

As authorized by the Foreign Assistance Act of 1961, President Kennedy proclaimed an embargo on trade with Cuba [in February] 1962.⁷⁰⁸ The Act also provided for the president to request an evaluation of expropriated U.S. properties. Enabling legislation prompted by the Cuba Claims Association of Miami, headed by Mr. Clarence Moore, led directly to the *ex parte* adjudication of Cuba claims by the U.S. Foreign Claims Settlement Commission. That process was completed in 1972, after three extensions. The commission to the Secretary of State certified that process in the amount of \$1.8 billion. Records show there were a total of 8,816 were claims filed; 1,195 were denied, 1,710 were dismissed, and 5,911 were awarded. While about \$1.8 billion was awarded . . . \$1.5 billion was denied. Of the 5,911 claims awarded . . . 898 were corporate, amounting to \$1.578 billion and 5,013 were for individuals, amounting to \$221 million.⁷⁰⁹

What also makes U.S.-Cuba claims noteworthy is that the \$1.8 billion in claims "constitutes the largest certified seizure of U.S. property by a foreign government in history."⁷¹⁰

The United States has also restricted travel to Cuba since 1963.⁷¹¹ It has been noted that: "In 1992, those restrictions were increased under the Cuban Democracy Act (also known as the Torricelli Law), which prohibited trade with Cuba by foreign subsidiaries of U.S. corporations. Previously, these subsidiaries could be licensed by the U.S. government to engage in such trade."⁷¹² Ambassador Alexander Wat-

708. See Foreign Assistance Act § 620(a), 75 Stat. 424, 444-45 (1962). In 1992, several countries reported unwanted U.S. pressure on them to cease trading with Cuba. See Cameron, *supra* note 171, at 481, 482. That same year in November, the United Nations General Assembly voted 59-3 with 79 abstentions in favor of a resolution calling on the United States to end its embargo of Cuba. *Id.*

709. Ralph Galliano, *Ignoring U.S.-Cuba Claims?*, WASH. TIMES, July 6, 1993 at E4.
710. *Id.*

711. See Lisa Shuchman, *U.S. Won't Ease Embargo Against Cuba, Official Says*, PALM BEACH POST, Apr. 29, 1994, at 5B, available in LEXIS, News Library, Pbpst File. New rules continue to emerge. See, e.g., 60 Fed. Reg. 39, 255 (1995) (to be codified at 31 C.F.R. § 515).

712. Shuchman, *supra* note 711, at B5. See Jefferies, *supra* note 1, at 76 (citing Cuban Democracy Act of 1992 §§ 1791-1712, 22 U.S.C. §§ 5001-6010 (1993)); Bell, *supra* note 7, at 77.

There are some questions about the validity of the legislation from the vantage of its extraterritorial application. See Jefferies, *supra* note 1, at 97-99 (1993). Canada passed legislation to retaliate against the United States if any Canadian companies were affected. See Bell, *supra* note 7, at 95.

Curiously, while the United States seeks to extend territoriality to protect U.S. investors, it is narrowly defining territoriality in human rights cases involving Cuba. In one human rights case involving Cuba, Judge Birch of the Eleventh Circuit Court of Appeals held that Cuban and Haitian migrants in a safe haven outside the physical borders of the

son, U.S. Representative to the United Nations, asserted: "The government of Cuba, in violation of international law, expropriated billions of dollars' worth of private property belonging to U.S. individuals and has refused to make reasonable restitution."⁷¹³ Similarly, Dennis Hays, Coordinator for Cuban Affairs in the U.S. State Department, reportedly has stated that "before the United States lifts the embargo, the expropriation of American-owned property by the Cuban government would have to be addressed."⁷¹⁴

Further, Representatives Robert Torricelli and Robert Menendez, both Democrats from New Jersey, "have denounced unnamed corporations doing business with Cuba by acquiring assets Cuba expropriated from U.S. owners. 'To those who seek to profit from stolen properties, our message is clear: you will not be allowed into the United States,' stated Menendez."⁷¹⁵

More recently, the Cuban Liberty and Democratic Solidarity Act of 1995⁷¹⁶ proposed to:

United States did not have cognizable U.S. statutory or constitutional rights. Cuban American Bar Association, Inc., Cuban Legal Alliance, Inc. v. Christopher, 43 F.3d 1412, 1426 (11th Cir. 1995). The court also held that humanitarian organizations did not have a U.S. First Amendment right to associate with the migrants held in the safe haven outside physical borders of United States for the purpose of engaging in political speech. *Id.* at 1429. Finally, the court held that the government was not required to disclose to humanitarian organizations the names of all Haitian migrants in the safehaven. *Id.* at 1430.

The *Cuban American Bar* case brings up the question of priority in foreign policy. Given that the top 15 U.S. claimants correspond to over two-thirds of all U.S. claims against Cuba and given the reluctance to extend U.S. constitutional protections to persons held at Guantanamo Bay in Cuba, is U.S. foreign policy really intended to protect large U.S. investors but not indigent refugees fleeing oppressive governments? This appears the result under present law. Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189 (1994); see also Shuchman, *supra* note 711, at B5.

713. Ralph J. Galliano, *More Than a 'Foreign Policy Option'*, WASH. TIMES, Mar. 7, 1993, at B5.

714. Shuchman, *supra* note 711, at 5B. Mike McCurry, formerly of the U.S. Department of State, has indicated: "Our long-standing position is that Americans are entitled to unconditional compensation for their expropriated properties. If the Cubans have a serious proposal in that regard, we would be interested to hear it." See State Department Regular Briefing: Mike McCurry, Federal News Service, June 16, 1993, available in LEXIS, News Library, Fednew File.

715. Jorge A. Banales, *New Measures Against Cuba Proposed*, UPI, Feb. 9, 1995, available in LEXIS, News Library, UPI File.

716. Similar versions were passed by the House and Senate on September 21 and October 19, 1995 respectively. Bryan T. Johnson, *The Cuba Bill: Protecting the Property Rights of Americans*, BACKGROUNDER (Heritage Foundation Repts. No. 441), Dec. 7, 1995, at 1, available in LEXIS, News Library, Hfrpts File.

[A]llow U.S. citizens whose property was confiscated by Fidel Castro to seek compensation in U.S. courts from foreign businesses that now operate on this property. To avoid a threatened Democratic filibuster, the Act's Senate sponsor, Foreign Relations Committee Chairman Jesse Helms (R-NC), agreed to remove Title III, which enabled U.S. citizens to use U.S. courts to seek compensation for their confiscated properties.⁷¹⁷

The bill was sent to conference to reconcile differences between the Senate and the much tougher House bill [HR 927].⁷¹⁸

With the downing of two American civilian planes off the coast of Cuba on February 24, 1996, the bill received renewed support.⁷¹⁹ Shortly thereafter, the bill was signed into law and is known as the Helms-Burton Act.⁷²⁰

There are three main titles in the Cuba bill:⁷²¹

Title I: strengthens international sanctions against the Castro regime by urging the President to seek an international embargo in the United Nations Security Council. In addition, this title prohibits indirect financing of Castro by U.S. citizens through loans or lines of credit for business ventures using confiscated U.S. property. It also requires the President to oppose Cuban membership in such international financial institutions as the World Bank and the International Monetary Fund until a transitional government is established with a system in place to hold democratic elections.

