See* Lizette Alvarez, *Miami's Cuban Exiles Celebrate Castro's Death*, N.Y. TIMES (Nov. 26, 2016), https://www.nytimes.com/2016/11/26/us/miami-cubans-fidel-castro.html?_r=0, *archived at* https://perma.cc/5X6H-5EB9.

[252] *See* Press Release, The White House, Statement by the President on Cuban Immigration Policy (Jan. 12, 2017), *available at* https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/statement-president-cuban-immigration-policy, *archived at* https://perma.cc/RD8T-GXHB.

nism of Cuba and the United States. At the heart of this antagonism is the political risk stand-off between the certified claims of the United States and Cuba's claim for sanctions damages. The claims resolution considered in this Article is part of that process. This Article has tried to break out of the exile/island binary by clearing a field in which contentious claims about expropriation, sanctions, political risk, economic harm, and causation can be explored.