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LIFTING THE EMBARGO AGAINST CUBA USING VIETNAM AS A MODEL: A POLICY PAPER FOR MODERNITY

I. INTRODUCTION

In the last thirty-eight years, the United States has imposed full trade embargoes upon Cuba and Vietnam. For economic, political, and moral reasons, the United States took the extreme measure of halting all trade with these countries and effectively stopped others from doing business with them as well.¹ Both countries were Communist at the time of sanctioning, and both countries remain Communist today, yet only the Cuban embargo continues.²

During the Cold War, U.S. foreign policy towards Communist countries, and Communism in general, was openly adversarial.³ American strategy regarding Communist governments was to engage in a constant barrage of anti-Communist exercises (a trade embargo being just one such example) to force an end to Communist ideology in many third-world nations.⁴ In retaliation, to this strategy, Communist superpowers supplied money, arms and other goods to burgeoning Socialist

1. The reasons and ramifications for each embargo are vast. For detailed discussions of the histories of the tensions between the United States and the two countries, see *infra* Sections II, III, IV, and V.

2. In 1963, the United States imposed a full trade embargo against Cuba. See generally Matias F. Travieso-Diaz, *Actions Needed for Lifting the U.S. Trade Embargo Against Cuba*, 3 U. MIAMI Y.B. INT'L L. 53 (1995) (discussing in detail the intricacies of the American embargo against Cuba). In 1975, after the fall of Saigon, the United States imposed a full trade embargo against Vietnam. See generally Ky Tran-Trong, Note, *A Would Be Tiger: Assessing Vietnam's Prospects for Gaining Most Favored Nation Status*, 38 WM. & MARY L. REV. 1583 (1997) (explaining the technicalities of the embargo against Vietnam and the strategies implemented by the United States and Vietnam to end the embargo).

3. See generally Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument For a Constitutional Amendment*, 40 STAN. L. REV. 1543 (1988); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989) (discussing, by both authors, the U.S. policies regarding the Communist "threat" and the strategies implemented by various administrations to deal with the perceived threat).

4. See Yen D. Chu, Note, *The Making of a Quagmire: The Inadequacies of Applying the Jackson-Vanik Amendment to Vietnam's Transitional Economy*, 35 COLUM. J. TRANSNAT'L L. 453, 459 (1997).

governments throughout the world.⁵ Apart from the former Soviet Union and China, Vietnam and Cuba took advantage of this policy, impacting on the U.S. psyche.⁶ Twice during this period, the United States acted aggressively against a perceived "threat" of Communism: the Cuban Missile Crisis which brought the United States and the Soviet Union to the brink of nuclear war, and the Vietnam War which cost the lives of 56,000 Americans and hundreds of thousands of Vietnamese.⁷ Generally, military action has been the last resort for the United States, but instead the United States has preferred the more common, and more internationally acceptable strategy of implementing trade embargoes.⁸

Two such embargoes—against Cuba and Vietnam—are examples of U.S. foreign policy being implemented without military force.⁹ There is evidence that embargoes are successful, as demonstrated by the decision to lift the U.S. embargo against Vietnam in 1994. That embargo was removed only after the United States and Vietnam had negotiated methods and strategies for normalization of relations, and Vietnam demonstrated its willingness to ease its hard-line stance on many key issues.¹⁰ Today, trade relations and diplomatic ties between the United States and Vietnam are being further normalized in the hopes by both countries that U.S. entrepre-

5. See Lobel, *supra* note 3, at 1426.

6. *Id.* at 1417.

7. See Goldstein, *supra* note 3, at 1548, 1558.

8. See U.N. CHARTER chs. VI-VII: "Pacific Settlement of Disputes," and "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," in which the methods and strategies are discussed for parties to the Charter to settle disputes. A principle that resounds throughout the Charter and international law in general is that settlement of disputes should be carried out pacifically whenever possible.

9. U.S. citizens may file claims against foreign governments for expropriated property under 22 U.S.C. §§ 1621-1645 (1990). This statutory scheme results from the Foreign Claims Settlement Commission (FCSC), a branch of the Department of Justice that follows a statutory procedure to determine the amount and validity of claims against a foreign government. The FCSC was an integral part of the International Claims Settlement Act of 1949, 64 Stat. 12 (1950) (codified as amended in 22 U.S.C. §§ 1621-1625 (1990)), which was enacted out of a "growing concern of the United States regarding violations by Communist governments of the rights of American citizens who owned property in foreign countries." Edward D. Re, *The Foreign Claims Settlement Commission and the Cuban Claims Program*, 1 INT'L LAW. 81, 83 (1966).

10. See *Clinton Lifts Vietnam Embargo*, EXPORT CONTROL NEWS, Feb. 28, 1994, available in 1994 WL 2247089.

neurs or investors will bring an eventual influx of capital to Vietnam.¹¹ Yet the U.S. embargo against Cuba lingers. The Cuban embargo, which began before full U.S. military involvement in Vietnam, is in its third decade without any plans for its future termination.¹² The United States seems to be awaiting the day that the island nation might revert to the capitalist investment state that it once was.¹³

Although an entire world separates Vietnam and Cuba, there are interesting parallels and distinctions between the two trade embargoes. To begin, both Cuba and Vietnam became Communist states after major governmental upheavals.¹⁴ Both countries were given substantial aid by Communist superpowers such as China and the former Soviet Union, and both suffered economically with the fall of the Socialist Bloc.¹⁵ From a U.S. perspective, the most important similarity is that both countries exercised major expropriations¹⁶ of American property interests, and refused to adhere to the "compensation principle" of international law.¹⁷ Both countries' histories diverge when the respective strategies toward settling the expropriation issue with the United States are examined.