717. *Id.*

718. *Canada Urged to Use Legislation to Fight U.S. Bill on Cuba*, 12 Int'l Trade Rep. (BNA) 1957 (Nov. 29, 1995), available in LEXIS, News Library, Intrad File.

719. *Cuba the Outlaw*, ECONOMIST, Mar. 2, 1996, at 20.

720. Ann Devroy, *Clinton Adds to Pressure on Cuba: Legislation is Signed to Discourage Foreign Investment on the Island*, WASH. POST, Mar. 13, 1996, at A4.

721. This summary of the bill is from Johnson, *supra* note 717, at 1. According to Johnson:

To get a property claim to court under this bill, a claimant must meet a number of stringent conditions: 1) the claimant must be a U.S. citizen; 2) the disputed claim must be valued at over \$50,000; 3) a foreign investor must occupy the disputed property after the bill is enacted (thus, the bill is not retroactive); 4) a foreign investor must be given 180 days to vacate the disputed property; and 5) a foreign investor laying claim to U.S. property must hold assets within the continental U.S. before he can be sued in a U.S. court. Only after all of these conditions are met may a U.S. claimant seek action in U.S. courts. Under these strict conditions, most of the 6000 claims will not be brought to court.

Johnson, *supra* note 717, at 1. For a good summary of the Act and its proponents' justifications, prepared by the Republican Staff of the Senate Committee on Foreign Relations, see Don Nickles, *Democratic Solidarity (LIBERTAD) Act*, Congressional Press Release, Sept. 21, 1995, available in LEXIS, News Library, Hillpr File.

Title II: specifically instructs the President to develop a strategy to support Cuba's transition to a democratically elected government.

Title III: seeks to protect the interests of U.S. citizens whose property was seized by the Castro regime without due compensation. U.S. citizens could seek restitution from potential foreign investors through the U.S. legal system.⁷²²

The law allows the President to suspend for six month periods the Title III provision against property.⁷²³ However, the first suspension period was set for August 1, 1996, the middle of the 1996 Presidential campaign.⁷²⁴ This is a rolling six-month waiver that can only be used if the President finds that suspension of the provision is in the national interest.⁷²⁵

Under the new legislation, the embargo will remain in place until "democracy" arrives in Cuba.⁷²⁶ Democracy is defined specifically to exclude any government that includes Fidel Castro or Raul Castro.⁷²⁷ Current licensing practices are continued.⁷²⁸ In addition, the civil penalty process is carried forward under the Helms-Burton Act.⁷²⁹

Curiously, the legislation appears designed only to help former large estate holders and not the bulk of Cuban-American claimants.⁷³⁰ Former property must have a minimum value of \$50,000 exclusive of interest for a claim to inure.⁷³¹ Thus, only the wealthiest of Cuban-

722. Johnson, *supra* note 717, at 1.

723. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12, 1996) (codified at 22 U.S.C. §§ 6022 et seq. (1996)).

724. William Scally, *U.S. Senate Approves Cuba Sanctions Bill*, Reuters, Mar. 5, 1996, available in LEXIS, News Library, Reuwlid File. The bill became law on August 1, 1996.

725. 22 U.S.C. § 6064(e).

726. 22 U.S.C. § 6065(a).

727. 22 U.S.C. § 6065(a)(7).

728. 22 U.S.C. § 6082(a)(7).

729. 22 U.S.C. § 6082(a). Many attorneys complain that this hearing process is extremely slow and expensive for litigants and the government. To the extent this process is now embodied in law, the Helms-Burton Act could be criticized as wasteful. Further, the new legislation provided no new funding for the Office of Foreign Assets Control, the U.S. Treasury Department in charge of enforcing embargo provisions. Attorneys also complain the provisions of the law are vague. Assuming most U.S. corporations are excellent in their compliance with law generally and sanctions in particular, we should expect in-house attorneys to construe the statute conservatively. This will further restrict even lawful activity. Yet another problem with the legislation is that it mandates compensation to the families of the pilots shot down off the Cuban coast. To date, there has been no trial or finding of fact by any court. In the future, however, legislation could be criticized as a violation of the rule of law.

730. Louis F. Desloge, *The Great Cuban Embargo Scam: A Little-Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST, Mar. 3, 1996, at 1.

731. *Id.*

Americans will benefit. Yet another loophole allows for settlement outside court without need for U.S. government approval.⁷³² As a result, if a former landowner wants to sue a British company, for example, for trafficking in property in Cuba, the former landowner can reach a settlement agreement whereby the former owner can share in the profits of the new venture in Cuba. In this way, the former owner in fact becomes a de facto and legal U.S. investor in Cuba, without the need for approval from the U.S. government and despite the embargo.⁷³³

While helping the wealthiest Cuban-Americans and denying recourse to others, the new legislation also has produced two curious results.⁷³⁴ First, the law applies only to commercial property, and excludes residential property, further excluding small U.S. claimants. Second, it advances an internationalization of American citizenship. In some cases, it has been alleged that third country nationals have incorporated legal entities in Florida, and transferred ownership of "their" property in Cuba to the Florida entity. The Florida company is then treated as a U.S. citizen for purposes of the legislation. In effect, the legislation has been used to extend protection to sophisticated, third country nationals. U.S. courts are now faced with resolving conflicts of non-citizens that occurred in Cuba about thirty years ago.⁷³⁵

Even as the bill was being discussed, the Canadian government began consideration of retaliatory measures using the Foreign Extraterritorial Measures Act to block application of U.S. congressional measures that would affect Canada's trade with Cuba.⁷³⁶ According to Bill Graham, a member of the House of Commons with the governing Liberal Party in Canada:

The United States has the right to embargo trade with Cuba by U.S. firms based on domestic political considerations But the Canadian government, however, must move to ensure that any measures adopted by Congress that violate international law or U.S. international trade obligations are not used to restrict Canada's rights to conduct relations with Cuba.⁷³⁷

732. *Id.*

733. *Id.*

734. Robert Muse, Address at the Bar of Washington D.C.'s Forum on Cuba (Mar. 21, 1996).

735. *Id.*

736. *Canada Urged to Use Legislation to Fight U.S. Bill on Cuba*, *supra* note 718.