11. See Tran-Trong, *supra* note 2, at 1583.

12. See Travieso-Diaz, *supra* note 2, at 56.

13. See Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 217-19 (1995).

14. Cuba's government changed to Communist ideology when Fidel Castro came to power after usurping the Batista regime. Vietnam became a fully Communist state after the U.S. pullout in 1975, when Saigon fell to the Communists. See *Vietnam*, in UNITED STATES CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1995 453, 453 (1995) [hereinafter FACTBOOK]; KCWD/*Kaleidoscope-Cuba and Vietnam Profiles*, available in LEXIS, World Library, KCWD File [hereinafter KCWD]; Ron First, *Cuba's Changing Foreign Investment Climate: Castro's Attempt to Lure Foreign Investors*, 9 TRANSNAT'L LAW. 295, 297 (1996); ROBERT GOLDSTON, THE VIETNAMESE REVOLUTION 82-89 (1972).

15. See FACTBOOK, *supra* note 14, at 453. For an in-depth discussion of aid to Vietnam prior to U.S. engagement, see GOLDSTON, *supra* note 14.

16. Expropriation is defined as "[a] taking, as of privately owned property, by government under eminent domain." BLACK'S LAW DICTIONARY 582 (6th ed. 1990).

17. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1) (1987).

State Responsibility for Economic Injury to Nationals of Other States:

A state is responsible under international law for injuries of the property of a national of another state that is:

- a) not for a public purpose, or
- b) is discriminatory.

After a war with the United States and the downfall of the Soviet Union, Vietnam's economy was in turmoil. The Vietnamese Government realized that the world economy was growing without its own and made efforts to offer the United States a settlement of the expropriation issue.¹⁸ Though Vietnam has yet to actually return money or property, Vietnam made an important gesture by negotiating settlement strategies that the United States could accept without losing face in the international political forum.¹⁹ In contrast, Cuba has failed to make any offer to compensate the property owners who lost billions of dollars in property to expropriations since 1959.²⁰ Thus, the U.S. strategy of continuing the Cuban embargo today hinges on the issue of expropriations.²¹

In the 1990s, the United States cited Communism as the foremost tenet of conflict with the Vietnamese Government's policies, followed by the MIA issue, and lastly expropriations.²² Although Vietnam remains Communist, it has worked towards giving closure to the MIA issue, and more importantly, offered an arrangement for settling the expropriation claims of U.S. nationals.²³ It seems likely that Cuba and the United States could come to a similar arrangement. In fact, it would appear to be a simpler issue than in Vietnam because there is no legacy of military intervention in Cuba. Cuba expropriated billions of dollars in property and now needs to give restitution. Here, only money, not lives, are involved in the dispute. Utilizing diplomacy, and a well-drafted bilateral investment treaty (BIT), relations between the United States and Cuba

18. See F. Gale Connor, *Vietnam: Trading With the Enemy or Investing in the Future*, 25 LAW & POL'Y INT'L BUS. 481, 481 (1994).

19. See Thomas J. Lang, *Satisfaction of Claims Against Vietnam for the Expropriation of U.S. Citizens' Property in South Vietnam in 1975*, 28 CORNELL INT'L L.J. 265, 270 (1995).

20. See Foreign Claims Settlement Commission Final Report of the Cuban Claims Program, at 25 (1973) [hereinafter 1973 FCSC Report].

21. There is no single internationally accepted definition of "expropriation." Different states interpret the term differently; appearing to suit the need of the state. See RESTATEMENT, *supra* note 17.

22. See *Vietnam Relations: Looking Forward: Before the House of Representatives*, 141 Cong. Rec. 59,725 (1995) (remarks of Sen. Daschle). The MIA "issue" relates to the soldiers reported as missing in action during the Vietnam War. Vietnam had agreed to return any prisoners of war, or their remains, as part of the Paris Accords. *Id.* See Agreement on Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, 24 U.S.T. 1, 935 U.N.T.S. 2 [hereinafter Paris Accords].

23. See Connor, *supra* note 18, at 486.

could be normalized, billions of dollars in investment opportunity could be realized and the Western Hemisphere could eventually be without a Communist economy.

This Note will begin by briefly exploring the history behind each conflict, and the resulting embargoes imposed by the United States. It will not advocate political reasons for lifting the Cuban embargo, but rather assert a practical methodology utilizing current legislation. This Note assumes the position that the United States should lift the embargo. Cuba's recent trend toward capitalism has revitalized financial markets in which American businesses are prohibited from participating, while global investors funnel capital into Cuba investing in the natural resources found there and offshore.²⁴ Since the demise of the former Soviet Union, Cuba has lost billions in annual aid.²⁵ Today, Cuba cannot adequately feed or supply healthcare for its citizens, yet Castro and his regime remain vibrant.²⁶ One explanation is that foreign investors are keeping the Cuban economy afloat.²⁷ Thus U.S. policy towards Cuba is pragmatically and economically obsolete.

This Note concludes with an exploration of the parallels and distinctions between the embargoes against Vietnam and Cuba, and argues that the parallels outweigh the distinctions. Thus, the United States should follow the same strategies that were used with Vietnam to settle the dispute with Cuba. Conversely, Cuba must approach the United States with settlement measures akin to those offered by Vietnam. This may serve to allow the United States and Cuba to once again share in the wealth of a trade route separated only by ninety miles.

II. HISTORY OF THE CONFLICT AND SUBSEQUENT EMBARGO AGAINST CUBA

On May 15, 1997, the U.S. Government, as authorized by

24. See Suzanne Bilello, *Still on the Sidelines: Hard-line Stance on Cuba May Mean Missed Opportunities for U.S. Business*, *NEWSDAY*, Sep. 18, 1994, at A8 (observing that "[t]he 34-year-old U.S. trade embargo against Cuba . . . keeps American businesses watching from the sidelines in a sort of economic quarantine.").