737. *Id.*

He added that:

Canadian legislators have a number of concerns about the original bills, introduced by Senator Jesse Helms, Republican from North Carolina, and Representative Dan Burton, Republican from Indiana, such as the confiscation prohibition, which is particularly troublesome as the bill defines a U.S. person in terms that could apply to subsidiaries in Canada.⁷³⁸

According to Graham, "this represents a form of secondary boycott, a practice the United States has in past condemned, for example in the case of the Arab boycott of Israel." Graham has stated that the new law represents "an extraterritorial application of laws against Canadian corporations carrying on lawful business in this country and with Cuba."⁷³⁹ The enactment of the bill into law prompted scores of condemnations of the United States from countries around the world.⁷⁴⁰

Mario Diaz Cruz Jr., a Cuban lawyer, and David Willig, a Miami-based attorney, are drafting "property-claims legislation for a free-market Cuba. Several property-claims laws are in the works that use restitution and compensation laws from Germany, Hungary, Czechoslovakia, Nicaragua and Mexico as models."⁷⁴¹

The drafting of new property-claims laws for Cuba has received much of the attention so far. Without the political and economic stability created by a legal framework to return land, homes and businesses to their former owners, and to award money damages and resolve disputes, international investors might balk at pouring money into the island nation. 'Central to the legitimacy of any return to a market-based democracy [in Cuba] and to the confidence of capital markets is the government's recognition that owners

738. *Id.*

739. *Id.* According to the New York Times, administration officials say the provision would violate international law, create numerous lawsuits, sour relations between Washington and any post-Castro Government, and make it difficult for a post-Castro Cuba to privatize property because of pending lawsuits. Steven Greenhouse, *Bill to Ease Cuba Suits Faces a Veto By Clinton*, N.Y. TIMES, Aug. 20, 1995, § 1, at 4.

740. The 14 Caribbean countries and the Rio Group of 14 Latin American countries both denounced the legislation. See *The Americas: Falling out with Uncle Sam*, ECONOMIST, Mar. 16, 1996, at 47-48. Europe, Japan, and Canada, among others, also objected. See Anne Swardson, *Allies Irked by Bill to Deter Their Trade with U.S. Foes*, WASH. POST, Mar. 7, 1996, at A20.

741. Resnick, *supra* note 4, at 1.

whose property was confiscated 30 years ago have legal rights to their property,' writes Robert E. Freer, Jr.⁷⁴²

The Cuban American National Foundation (CANF) has promulgated a number of recommendations for post-Castro economic legislation. These include repeal of all laws, regulations and decrees creating a state-run economy, rapid privatization of most state-controlled assets, and recognition of the right of Cuban citizens, residents, and legal entities to own private property.⁷⁴³

CANF leader and Miami millionaire Jorge Mas Canosa has called for a compensation system based on privatization.⁷⁴⁴ The National Association of Ranchers and National Association of Land-owners in Exile have claimed that "[n]obody has more right to property than its legitimate owners," providing the example of Nicaragua, which has allowed return of properties to the original owners.⁷⁴⁵ As early as August 1990, a joint venture between former Dade County Commissioner Barry Schreiber and the University of Miami Research Institute for Cuban Studies began a private Registry of Expropriated Properties in Cuba, encouraging Cuban exiles to register their claims.⁷⁴⁶

Jeb Bush, the son of former President George Bush and the Chairman of the International Republican Institute (IRI), has taken a slightly different stance than CANF.⁷⁴⁷ Bush urges a rapid effort to define the parameters of restitution.⁷⁴⁸ He stops short of calling for full, adequate, and effective compensation for expropriated properties.⁷⁴⁹ Instead, Bush emphasizes acceptance of responsibility to make restitution in a form to be determined by future negotiations.⁷⁵⁰

742. *Id.* (quoting Robert E. Freer, Jr.). Freer is a partner at Freer & Alagia in Washington, D.C. and a member of the Cuban American National Foundation's Blue Ribbon Committee on the Reconstruction of Cuba. *Id.* The quotation comes from a paper published in May 1993. *Id.*

743. *Id.* According to Resnick, the Cuban American National Association is a powerful Washington, D.C., lobbying group with close ties to the Republican Party and an anti-Communist orientation. *Id.*

744. OPPENHEIMER, *supra* note 166, at 323. In mid-1991, Mas Canosa released his "Social, Political and Economic Program for the Reconstruction of Cuba." *Id.* According to Oppenheimer, Mas Canosa is perceived as the "head of a horde of rich exiles eager to reclaim their lost properties." *Id.* at 328.

745. *Id.* at 324.

746. *Id.* at 323.

747. INTERNATIONAL REPUBLICAN INSTITUTE, *supra* note 3, at 26.

748. *Id.*

749. *Id.*

750. *Id.*

Alternatively, Michael Krinsky, a lawyer representing Cuban interests in the United States, asserts: "In most other countries the United States has ultimately reached a settlement not for the return of the property but for a part of the lump sum. On the average that was about 40 percent of the claim value without interest."⁷⁵¹

Part of the problem in dispute resolution, compensation, or restitution is deciding which law applies: the prerevolutionary, revolutionary, or postrevolutionary law. In Cuba, some scholars argue that the 1940 Constitution remained in effect during the Castro years. They claim the new government was never legally constituted under the provisions of that 1940 document; consequently, all subsequent actions are violations, and prerevolutionary law should apply.⁷⁵² Some takings may have violated even revolutionary law norms.⁷⁵³ These same scholars advocate that future law could clarify the current ambiguity and restore rights from the past.⁷⁵⁴

V. Property Disputes with Other Countries

"Cubans also cite the embargo as the reason it has been impossible to negotiate indemnification agreements with . . . the U.S. property seized during the revolution."⁷⁵⁵ In comparison, Cuban officials assert that "all other countries with property claims have been indem-

751. Ana Arana, *U.S. firms making Cuban land claims*, SUN-SENTINEL, May 16, 1993, at 1F, available in LEXIS, News Library Sungen File.

752. Jon L. Mills, *Principal Issues in Confiscated Real Property in Post-Communist Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 23-25 THE CENTER FOR PUBLIC RESPONSIBILITY, UNIV. FLORIDA COLLEGE OF LAW & A.B.A. SEC. OF INT'L L. & PRAC. Perhaps the most direct argument against the constitutionality of the Castro government is found in Gutiérrez, *supra* note 119, at 2. These necessary arguments are based on the unconstitutionality of the takeover by Castro and the implicit reforms to the 1940 Constitution through the Organic Law of 1959, which were without following procedures set out in the 1940 Constitution itself. It should be noted, however, that the status of the 1940 Constitution itself was in question even before Castro assumed power. Batista had usurped power himself in 1952 in an unconstitutional manner, leaving some doubt as to the exact status of the 1940 document by the time Castro had taken over. For his part, Castro's speeches seem to indicate that he at least thought of the 1940 Constitution as governing, as he cited its provisions against largeholder estates, and carried these provisions over to the new Organic Law.

753. This occurred in Nicaragua. See *Nicaragua Property Disputes*, WORKING PAPER SERIES (The Carter Center, Emory Univ., Atlanta, Ga.), Apr. 1995, at 8-12 (report prepared for the United Nations Development Program by the Latin American and Caribbean Program) (on file with author).