25. See *FACTBOOK*, *supra* note 14.

26. See John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C. J. INT'L L. & COM. REG. 66, 66 (1995).

27. *Id.* at 100.

statute, once again approved legislation that has been in place since 1960.²⁸ To summarize the language of the statute:

No assistance shall be furnished . . . to the government of Cuba . . . the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba . . . until the President determines that such government has taken appropriate steps according to international law standards to return to U.S. Citizens . . . property taken from such citizens and entities on or after January 1, 1959, by the government of Cuba.²⁹

The foregoing language summarizes the U.S. policy regarding the trade embargo against Cuba. However, there is no clear reason for the United States to continue to maintain an embargo, given the contemporary geopolitical climate. This section will briefly explore the history of the adversarial relationship between the United States and Cuba.

Prior to the "Castro revolution" of 1959, Cuba's economy was characterized as a "mercantilist oligarchic system."³⁰ Though the Cuban Government claimed to be a capitalist state, the reality was that only wealthy Cubans could afford to participate in the market of goods and ideas.³¹ The classes were extremely stratified and the most viable way to achieve entry into the Cuban entrepreneurial market was through "favors" paid to government officials.³² While this policy did not prevent the participation of wealthy industrialists or American business interests, the majority of middle-class Cubans were unable to participate significantly in the Cuban economy.³³ In the early 1950s, Fidel Castro, a Communist leader who believed that a Communist/Socialist way of life was preferable to the status quo, began a decade-long overthrow of the

28. 22 U.S.C.A. § 2151 (West 1990).

29. *Id.*

30. *Free Trade with Cuba Act, 1994: Hearings on H.R. 2229 Before the Subcomm. on Select Revenue Measures and the Subcomm. on Trade of the House Comm. on Ways and Means*, 103d Cong. 321 (1994) (statement of Irene Philippi, Senior Economist with Polyconomics, Inc.) [hereinafter Philippi]. Philippi spoke at length about the possibility of reforms in Cuba and the need for the relationship with the United States to become more open and "normal." *Id.*

31. *Id.* at 322.

32. *Id.*

33. See HERBERT L. MATTHEWS, *REVOLUTION IN CUBA* 121 (1975).

Cuban Government and society.³⁴

From 1959-1963 Castro's "new" government instilled its Socialist policies throughout Cuba culminating in the expropriation of all properties in Cuba, American and otherwise, for the use of the "new" government.³⁵ Until the expropriations, owners of American businesses on the island were unsure of how the new regime would govern Cuba.³⁶ U.S. investors, from energy companies to hoteliers, had enjoyed Cuba's rich economic and natural resources which Cuba offered so close to American soil for many years.³⁷ For Americans, Cuba offered an oil-rich Caribbean tax shelter.³⁸ As long as the investing businesses followed the government's unspoken "rules," they were allowed to "reap what they could sow."³⁹

However, beginning in late 1959 and continuing into the middle of 1963, Castro expropriated U.S. manufacturing and production interests in Cuba.⁴⁰ In retaliation, the U.S. Congress amended the Sugar Act of 1948⁴¹ in 1960 to permit a reduction of the sugar quota from Cuba.⁴² The Cuban Government viewed and treated this action as an act of war by the United States. It enacted "Law No. 851" which gave the Cuban President and the Prime Minister the power to nationalize by forced expropriation "property or enterprises in which American nationals had an interest."⁴³

While it is certain that the United States seriously damaged Cuba's economy with its reduction of the sugar quota,

34. *Id.* at 11.

35. See generally Smagula, *supra* note 26, at 74.

36. See MATTHEWS, *supra* note 33, at 125.

37. *Id.* at 126.

38. *Id.*

39. *Id.* at 130.

40. See MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 69-108 (1976).

41. 7 U.S.C. § 1158 (1960).

42. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). At issue in this case was whether the Act of State doctrine protected Cuba's actions with respect to its territorial jurisdiction over the U.S. sugar company located in Cuba. The Court discussed both the propriety of the congressional action, as well as the Cuban law under international law.

43. Ley [Law] 851, July 6, 1960, *Gaceta Oficial*, July 7, 1960, reprinted in 55 AM. J. INT'L L. 822, 822-24 (1961). Resolution No. 1, issued pursuant to Law 851, authorized the nationalization of American owned businesses. This nationalization resolution was followed by Resolutions 2 and 3 respectively, which effectively took over American banks, and other properties.

Cuba's subsequent expropriations effectively severed diplomatic relations with the United States.⁴⁴ In 1960, President Eisenhower took the reduction of the sugar quota one step further and announced the embargo on "almost all trade to Cuba."⁴⁵ Cuba would have almost surely met with economic and social ruin if the former Soviet Union had not provided billions in annual aid.⁴⁶ Any discussion of the effects of the American trade embargo from a U.S. perspective, without accounting for Soviet assistance to Cuba, is rather disingenuous, as it cannot be convincingly determined whether Cuba and Castro would have survived for decades without the aid of a superpower such as the former Soviet Union. Therefore, an argument can be made that Soviet aid created the need for the U.S. embargo.

In 1964, the U.S. Congress established the Cuban Claims Program (CCP) to determine the amount of claims on expropriated property by U.S. nationals against the Cuban Government.⁴⁷ The CCP certified that 5,911 claims on expropriated property worth U.S. \$1.8 billion were viable and, at a rate of 6% interest, these claims were worth U.S. \$5.6 billion by 1995.⁴⁸ The amount of property taken and the threat of Communism ninety miles south of Miami motivated the U.S. Government to implement programs to end Communism in the Western Hemisphere.⁴⁹ The U.S. Government was not comfortable having a "pipeline" for the Soviet Union so close to its shores. The pressure around this tense situation culminated with the Cuban Missile Crisis of 1962, when a U.S. spy plane discovered that Cuba was stockpiling Soviet nuclear missiles.⁵⁰ Though the crisis was averted, the "threat" of Cuba

44. See FACTBOOK, *supra* note 14.

45. JOHN PRADOS, *PRESIDENTS' SECRET WARS* 189 (1986).

46. The total output in Cuba dropped by 50% in the years after the fall of the Soviet Union, and treating the aid given/lost to Cuba by the U.S.S.R. as a bell curve, the aid given to Cuba at the apex of the former Soviet Union's power in the 1960s and 1970s can be argued to have been the lifeblood of a revolution. See FACTBOOK, *supra* note 14.

47. 22 U.S.C. § 1643 (1988) (as amended 1994).

48. See 1973 FCSC Report, *supra* note 20. Although this amount may not be staggering in 1999, it is extremely significant when compared to the loss of importable income that Cuba has missed each year since the fall of the Soviet Union.

49. See Lobel, *supra* note 3, at 1401.

50. See Goldstein, *supra* note 3, at 1548.

became very vivid in the American psyche.⁵¹ Tensions between the United States and Cuba were the most strained during this "peak" of the Cold War.⁵²

Utilizing international law as a basis for its embargo, the United States' sanctions against Cuba were to fight Communism.⁵³ However, the U.S. Government's true impetus for the embargo against Cuba appears to have been the seeking of restitution for U.S. businesses which lost money and property in the Cuban nationalization program.⁵⁴ With the demise of the former Soviet Bloc, resulting in Cuba's economic instability due to lost aid, the United States is left with a single unsettled issue—property expropriation.⁵⁵ The United States must now rely solely on the strength of the expropriation argument for the embargo against Cuba to remain valid.

III. EFFECTS OF THE EMBARGO AGAINST CUBA

The U.S. trade embargo against Cuba has been in place since 1961.⁵⁶ In the thirty-eight years since, a multitude of U.S. statutes and regulations have been implemented with the ultimate goal of restricting trade with Cuba as completely as possible.⁵⁷ The regulations *in toto* consist of an "extraordinarily comprehensive range of financial, commercial and trade transactions and transactions involving property of almost any kind, unless licensed by the Department of the Treasury."⁵⁸

51. *Id.*

52. *Id.*

53. See Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 Vand. J. Transnat'l L. 901, 912 (1995).

54. See RESTATEMENT, *supra* note 17 (discussing the U.S. policy regarding expropriations).

55. See generally Smagula, *supra* note 26.

56. Section 620(a) of the Foreign Assistance Act of 1961 authorized the President to impose a trade embargo against Cuba. See 22 U.S.C. § 2370(a) (1993) [hereinafter FAA of 1961]; the Cuban Solidarity Act of 1992, 22 U.S.C. §§ 6001-6010 (1992).

57. See FAA of 1961, *supra* note 56; Cuban Solidarity Act of 1992, 22 U.S.C. §§ 6001-6010. See Proclamation No. 3447, 27 Fed. Reg. 1,085 (1962) (establishing a comprehensive embargo on Cuba); Cuban Assets Control Regulations, 31 C.F.R. § 515 (1999) (implementing regulations of transactions with Cuba and Cuban property).

58. Dennis M. O'Connell, *Are the U.S. Treasury's Assets Control Regulations a Fair and Effective Tool of U.S. Foreign Policy? The Case of Cuba*, 79 AM. SOC'Y INT'L L. PROC. 169, 169-89 (1985).

Like the embargo against Vietnam, the statutory basis for the embargo against Cuba is the Trading With the Enemy Act of 1917 (TWEA).⁵⁹ The statutes and regulations enabling the embargo have been evolving since 1963.⁶⁰ But what effect has the embargo had on Cuba over thirty years? There is no sign that Fidel Castro is about to step down from power, or that Cuba is remaining in the financial straits that they and other Socialist Bloc countries, specifically Vietnam, suffered after the fall of the former Soviet Union.

In 1960, the United States demanded from Cuba the restitution of expropriated property, however, the U.S. reduction of the sugar quota may have eliminated the monetary possibility for Cuba to restore the value of any taken property.⁶¹ As one commentator has theorized, the United States "may have been more concerned with ensuring, financially, that Cuba would not be able to export its sugar to other countries."⁶² If this was indeed the strategy, it failed as Cuba initially agreed with the Soviet Union on February 13, 1960 to provide one million tons of sugar per year for five years, and provide East Germany, Poland and China, collectively, an additional 180,000 tons.⁶³ Though this initial total was roughly one-third of the amount of sugar that the United States had been importing from Cuba, it indicated that U.S. trade sanctions would not necessarily have their desired effect.⁶⁴ The Castro government's position was that the reduction in the sugar quota for import to the United States was a step away from an

59. Trading With the Enemy Act, 50 U.S.C. § 5(b) (1988) [hereinafter TWEA].

60. See generally Jerry W. Cain, Jr., *Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379 (1994).

61. See Smagula, *supra* note 26, at 73; *Hearings Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs on Claims of U.S. Nationals Against the Government of Cuba*, 88th Cong. 164, 164 (1964). The Acting Legal Advisor of the Department of State, Leonard Meeker, said, "it is clear that the funds which would be available for distribution under a vesting of Cuban assets would be trivial when compared to the losses which have been sustained [by Cuba.]" *Id.*

62. See Smagula, *supra* note 26, at 73.

63. *Id.* at 73 nn.67, 68 (citing Fidel Castro, *The Case of Cuba is the Case of All Underdeveloped Countries*, Address Before the U.N. General Assembly 31, 39 n.64 (Sept. 26, 1960)).