754. Mills, *supra* note 752, at 23, 25.

755. *Hearings before the Subcomm. on Select Revenue Measures and the Subcommittee on Trade House Comm. on Ways and Means*, 103rd Cong. 2nd Sess. 314 (1994) (testimony of Irene Philippi, Senior Economist, Polyconomics, Inc.) [hereinafter *Philippi Testimony*].

nified.⁷⁵⁶ Cuba has already settled with Switzerland, France, Canada, Great Britain, Italy, and Spain, claims totaling about \$60 million.⁷⁵⁷

"No other country applies economic sanctions against Cuba,"⁷⁵⁸ and in 1995 the U.N. General Assembly for the third consecutive year condemned the U.S. embargo.⁷⁵⁹ "Almost every government in the

756. *Id.*

757. Olga Miranda, *Cuba Ha Satisfecho con Puntualidad sus Obligaciones de Pago por Nacionalizaciones*, in Cuba Transition Workshop, *supra* note 119, at 32, 36. In general, these claims have been settled at a fraction of the assessed value of the expropriated assets. Travieso-Díaz, *supra* note 24, at 220 (citing *Cuba to Compensate Spaniards for Property Seizures*, Reuters, Feb. 15, 1994). The Spanish claims, for example, were valued at \$350 million. The settlement paid \$37.6 million. *Id.* "Even this amount was not actually paid until 1994, three decades after the claims accrued." *Id.*

758. Banales, *supra* note 715. The Organization of American States lifted the mandatory sanctions on Cuba in 1975. See Boris Yopo H., *Latin American Perspectives on the Cuban Transition*, 3 CUBA BRIEFING PAPER SERIES 1 (1993).

759. *General Assembly Adopts Draft on Need to End United States Embargo Against Cuba*, Federal News Service, Nov. 3, 1995, available in LEXIS, News Library, Fednew File; *Foreign minister comments on UN Resolution Condemning US Embargo*, BBC Summary of World Broadcasts, Nov. 3, 1995, available in LEXIS, Top News Library, Bbcwb File; Banales, *supra* note 715.

One example of the drastic extraterritorial effects of the embargo occurred in May 1991. Regor International, a Canadian corporation, incorporated and doing business in Canada, ordered 29,000 cases of Pepsi from Pepsi Cola Montreal. Pepsi, however, canceled this order when it learned that the product's final destination was Cuba. Pepsi-Cola Montreal claimed that due to discussions between its Canadian office and the U.S. head office, it was unable to fill any orders where the product was destined for Cuba. The drastic effect on companies incorporated in Canada and subject to Canadian laws stems from the fact that Canadian foreign policy towards Cuba favors trade in non-strategic goods. In response to this situation, the Canadian Trade Ministry issued a reprimand which stated that the Canadian government has . . . consistently opposed the extraterritorial application of U.S. trade policy towards Cuba, either directly by the U.S. government or through U.S. parent corporations.

Bourque, *supra* note 149, at 213-14. Bourque also notes that:

Many countries, such as Great Britain, view the (Mack) Amendment and the policies supporting it, as a violation of their sovereign rights. As evidence of its opposition, in 1980 Great Britain passed into law The Protection of Trading Interests Act (PTIA). The PTIA is a response to what many consider to be U.S. extraterritorial measures. This Act instructs British companies to ignore American laws, such as the Mack Amendment, that affect foreign sovereignty.

Id. at 217-18. Bourque goes on to assert that:

[T]he European Community also protested the Cuban Democracy Act by stating: the European Community and its Member States cannot accept the extraterritorial extension of U.S. jurisdiction as a matter of law and policy The Bill . . . would also prohibit any vessel from engaging in trade with the United States if the vessel has entered a port in Cuba during the preceding 180 days. Such a measure would be in conflict with long-standing rules on comity and international law

Id. at 220 (citing Mary Murray, CRUEL AND UNUSUAL PUNISHMENT: THE U.S. BLOCKADE AGAINST CUBA 21 (1993)).

Western Hemisphere maintains diplomatic and economic relations with Cuba," among these are "Canada and Mexico, members of the

Arguably, the criticism directed against the United States is well-deserved. The Torricelli Bill's imposition of sanctions onto third countries violates international law and encourages the economic isolation of Cuba. In addition, this policy clearly imposes U.S. domestic law onto sovereign states by making foreign investors and businessmen suffer should they choose to engage in business relations with Cuba. The Bill, therefore, removes the element of free choice from business decisions of companies outside of U.S. territory.

Id. at 220-21.

In March 1974, MLW-Worthington, a Canadian firm, negotiated a contract with Cuba for approximately \$15 million. Bell, *supra* note 7, at 86. The Canadian government and the Canadian directors of MLW-Worthington protested the application of the Cuban Assets Control Regulations (CACR) regulations as a violation of Canadian sovereignty because of the possible delay that applying for a Treasury license could cause. *Id.* at 86-87. The Canadian government stated:

The Canadian government holds that the Cuban Assets Control Regulations of the U.S.A. should not be given effect in Canada through the parent-subsidiary relationship or in any other way . . . the Canadian Government wishes to emphasize the significance of this issue and to urge the U.S.A. Government to remove on an urgent basis any restraint on the directors or officers of MLW-Worthington, who are also U.S.A. citizens, which might interfere with the proposed sale of the Canadian company.

Id.

MLW-Worthington completed the contract without U.S. approval and over the objection of two U.S. directors. The United States eventually granted a waiver for the sale, but this was apparently connected with a similar problem that the United States was having with Argentina. Argentine executives of two U.S. foreign automobile subsidiaries, Ford and Chrysler, traveled to Cuba during the early part of 1974 to negotiate a possible sale. The Argentine government stated that it would consider any United States attempt to block the sale a violation of Argentine sovereignty. Argentina threatened to nationalize the plants involved and to proceed independently to fulfill the contract. The United States responded by granting Argentina a special license, in the interest of good relations with Argentina.

The United States again deferred to foreign pressure during a third incident, the Litton affair. Late in 1974, a Canadian subsidiary of Litton Industries, a U.S. corporation, asked whether the Treasury Department would prohibit a proposed furniture contract with Cuba. When the Treasury Department stated that it could deny such an application as violative of the regulations, the U.S. parent company canceled the sale. In response, the Canadian government pressured the United States to allow the sale. The United States again relented.