64. Ley de Reforma Agraria [Agrarian Reform Law] 1959, 7 Leyes del Gobierno Provisional de la Revolucion 135 (1959). The 1959 U.S. allotment for sugar from Cuba was 3,215,000 tons for the year.

ideological market-slavery to an export economy, and thus, was a positive move for Cuba.⁶⁵

Another U.S. action against Cuba's Communism was the failed "Bay of Pigs" invasion in the spring of 1961, in which U.S. trained and funded Cuban anti-Castro forces landed in Cuba and attempted an overthrow of the Castro government. Castro's forces summarily defeated them in three days.⁶⁶ Ultimately, 1400 anti-Castro Cubans were taken prisoner and the United States was forced to pay a humbling U.S. \$53 million in medicine and equipment for their release.⁶⁷ Despite these incidents, Cuba did not remain completely unaffected by the U.S. embargo; by 1964 every nation belonging to the Organization of American States, with the exception of Mexico, had severed ties with Cuba.⁶⁸ As Cuba's trade and diplomatic relations in the Western Hemisphere diminished or disappeared altogether, Cuba's relationship with the Soviet Union strengthened.⁶⁹ During the 1960s, Cuban reliance on Soviet aid had been reported to be as much as the equivalent of one million U.S. dollars per day.⁷⁰ In 1972, the Soviet Union forgave Cuba's accumulated debt.⁷¹ It appeared that although the United States had affected a total embargo on goods to and from Cuba (with the exception of medicinal and humanitarian aid), Cuba was able to circumvent the embargo by dealing with other sympathetic Communist countries.

Cuba's success at this circumvention came to an end, much like Vietnam's had, with the fall of the Soviet Union in 1989. Cuba began to suffer severe economic hardship.⁷² The Cuban

65. See ERIC. N. BAKLANOFF, *EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE* 118 (1975).

66. See First, *supra* note 14, at 299.

67. See GEORGIE A. GEYER, *GUERRILLA PRINCE: THE UNTOLD STORY OF FIDEL CASTRO*, 270-79 (1991).

68. See BAKLANOFF, *supra* note 65, at 119. It must be noted that the majority of Latin States severed ties due to Cuban activities in Latin America, notably a guerrilla invasion of Venezuela in 1964. *Id.*

69. See CUBA, *A COUNTRY STUDY* 42 (James D. Rudolph ed., 1985).

70. BAKLANOFF, *supra* note 65, at 120. This amount excludes military aid.

71. *Id.* at 121 (noting that beyond merely forgiving a huge amassed debt, estimated at \$2.2 billion in trade deficit, the U.S.S.R. also agreed to pay twice the regular rate for sugar).

72. See José de Cordoba, *Cuba's Business Law Puts Off Foreigners: Even Castro Concedes Disappointing Response*, *WALL ST. J.*, Oct. 10, 1995, at A16 (reporting the Cuban economic future as "delicate" due to the Cuban economy's growth of only 0.7% in 1994).

economic growth rate declined by one-third in the four years after the downfall of the Soviet Union,⁷³ giving credence to the argument that without Soviet assistance, the embargo against Cuba may have indeed met with the "success" the U.S. Government had wished for. Once the Soviet Empire fell, the need for foreign investment came once again to the forefront of Cuban policy.⁷⁴

On September 5, 1995 Cuba passed a new foreign investment law which had among its goals "the protection of Cuba's accomplishments from the demise of the Socialist Bloc, as well as from the embargo."⁷⁵ Cuba apparently recognized the need for foreign investment to assist with an influx of capital and technology. The law cites the "globalization of the world economy" and the "strong hegemonistic tendencies in the economic, political, and military fields" as reasons for why Cuba must resuscitate its foreign investment policies.⁷⁶

Today in Cuba, more bicycles than automobiles travel Cuba's streets,⁷⁷ but as of 1992 Cuba was close to completing its first nuclear power plant.⁷⁸ Cuba also maintains business ties with much of the world and in 1992, for the first time since the fall of the Soviet Union (when Cuba's economy was cut by two-thirds), Cuba's economy grew 0.7%.⁷⁹ Cuba also has had growth in foreign investment, with Cuban officials claiming "as of mid-1995 that foreign investment totaled over 2 billion."⁸⁰ One commentator noted "that this figure was probably overstated due to the confidential nature of foreign investment, and the fact that such investments are spread out over a period of years; the true figure was probably closer to 500 million."⁸¹ However, the point remains that Cuba and Castro,

73. *Id.*

74. See James D. Whisensand, *Cuba's Legal Structure: How it Affects Foreign Investment and Trade*, COLUM. J. WORLD BUS., Spring 1995, at 16, 16-17.

75. Law Number 77, Foreign Investment Act, Final Provision (1995).

76. *Id.*; see First, *supra* note 14, at 299-300.

77. See Jonathan P. Decker, *The \$800 Million Question: is Cuba Building a Potential Chernobyl in U.S. Backyard?*, CHRISTIAN SCI. MONITOR, Nov. 8, 1995, at 11; First, *supra* note 14 at 318.

78. See Decker, *supra* note 77, at 11.

79. See FACTBOOK, *supra* note 14.

80. See Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C. J. INT'L L. & COM. REG. 511, 513 (1996).

81. Thomas T. Vogel, Jr., *Investors Find Cuba Tantalizing Yet Murky in Fi-*

while suffering economically at the hands of the U.S. embargo, have not been "defeated" into submission to democratic ideology. Rather, Cuba appears to have survived the fall of the Soviet Union and appears to be on the way to a recovery, if only a mild one.

IV. HISTORY OF THE CONFLICT WITH VIETNAM

Like Cuba, Vietnam has until relatively recently been a primary motivating force for continuing U.S. anti-Communist foreign policy.⁸² Many of the tenets of the U.S. conflict with Vietnam parallel those of the conflict between the United States and Cuba. Both countries have undergone tremendous upheaval due to revolution, and the socio-political strife that had racked both countries has merged them in the wake of the U.S. struggle against Communism.⁸³

To understand the tensions between the United States and Vietnam, it is important to examine the history of Vietnam. Vietnam in the 1960s was a country of 24 million people divided in half by a "demilitarized zone" (DMZ).⁸⁴ The North was reserved for Communist followers of Ho Chi Minh, while the South was the Democratic stronghold.⁸⁵ It was in response to the impending invasion by North Vietnam into South Vietnam that the United States sent hundreds of thousands of troops and "advisers" into Vietnam in order to protect the dying democracy.⁸⁶ The U.S.-Vietnam war was the culmination of a long line of struggles by the people of Vietnam. Occupation by Chinese Buddhists, Indonesian Khmers, Hindus, the French and Communists had seen the Vietnamese people struggle not only for independence, but for a cultural identity.⁸⁷ With less than a thousand miles between its northern and southern borders, and at most a width of 330 miles, Vietnam has never been truly united politically.⁸⁸ Even the Vietnamese language

nancial Matters, WALL ST. J., Aug. 7, 1995, at A1; Travieso-Diaz & Ferrate, *supra* note 80, at 514.

82. See Goldstein, *supra* note 3, at 1558.

83. *Id.*

84. See GOLDSTON, *supra* note 14, at 82-89 (1972).

85. *Id.*

86. See Goldstein, *supra* note 3, at 1558.

87. See GOLDSTON, *supra* note 14, at 18-21.

88. *Id.* at 16.

may be considered a form of Chinese.⁸⁹

Beginning in 1787, Vietnam was effectively given to the French.⁹⁰ In an arrangement reminiscent of old-time gangster movies, a dispossessed Vietnamese ruler came to the court of Louis the XIV to ask for protection, in the form of French troops, from any invading forces.⁹¹ Thus, colonialist France viewed Vietnam as a new Oriental outpost with a safe trade route to the Far East, rather than a country with a people hungry for their own identity and culture.⁹²

Negative Vietnamese sentiment against the French was quick to take hold and was never fully extinguished, nor was the French desire to profit from Vietnam's resources.⁹³ France lost its trading outpost when Vietnam was occupied by Japan during World War II, however, after the Americans defeated Japan, France attempted to reassert power over Vietnam.⁹⁴ France might have succeeded were it not for the appearance of Ho Chi Minh.⁹⁵

Ho Chi Minh was a believer in Vietnamese independence and a Communist.⁹⁶ However, Ho's beliefs in a strong, and more importantly, independent Vietnam are arguably more reminiscent of Gandhi than of Marx.⁹⁷ Ho Chi Minh believed that Vietnam should be free to decide her own political and military fate, he eventually took over a small part of Northern Vietnam and began an insurgency called the "Vietminh."⁹⁸

When Ho Chi Minh came to power in 1946 as president of the northern Democratic Republic of Vietnam, France, ruling in the south, realized that it would have to deal with Ho Chi

89. *Id.* at 19-21.

90. *Id.* at 32-33.

91. *Id.* at 32.

92. *Id.* at 35.

93. *Id.*

94. *Id.* at 64-67.

95. Ho Chi Minh was the first successful leader of a Vietnamese independence movement. *Id.*

96. See GOLDSTON, *supra* note 14, at 52-53.

97. This statement is not to compare Ho Chi Minh with Gandhi except to highlight a shared intense desire for independence that they both possessed for their countries. It is not difficult to understand how Ho Chi Minh became enraptured with communist ideology. For hundreds of years his country had been subject to French rule, used as a funnel for profits from Southeast Asia and had constantly been besieged by class struggle.

98. See GOLDSTON, *supra* note 14, at 67-69.

Minh or face war.⁹⁹ Yet, after many failed attempts at negotiating a peaceful co-existence between Vietnam and France, armed conflict was inevitable.¹⁰⁰ In protracted fighting that continued until the French pullout in 1954, guerrilla warfare became a way of life for the Vietnamese.¹⁰¹ During this period, China, bordering Vietnam to the north, had "fallen" to Communism when Mao Tse-tung defeated Chiang Kai-shek.¹⁰² This allowed Ho Chi Minh to have his northern stronghold fortified with military and monetary aid from China.¹⁰³ This new Communist pipeline may be the single most important piece of history when attempting to understand the reasons for American involvement in the conflict.¹⁰⁴

The French pulled out of South Vietnam in 1954 as per the Geneva Accords.¹⁰⁵ The subsequent fighting between the Vietnamese over who would rule the newly independent state, the northern Communist Ho Chi Minh or the southern Democratic President Diem, was not the major concern to American advisers and politicians. The major fear was that North Vietnam, faced with the looming presence of communist China, would quickly become a puppet government of the Chinese and the Soviet Union, and usurp any power of the Geneva Accords to keep peace in the divided nation.¹⁰⁶ After the sacrifices made fighting the Japanese during World War II, the United States was afraid to neglect Vietnam, perhaps allowing Asia to fall

99. *Id.* at 83.

100. *Id.* at 84-88.

101. *Id.* at 93.

102. Mao Tse-tung defeated Chiang Kai-shek in 1949. See 3 *ENCYCLOPAEDIA BRITANNICA* 191 (1994).

103. See GOLDSTON, *supra* note 14.

104. The reason behind this is that the United States has never entered a war, other than the American Civil War, without extreme economic incentive to do so. The United States had relatively recently fought an extremely costly war in the Pacific during World War II, and more recently in Korea. After these conflicts, the administrations were heavily vested in ensuring that the Asia markets remain open and free of Communism. The American disagreement with Communism extends beyond ideology, however, and into economics. A burgeoning "Communist market" in Asia is a misnomer, as a Communist state is, in effect, no market at all. *Id.*

105. See Paris Accords, *supra* note 22; Thomas J. Lang, *Satisfaction of Claims Against Vietnam for the Expropriation of U.S. Citizens' Property in South Vietnam in 1975*, 28 *CORNELL INT'L. L.J.* 265, 270 (1995).