Id. A New York Times reporter notes that French President Francois Mitterrand calls the U.S. blockade "stupid." Craig R. Whitney, *In a Slap at the U.S., Castro Is Given a Warm Welcome in Paris*, N.Y. TIMES, Mar. 14, 1995, at A5. The French have long criticized the American trade embargo, and more than most other Europeans have gone out of their way to show their disregard for it. *Id.* "The U.S.A. has held this country by the throat for decades," Mitterrand is quoted as saying. *Id.* "Strangling this people through this embargo no longer has any sense. *Id.* "It no longer represents any threat to world peace, nor any threat to the Americans." *Id.*

North American Free Trade Agreement."⁷⁶⁰ Meanwhile, the blockade has caused strained relations with traditional American allies in Europe and elsewhere as evidenced by the U.N. declaration and pro-Cuba domestic legislation, such as the act passed in Canada.⁷⁶¹ More recently, on September 13, 1995, the Prime Minister of Jamaica, P.J. Patterson, called for an end to the U.S. embargo on Cuba, declaring that "the continued isolation . . . 'cannot be justified' in a post-Cold War world."⁷⁶² Even the Pope has come out against the embargo.⁷⁶³

Honduran Foreign Minister Mario Carias said Washington sent a letter to the [Honduran] economy ministry warning that much of the property being bought by Honduran investors in Cuba actually belongs to Cuban exiles and U.S. citizens—and is subject to expropriation claims. According to the . . . United States, legal proceedings to recover these properties 'will be initiated the moment the Fidel Castro regime falls.'⁷⁶⁴

With the more recent passage of the Helms-Burton law, the United States has received criticism of the embargo and its extraterritorial impacts from Japan, the European Union, the fourteen Caribbean countries, the Rio Group of fourteen Latin American countries, Mexico and Canada.⁷⁶⁵

VI. Analysis

A. *The U.S.-Cuba Property Rights Dispute*

Settlement of the property dispute with the United States will be a precondition for sustainable development and normalization. One precedent potentially similar to the Cuban case is Nicaragua. That country transferred power from the Sandinistas to the UNO coalition

760. Banales, *supra* note 715; Bourque, *supra* note 149, at 213-14.

761. For a discussion on how the U.S. embargo has impacted U.S.-Canada relations, see Bell, *supra* note 7, at 95.

762. Gus Constantine, *Jamaica's Patterson Asks End to Cuban Policy*, WASH. TIMES, Sept. 14, 1995, at A11. In a similar statement, President of Venezuela Carlos Andrés Pérez criticized then President Reagan, saying "we must not permit a new confrontation between Cuba and the rest of Latin America . . . we must promote coexistence with a regime [that is] different from ours, but which is an integral part of Latin America." Yopo H., *supra* note 758, at 1.

763. Greg McDonald & Cecile S. Holmes, *Pope Tells U.S. to be 'Example': Clinton Gives Welcome Upon Pontiff's 4th Visit*, HOUSTON CHRON., Oct. 5, 1995 at A1, available in LEXIS, News Library, Hchrm File.

764. *Honduras: United States Warns Against Investing in Cuba*, Oct. 19, 1993, Inter Press Service, available in LEXIS, News Library, Wires File.

765. Swardson, *supra* note 740, at A20; *The Americas: Falling out with Uncle Sam*, *supra* note 740, at 47.

in 1990, ending a decade-long civil war and beginning a process of reconciliation.⁷⁶⁶ Donors again began to operate there and a U.S. embargo was lifted. However, as time went on, U.S. foreign aid and support for loans to Nicaragua through multilateral institutions (like the International Monetary Fund, the World Bank and the Inter-American Development Bank) were made contingent on resolution of property claims for U.S. citizens.⁷⁶⁷ It appears in regard to Cuba, that resolution of the property dispute may be a precondition to receiving any assistance, rather than a condition for continued aid.

U.S. claims in Cuba approved by the Foreign Claims Settlement Commission in 1972 reflect a concentration of assets among the largest former owners. The top ten corporate claims account for about half of the \$1.8 billion.⁷⁶⁸ The top fifteen claims reflect about two-thirds of all claims.⁷⁶⁹ Most of these expropriated properties have not been subject to improvements, nor have they been parceled.⁷⁷⁰ Therefore, some former owners view recovery of the original asset as a real source of compensation.⁷⁷¹ It has not been determined what impact UBPCs are having in conserving the original confiscated parcels.

So far the approach to the property dispute has been characterized by polarization, posturing, and politicization.⁷⁷² To date, little has

766. *Nicaraguan Property Disputes*, *supra* note 753, at 1.

767. *Id.* at ii (preface).

768. Top claimants include the following: Cuban Electric Company (\$267.6 million), International Telephone and Telegraph (\$130.7 million), North American Sugar Industries (\$100.9 million), Moa Bay Mining Company (\$88.3 million), United Fruit (\$85.1 million), West Indies Sugar (\$84.9 million), American Sugar (\$81.0 million), Standard Oil (\$71.6 million), Bangor Punta Corporation (\$53.4 million), and Francisco Sugar (\$52.6 million). See Rolando H. Castañeda & George Plinio Montalván, *Economic Factors in Selecting an Approach to Expropriation Claims in Cuba*, in *Cuba Transition Workshop*, *supra* note 119, at 4.

769. The 11th through 15th companies included Texaco (\$50.1 million), Manatí Sugar (\$48.6 million), Nicaro Nickel Company (\$33.0 million), Coca-Cola (\$27.5 million), and Lone Star Cement (\$24.9 million). *Id.*

770. *Id.*

771. *Id.*

772. For example, U.S. Congressman Lincoln Díaz-Balart, a Republican from Florida, issued a press release denouncing Cuban foreign investment legislation as "an immoral farce" the day after it was passed. See Lincoln Díaz-Balart, *Díaz-Balart Denounces Castro Foreign Investment Farce*, in *Cong. Press Releases* (Sept. 6, 1995), available in LEXIS, News Library, Hillpr File. That press release cites Yanik Fenton as the contact person for information. *Id.* On September 11, 1995, the author contacted Ms. Fenton regarding the announcement. According to her, neither the Congressman nor any member of his staff had a copy of the new law, nor had any of them seen it. Telephone Interview with Steven E. Hendrix with Yanik Fenton, advisor to Congressman Lincoln Díaz-Balart (Sept. 11, 1995). However, Ms. Fenton insisted the law was a "farce" and did not see any reason why the

been done to explore technical approaches or the adequacy of property records to verify ownership as a prerequisite for dispute resolution. Also, closer examination of past compensation by Cuba to other countries, and how such amounts were calculated, will be essential. The following questions must be answered: Was that process viewed as fair? What was the level of compensation? How was compensation calculated? Was any interest paid? How did those settlement arrangements compare with those granted by the Czech and Slovak Republics? Hungary? Poland? Russia? Nicaragua? To date, these analyses have been done largely in the abstract, rather than by technical comparison of the present state of Cuba disputes with these other experiences.