106. See generally Thomas R. Stauch, *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 *INT'L LAW.* 995, 1004 (1994).

into the hands of Communism one country at a time, much like a set of dominoes.¹⁰⁷

The "domino theory" was widely espoused in Washington as incentive for the United States to enter into the political forum in Vietnam, to support the French and the Southern Democratic Republic, and to help stem the growth of Communism.¹⁰⁸ President Eisenhower decided to send "advisers" to South Vietnam to assist the French in maintaining the peace of the Geneva Accords.¹⁰⁹ In 1954, Eisenhower appeared innocently, or naively, to sign the fates of many lives away with a simple letter to President Diem that offered, in part, "how an intelligent program of American aid given directly to your government can serve to assist Vietnam in its hour of trial."¹¹⁰ This letter never mentioned the words "military action," and Eisenhower never stated or intended that the United States would help South Vietnam fight a war.¹¹¹ Yet, the scars that the Vietnam War left are still palpable in the minds of many Americans. The total trade embargo against Vietnam, begun in 1975 by President Ford, was a lasting symbol of the animus between the United States and Vietnam.¹¹²

V. THE EFFECTS OF THE EMBARGO AGAINST VIETNAM

In 1964, because of intensifying military action between the northern Communists and South Vietnam, the United States began a trade embargo against what was then North Vietnam.¹¹³ The Foreign Assets Control Regulations embargo

107. See ROBERT S. McNAMARA, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM 97 (1995).

108. *Id.*; see generally Stauch *supra* note 106, at 1003.

109. See GOLDSTON, *supra* note 14, at 109.

110. *Id.* at 130.

111. *Id.* at 131.

112. See Beth Castelli, *The Lifting of the Trade Embargo Between the United States and Vietnam: The Loss of a Potential Bargaining Tool or a Means of Fostering Co-operation?*, 13 DICK. J. INT'L L. 297, 301-03 (1994). The embargo was the last in a line of sanctions that the United States began against Vietnam. The theory behind the measure was that a U.S. embargo would encourage other states to abide by the spirit, if not the technicalities, of the embargo. See WILLIAM J. DUIKER, VIETNAM: REVOLUTION IN TRANSITION 211 (2d ed., 1995). This is indeed what happened as "[t]he invasion had equally disruptive effects on Vietnam's relations with its neighbors in the region." *Id.* However, the United States was aware of the flow of Communist capital that would continue with or without an embargo. *Id.*

113. Foreign Assets Control Regulations, 31 C.F.R. § 500 (1993). See Stauch,

powers stemmed from powers granted in the TWEA.¹¹⁴ The TWEA was designed to hinder the strengthening of the German economy after World War I.¹¹⁵ The TWEA powers were used for the same purpose in Vietnam; it was hoped that the embargo would make the success of a northern Communist governmental takeover in the South difficult, if not impossible.¹¹⁶ However, as with Cuba, the embargo against North Vietnam did not have the desired effect, as China and the former Soviet Union were ignoring the embargo and supplying the Viet Cong from the Vietnam/China border.¹¹⁷

After the fall of Saigon to Communist forces in 1975, the Communist government commandeered the Vietnamese economy, as well as its political and social climate,¹¹⁸ and the United States utilized the TWEA to extend its trade embargo to include South Vietnam.¹¹⁹ Since the United States was no longer technically "at war" with North Vietnam, the powers of the TWEA were utilized to cover the takeover of South Vietnam under authority of the International Emergency Economic Powers Act (IEEPA).¹²⁰ The IEEPA gives the President the ability to act on any "unusual and (extraordinary external) threat to the national security, foreign policy, or economy of

supra note 106, at 1004; Merian Nash Leich, *Foreign Assets Control*, 84 AM. J. INT'L. L. 536, 539 (1990). The Foreign Assets Control Regulations (FACR) were first utilized to impose an embargo on trade or financial transactions against China and North Korea, both Communist countries. The FACR were also utilized to freeze any assets of the two countries within the United States. The United States extended the regulations to reach North Vietnam on May 5, 1964, and South Vietnam on April 30, 1975. South Vietnam was added due to the Communist takeover of Saigon (renamed Ho Chi Minh City), and the subsequent U.S. pullout of the country. *Id.*

114. TWEA *supra* note 59, at app. §§ 1-44 (1988). FACR are authorized by § 5(b) of the TWEA, which states:

(b)(1) During time of war, the President may

(A) . . . prohibit any transactions in foreign exchange . . . and the importing, exporting of currency or securities, and

(B) . . . prohibit transactions involving any property in which any foreign country or a national thereof has any interest.

115. See Castelli, *supra* note 112, at 302.

116. *Id.*

117. See Stauch, *supra* note 106, at 1002; GOLDSTON, *supra* note 14, at 144. "In fact North Vietnamese independence of both Moscow and Peking was in direct proportion to how much aid North Vietnam required." *Id.*

118. See Stauch *supra* note 106, at 1005.

119. *Id.*; 50 U.S.C. app. §§ 1-44 (1988); Tran-Trong, *supra* note 2, at 1586.

120. IEEPA of 1977 § 202; 50 U.S.C. § 1701.

the United States, if the President declares a national emergency with respect to such threat."¹²¹ The perceived threat to the United States was the same as stated for the War, that Vietnam was only the first in a series of dominoes that would fall to Communism.¹²²

The embargo against Vietnam "encompassed import, export, travel, and financial dealings between any U.S. individual or organization and Vietnam or any of its nationals, and the TWEA and IEEPA imposed penalties for violations of its terms."¹²³ This was in contrast to the Paris Peace Agreements of 1973¹²⁴ where the United States had agreed to assist Vietnam with post-war reconstruction.¹²⁵ The effects of the embargo were soon felt in Vietnam as other countries abided by the embargo, and Vietnam became ineligible for international loans.¹²⁶

As the embargo continued through the 1970s, several obstacles to ending the embargo materialized. In 1973, with the Paris Accords, and the U.S. promise to assist with Vietnam's post-war reconstruction, Vietnam promised to assist with the resolution of the MIA issue.¹²⁷ These two key promises never came to fruition.¹²⁸ As the fall of Saigon became a reality, the United States gave up hope that the Paris Accords would resolve the MIA issue, thus making it a major impetus for extension and continuation of the embargo.¹²⁹

In 1977, President Jimmy Carter appeared willing to relax the trade embargo against Vietnam; travel restrictions to Viet-

121. Tran-Trong, *supra* note 2, at 1586 n.18.

122. *See generally* Stauch, *supra* note 106.