Congressman needed to read the law to come to that conclusion. *Id.* After all, she reasoned, Cuba is Communist. *Id.*

As points of comparison, Honduras paid between 2% and 6% per annum over 15 to 25 years. See Agrarian Reform Law, Decree Law No. 120 art. 67 (G.O. 21,564, Aug. 2, 1975) (Hond.). Bolivia was required to pay 2% over 25 years. See Agrarian Reform Law, Decree Law No. 3464 art. 156 (Aug. 2, 1953) (Bol.). In fact, in Bolivia no official compensation was ever paid nor have any agrarian bonds been issued. See Ronald J. Clark, *Agrarian Reform: Bolivia*, in LAND REFORM IN LATIN AMERICA 129, 138 (Peter Dörner ed., 1971). Peru used 4% to 6% over 20 to 30 years. See Decree Law No. 17716 art. 174, Supreme Decree No. 877 (July 18, 1979) (Bol.). Chile paid in bonds over 25 to 30 years. See Thome, *supra* note 301, at 197. Other Latin American countries had similar programs.

In comparison, the Italian land reform program of 1947 called for compensation with 25 year bonds at five percent interest. See VICENTE CASANOVA, *supra* note 55, at 126. In Peru, Bolivia, and elsewhere, the law on the books might have called for compensation, but in practice there were cases of de facto takeovers of property, with the former owner never receiving any indemnification or even due process. In fact, Bolivia, has offered no official compensation nor ever has issued any bonds. See Clark, *supra*, at 138. In other countries, for those that did receive compensation, the fixed rates of interest were often eroded with inflation. Bonds often have traded at a fraction of face value, reflecting the discount for political and economic risk. Cuba's case should be understood in this broader, regional context of similar experiments with agrarian reform.

General Fulgencio Batista's 1952 coup partially suspended the 1940 Constitution and constituted an extraconstitutional assumption of power. See Fernando L. Torres Ramirez, *Comentarios e Impresiones de Algunas Instituciones y Normas Jurídicas de la República de Cuba*, 28 REVISTA DE DERECHO PUERTORRIQUEÑO 2, 3 (1988); Gutiérrez, *supra* note 119, at 2-3. One author argues that acts after March 9, 1952 and before 1959 are prima facie invalid because the constitutional process was not followed. See Nestor Cruz, *Legal Issues Raised by the Transition: Cuba from Marxism to Democracy*, 29 COMP. JURID. REV. 68, 74 (1992).

A group of Cuban jurists living in exile maintain that the 1940 Constitution is still in effect and bases this argument on the procedure used in replacing the old constitution with the new constitution through 1959 Fundamental Law. Compare Consuegra-Barquín, *supra* note 109, at 898-99 with Travieso-Díaz, *supra* note 24, at 237-38 (noting that it is "generally accepted that a successful revolution has the power, under certain conditions, to annul the existing constitution and create new fundamental law") (citing law in Pakistan, Canada, Ghana, Lesotho, and Trankei). See also Baerg, *supra* note 105, at 247.

STEREOTYPED ⁷⁷³ LEGAL POSITIONS: CUBA VS. UNITED STATES ON THE MAJOR CONTENTION POINTS.		
Issue:	Cuba:	United States:
Was adequate compensation offered?	Yes. Cuban agrarian reform bonds paid 4.5% interest over 20 years, compared to bonds issued under Gen. Douglas MacArthur's agrarian reform in Japan, which paid interest at 2.5% over 24 years.	No. Expropriation demands compensation at fair market value. Even in comparative Latin American terms, the Cuban agrarian reform did not compensate former owners as other countries did in carrying out their agrarian reforms.
Was adequate compensation actually paid?	The law contemplated funding compensation out of U.S. sugar quota purchases. As this was discontinued, the U.S. ended the funding mechanism for compensation.	No. Cuba structured its repayment mechanism knowing the sugar quota had already been canceled.
What is the value of claims outstanding?	U.S. figures should be discounted due to damages and losses inflicted on the Cuban economy by the U.S. This includes the blockade. Further, any settlement should recognize and reflect the price paid by workers who lost their properties to the Batista officials who took their lands illegally in the years 1952-1959. N.B.: U.S. claimants have sometimes taken deductions from their taxes for losses in Cuba. Additional compensation at this point could mean double payment.	The Cuban claims program of the Foreign Claims Settlement Commission reviewed 8,816 claims, certifying 5,911 (\$1.8B), denying 1,195 (\$1.5B), and dismissing 1,710. FCSC decided that a statutory simple interest rate of 6% should be used, although the Cuban Claims Act did not specify a rate.

773. The word "stereotyped" is used intentionally in the chart's heading. These are not the official positions of either government. However, this chart does attempt to summarize possible anticipated positions. The Cuban position is summarized by Olga Miranda, Vice President of the Cuban Society of International Law. See Miranda, *supra* note 757, at 32; see also Travieso-Díaz, *supra* note 24, at 235; Consuegra-Barquín, *supra* note 109, at 898.

Were takings legal in the first place under the 1940 Constitution?	Yes, as the Constitution forbade large estates and insisted on the "social function" of land. Regional jurisprudence approved agrarian reform legislation. Indeed such an approach had the backing of the U.S. Alliance for Progress in the 1960s. Changes made to the 1940 Constitution via the Fundamental Law allow for the takings of property, especially those inconsistent with the social function.	No, because takings require compensation and due process.
Was the Fundamental Law a valid constitutional change?	Yes. The 1940 Constitution had been abrogated by Batista who assumed the presidency in violation of the Constitution. The revolution sought to restore the rule of law. Indeed, the Cuban Supreme Court held the 1959 Fundamental Law to have succeeded the 1940 Constitution. Further, the agrarian reform law provisions are consistent with the 1940 Constitution. Thus, the agrarian reform was a constitutional act, whether the 1940 Constitution or the 1959 Fundamental Law applies.	No. The Fundamental Law was announced in a manner inconsistent with the way in which the 1940 Constitution specified that amendments or changes were to be made. The 1940 Constitution was never effectively repealed and the Fundamental Law and subsequent constitutions are invalid because they did not conform to the procedures described in Articles 285 and 286 of the 1940 document. Laws deriving their authority from the Fundamental Law are thus invalid.

In the end, the political will of the parties, rather than the strength of their legal claims, will decide the actual settlement; legal arguments will only be bargaining chips. In Mexico, the government carried out an ambitious agrarian reform and expropriated vast amounts of property, especially U.S. investments in the petroleum sector, without resulting in an embargo.⁷⁷⁴ In Eastern Europe, lump sum agreements were offered to many countries shortly after the fall

774. Regarding the Mexican case, one author writes:

To this day Cardenas represents the promise of a "Mexico for the Mexicans." By the end of his administration, the role of foreign capital had diminished substantially: in 1940 total direct foreign investment in Mexico was under 500 million dollars, less than one-quarter of most estimates for the 1920s. "Of the four areas traditionally dominated by foreign capital—railroads, oil, mining, and electric power—foreign control had been eliminated from the first two. Foreign enterprise still controlled the mining and electric power industries . . . but even in those fields the amount of foreign capital had been reduced.

of the Berlin Wall, allowing those governments to cash out claims.⁷⁷⁵ Like Cuba, Nicaragua suffered an embargo. More recently, it has had to pay individual claims on a case by case basis, with the United States demanding fair market value for all its citizens, past and present.⁷⁷⁶ The deal Cuba receives will depend mainly on the politics of that moment.

Much of the focus so far has been on Eastern European models as precedent for any future compensation program leading to normalization. Yet the Cuban agrarian reform contains many of the same provisions that many Latin American reforms have had: the social function of land, restrictions on alienation, and preference for cooperative structure.⁷⁷⁷ The United States has categorized Cuba with Eastern Europe, thinking of Cuba as a state that is tied to Russia. U.S. authors have largely ignored many relevant models closer to home and more similar in structure and history to the Cuban case. Peru, Bolivia, Mexico, Venezuela, Colombia, El Salvador, Chile, Nicara-

Cardenas's last two years in office brought "severe economic difficulty." Several factors—among them, the expropriation of the oil industry, bitter counterattacks in the press by foreign companies, and retaliatory economic sanctions against Mexico . . .

Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 230-31(1995) (citations omitted).

775. For example, Hungary paid about \$20 million to the United States to settle all outstanding claims with U.S. citizens, however, this payment was largely symbolic. See Laszlo Takacs, Embassy of Hungary, Presentation at the Organization of American States (Washington, D.C., Sept. 18, 1992).

776. At the time of Nicaraguan President Chamorro's inauguration, less than 20 U.S. citizens had filed property claims with the U.S. government. *Nicaraguan Property Disputes*, *supra* note 753, at 3. In 1995, the State Department had over 600 persons claiming 1631 properties on file. *Id.* at 2. Only 501, or 31%, of those properties were owned by U.S. citizens at the time of expropriation or confiscation. *Id.* The remainder were owned by Nicaraguans who subsequently became naturalized U.S. citizens. *Id.* at 3. Claims were approved by the United States in 1972, capping the number of outstanding claims against claims and making the problem more manageable. *Id.* However, a Nicaragua-like result could occur in Cuba with the bill introduced in the U.S. Congress, which provides relief sought by new Cuban Americans. Travieso-Díaz, *supra* note 24, at 223. The LIBERTAD Act, amends the Cuba Claims Act to allow U.S. citizens to file expropriation claims against Cuba whether or not the claimants were U.S. citizens at the time of expropriation. *Id.* It would also enable any U.S. citizen whose property was confiscated to bring action in U.S. district courts against any third country person or government that "traffics" (defined as "sells, transfers, distributes, dispenses, purchases, receives, possesses, obtains control of, manages, uses, or disposes of") the expropriated property. *Id.* (citing Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 5,381, 104th Cong., 1st Sess., §§ 4(7), 302, 303 (1995)).

777. The concept of "land to the tiller" is found in Article 24 of the 1992 Cuban Constitution. 1992 CONSTITUTION art. 24.

gua,⁷⁷⁸ the Dominican Republic, Puerto Rico, Honduras and others should be reviewed in terms of their historic compensation methods, bond structures, and other features. If much of the text of the Cuban reform is repeated in these other countries, perhaps a balanced solution can be found in Cuba as well.

B. Privatization

Opening industry and agriculture to the private sector appears necessary, based on comparative experiences in other countries. Irene Philippi, Senior Economist at Polyconomics, Inc., argues that a quasi-privatization process "can be said to have already begun, with the emulation of the successful Chinese conversion of its farming communes to democratically run cooperatives." According to Philippi,

[T]he process could be enhanced by relinquishing even more power over policy decisions at the co-ops from the center, which appears to [her] to be the real key to China's success in agriculture. Privatization of large enterprises should not be rushed. Shock therapy has not succeeded in Russia or Eastern Europe, and there is no reason to believe that hurling Cuba into the 'free market abyss' could be accomplished with better results. A new economy should be built parallel to the old, enabling the new to replace the old over time. Asset values should be permitted to reflect the declining political risk and improving business climate before these companies are sold. In this way, the people of Cuba will reap the value of Cuban properties, rather than seeing them squandered in hard currency sales to foreign speculators.⁷⁷⁹

778. Nicaragua has sometimes been explored, perhaps in the belief that the Sandinista government was a "Communist" one. Yet, like Cuba, Nicaragua's reform package reflected much more influence from Mexican, Chilean, Bolivian, Peruvian, Cuban, and Colombian agrarian reform legislation than from Russia.

779. Philippi Testimony, *supra* note 755, at 29. For a lengthy discussion of the privatization process in China regarding agricultural properties, see Transition of China's Rural Land System 151, Land Tenure Center Paper (May 1995) (paper on file with the Land Tenure Center Library, University of Wisconsin).

One commentator wrote that:

Whether or not the Chinese model should be an antidote or an alternative to 'shock therapy,' its success at the very least indicates that before countries such as Vietnam, Cuba, North Korea, Russia and others from the ex-Soviet Union become the testing grounds for 'shock therapy,' this all-too-common prescription for ailing transitional economies should be subjected to further scrutiny.

Lan Cao, *The Cat that Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOK. J. INT'L L. 97, 178 (1995). GERALYN PYE argues that Cuba looks to China and Vietnam as examples in its modernization process. See Pye, *supra* note 412, at 7, 10.

Others point to Chile's relatively successful conversion from market intervention to free market principles. In that country, the change was accompanied by accelerated economic growth. This would support a faster, more dramatic privatization, more in conformity with standard International Monetary Fund (IMF) prescriptions for privatizing. In short, Cuba will have to decide whether an incremental, slow path to privatization is better, as in the Chinese model, or if a quicker pace would produce better results, as in Chile.

In discussions of private versus public ownership, it should be noted that empirical studies in Cuba have failed to provide a comprehensive comparison of private versus public sector productivity.⁷⁸⁰ The state has been the dominant factor in agricultural production.⁷⁸¹ During the first years of the Revolution, French agronomist René Dumont found that the newly created state enterprises were overly large, poorly organized and managed, and wasteful.⁷⁸² He was unimpressed with Cuba's private sector as well.⁷⁸³ In more recent times, government officials have maintained that economies of scale and centralized planning would facilitate the introduction of capital-intensive technological innovations.⁷⁸⁴ Yet, it is clear that state farms suffer from poor management and a lack of incentives for workers in the fields.⁷⁸⁵

C. Registry and Cadastral Reform

A literature review has uncovered no reviews or evaluations of registry or cadastral systems in Cuba. This is alarming for many reasons. First, normalization of relations with the United States depends, in part, on resolution of property disputes. To the extent accurate property records are needed to address this issue, a diagnostic of registry records will be needed. Any dispute resolution strategy should depend on the perceived reliability and precision of the existing records.⁷⁸⁶

780. Nancy Forster, *Cuban Agricultural Productivity*, in CUBAN COMMUNISM, *supra* note 139, at 196, 202.

781. *Id.* at 201.

782. *Id.*

783. *Id.*

784. *Id.* at 200.

785. *Id.*

786. For a similar but more detailed discussion of this same point in Venezuela, see Steven E. Hendrix, *Tenure Insecurity in Venezuela: Empirical Data on the Failure of Cadastral and Registry Systems in the Reformed Agrarian Sector*, 55 SURV. & LAND INFO. SYS. 92, 92-98 (1995).

generally, free market systems are based on private property. Registries are where interests in real estate property are recorded. If the registries are in order, any transition toward a free market economy will go more smoothly than if they are in disrepair. In fact, registries are usually the requisite informational infrastructure for market-oriented development strategies that include massive investment and tenure security.

In the longer term, if Cuba wishes to convert from its *folio per person* to a parcel-based system, like the *folio real*, it will need accurate survey data.⁷⁸⁷ This same information will be required to establish the base layers of any future multipurpose cadastre. The modernization of land records management will depend in large measure on the existence of and level of confidence in current records. Subject demands immediate attention.

It is perhaps axiomatic that tenure security is vital for investment. Consequently, the Cuban government should try to ensure the security of ownership. Yet, in any reversal of present policy in Cuba, precisely what might happen. In Bolivia, for example, R. writes:

Current land conflicts between peasants and ex-landlords have arisen because of confusion and inefficiency in the expropriation process. . . .

In many situations, peasants harbor resentment and feel very vis-à-vis the landlord. They remember the power of the landlord in the pre-reform period, and many fear that he will be able to take their lands because they do not yet have clear title. Landlords often exploit and foster this uncertainty by threatening to dispossess their land and by telling the peasants they will not get titles, especially now that ex-President Paz Estensoro is in power. In a few cases landlords have disguised peasants and their assistants as soldiers or police and sent them to demand payment for land to which they no longer have legal rights. Sometimes

A regional tendency is towards parcel-based systems. The following countries are either moving to the *folio real* system (or land registration, if under the British system in the civil code): Belize, Trinidad and Tobago, Guyana, Barbados, Costa Rica, Ecuador, Nicaragua, Guatemala, and Jamaica, among others.

In Uruguay, the IMF believes investment has failed to return to the country due to uncertainty resulting from the removal of the Sandinistas from power. Current uncertainty over whether they will be kicked off their land. Former owners seek return of assets. While there is indecision, there is no investment. See William C. Thibodeau & Steven E. Hendrix, *Poverty and Progress: The Cases of El Salvador and Nicaragua* HARV. INT'L REV. 16, 19, 59-61 (1995); J. David Stanfield and Steven E. Hershey, *Insecurity in Nicaragua*, 22 CAP. UNIV. L. REV. 939, 939-51 (1993).

the peasants, confused and bewildered after waiting so long for land titles, are willing to agree to almost anything. As a result, some peasants have purchased their own land—sometimes at inflated prices—in search of the security that a vigorous program of title distribution and enforcement could have provided.⁷⁸⁹

Such a result should alert the Cuban government and international donor assistance agencies. Like Bolivia, confusion or informality in the original expropriation process, combined with later lack of titling, may later result in tenure insecurity for current landholders.

D. Tenure Policy and Sustainable Development

A broad tenure policy to promote long-term sustainable development will be critical, especially in the early stages of any new market-oriented initiative. Cuba still suffers from inefficient land use and deficient land access for the resource poor. National and international investors will need institutional confidence in the land management system before investing the massive amounts of money Cuba will need to strengthen its economy and put people to work. In this regard, a well-articulated land tenure strategy will be crucial. Such a strategy could include land market activation, land and mortgage banks, property taxation, registry and cadastral reform, zoning, land use planning, and privatization. New property legislation should also be considered to promote investment while streamlining and simplifying the process.

Nevertheless, Cuba must be attentive to both public and private needs. A balance of these interests should be explored. This should provide sufficient tenure security to owners, while allowing the government flexibility in environmental regulation,⁷⁹⁰ eminent domain, and other historic state interests.

789. Ronald J. Clark, *Problems and Conflicts over Land Ownership in Bolivia*, 22 INT'L AM. ECON. AFFAIRS 3, 6-7 (1969) (reprinted as LTC Reprint No. 54, on file with the Land Tenure Center Library, University of Wisconsin). Elsewhere, Clark writes that in one case, land was not worked for fourteen years after the agrarian reform. Clark, *supra* note 772, at 143. The former landlord was particularly abusive and still wanted the peasants to work his remaining land for him under the pre-reform system. *Id.* The era was noted for confusion rather than tenure security. *Id.*

790. Advancement of environmental law often conflicts with privatization goals. See, e.g., Theodore S. Boone, *Environmental Regulations and the Privatization Process* (unpublished manuscript presented at the American Bar Association, Section of International Law and Practice). On the other hand, low incentives for resource conservation that characterize state farms in Cuba are leading to rapid reduction in the stock of soil resources. See Héctor Sáez, *Technology, Institutions, and Land Degradation: A Case Study of Santo Domingo, Cuba*, Presentation at LASA Meeting, *supra* note 412, at 1.

VII. Conclusions

This Article has provided a legal history of recent Cuban property law, highlighting expropriations and confiscations since 1959, the dispute with the United States, and the general agrarian reform structure. In many respects, the Cuban agrarian reform and property confiscations are similar to other regional tenure changes and should be understood in this context. While the rhetoric may have focused on East-West stereotypes, Cuban agrarian reform legislation is representative of the Latin American and Caribbean region.

While other articles have focused on the lack of compensation, few authors have noted that many of the lands now claimed by U.S. citizens were actually banned by the 1940 Constitution, which outlawed large estates. Perhaps the rhetoric clouded earlier reviews of the merits of these cases. Still, it appears that even the Cubans recognize some compensation remains due, as they have settled with all other countries to which indemnification was owed.

Today, a U.S. embargo continues against Cuba, due in part to the property claims of U.S. citizens. Castro's government expropriated property under dubious conditions with little compensation. Yet, as has been shown, just fifteen claimants represent about two-thirds of all claims in dollar figures. It may well be that the vast majority of these claimants have already received compensation in the form of tax deductions in the United States and any further indemnification would amount to double payment. It remains an open question whether the estates were lawfully confiscated under prerevolutionary law. Further, these investors invested in Cuba knowing the risks while making handsome profits. Should U.S. foreign policy now be tailored to a special interest group of former large estate holders and political opponents? Such an approach perpetuates the Cold War ideology and runs counter to U.S. interests in positive engagement with the Cuban people for peace, democratization, and economic growth. It also denies U.S. investors opportunities in agriculture, tourism, pharmaceuticals, and other attractive industries in Cuba, while injuring Cuba's poor and disadvantaged the most.

Based on this initial description of Cuba's property law, it is hoped policymakers can approach tenure policy in a more technical and nuanced fashion, providing opportunities for more scientific, less political solutions. It is fully recognized that tenure policy has become so politicized that final resolution will depend on Cuban and U.S. politics; still, tenure policies to address compensation or privatization mat-

ters should not lose sight of the longer term development goals of the island nation. Such interests should be taken up in a tenure strategy that promotes sustainable development and participatory growth.