123. *Id.* at 1007.

124. *See generally* Lang, *supra* note 105.

125. *See* Castelli, *supra* note 112, at 304.

126. *See* Stauch, *supra* note 106, at 1008 n.95 (citing *Decision on Vietnam Relations is Due Soon, Christopher Says*, INT'L TRADE REP., June 23, 1993). "The United States is the largest shareholder in the IMF, and as such, can block lending . . . by persuading other major shareholders . . . to support its position." *Id.*

127. *See* Paris Accords, *supra* note 22. The Paris Accords included a protocol on Prisoners and Detainees wherein North Vietnam agreed to return 591 claimed American prisoners of war, as well as the remains of those Killed In Action whose bodies had yet to be returned. The Americans promised, in article 21 of the Accords that, "the United States will contribute to healing the wounds of war and to postwar reconstruction of the Democratic Republic of Vietnam and throughout Indochina." *Id.* art. 21.

128. *See* Lang, *supra* note 105, at 270.

129. *Id.*

nam from the United States were reduced and President Carter sent an emissary to Vietnam to begin talks regarding the normalization of relations.¹³⁰ However, events in 1978 only served to rejuvenate the U.S. determination to keep the embargo in place. First, Vietnam announced that it was to be allied with the Soviet Union, and second, Vietnam invaded Cambodia and established a Communist regime in that country.¹³¹ Finally, Vietnam notified the United States that no more information pertaining to American POWs/MIAs would be forthcoming until the United States fulfilled its promise of reconstruction aid as agreed to in the Paris Accords.¹³² As a result, President Carter officially severed ties with Vietnam. The United States held this stance until 1992 when President George Bush was under fire from investors to open up the Vietnamese market to U.S. capital.¹³³

There is much evidence that Vietnam suffered under the embargo. Even though no other country directly joined the U.S. position, the U.S. embargo was readily, if reluctantly, acquiesced to by other states.¹³⁴ Ironically, advocates of the embargo in the United States used the economic instability in Vietnam (arguably caused by the embargo), as one argument for its continuation, stating that the benefits of lifting the embargo were outweighed by risks of investing there.¹³⁵

The embargo was one cause of Vietnam's reliance on trade with the Soviet Union and other Communist nations. After the war between the United States and Vietnam, the Soviet Union annually funneled an average of three billion U.S. dollars into

130. See Robert J. Sutter, *Vietnam-U.S. Relations: The Debate Over Normalization*, Congressional Research Service Issue Brief No. IB93081, at 2-4 (1993). Among the Administration's goals were easing Vietnamese nationals' emigration to America, resolving issues surrounding Amerasians, and release of Vietnamese who had been imprisoned in Vietnam for being American sympathizers during the war. *Id.*

131. See Tran-Trong, *supra* note 2, at 1587.

132. See Sutter, *supra* note 130, at 4.

133. See Castelli, *supra* note 112, at 311.

134. See Stauch, *supra* note 106, at 1009 n.99. Japan and France "were hesitant to begin economic relations with Vietnam for fear that the United States would take offense at such action." Andrew Sherry, *U.S. Embargo's End Will Bring Investment But Not Miracles to Vietnam*, AGENCE FRANCE PRESSE, Feb. 4, 1994, available in LEXIS, News Library, Curnws File.

135. See Raymond J. Ahearn & Robert J. Sutter, Congressional Research Service, *Vietnam-U.S. Normalization: Considerations for 1993*, 16 (1993).

the Vietnamese economy.¹³⁶ The Soviet Union's incentive for supplying a large amount of aid to Vietnam was not simply to spread Marxist ideology, but also in exchange for offshore oil exploration rights.¹³⁷ For Vietnam, this relationship with the Soviet Union led to Hanoi's modeling of the Vietnamese Government after the "central government" model of the Soviet Union. Unfortunately, Vietnam's economy soon paralleled the economic woes of the Soviet Union.¹³⁸ Under the Soviet model of "centralized state planning" the formerly private industries of Vietnam no longer profited, and the formerly profitable agrarian culture eroded and Vietnam became one of the poorest countries in the world with an average per capita income of under U.S. \$200 per year.¹³⁹

Vietnam's economic dependence on Soviet aid left it almost entirely at the mercy of the Soviet economy. Therefore, when the Soviet Union began to experience economic difficulties, repercussions were felt in Hanoi.¹⁴⁰ The lack of Soviet success with offshore oil exploration, coupled with the cuts in aid, led Vietnamese leaders to become disgruntled with the Soviet Union.¹⁴¹ At Vietnam's sixth Communist party Congress in 1986, the Government of Vietnam revealed a new economic policy: "doi moi" (renovation).¹⁴² This new policy was intended to provide an avenue to a market economy while the government continued to keep a tight hold of policy.¹⁴³ This first step in the relinquishing of total control over a failing economy was the genesis of the normalization of relations between Vietnam and the United States.

136. See Stauch, *supra* note 106, at 1009 n.101; Vietnam, *IBC Int'l Country Risk Guide*, Oct. 1991, available in LEXIS, Asiapc Library, IBCCRG File [hereinafter *Risk Guide*].

137. See Stauch, *supra* note 106, at 1009 n.101.

138. See Michael Hirsh, *Asia: East Asia's Not-Yet-Emerging Markets*, INST. INVESTOR, May 27, 1993.

139. See Stauch, *supra* note 106, at 1009.

140. See *Risk Guide*, *supra* note 136. Due to economic hardships, the Soviet Union was no longer able to fund Vietnam as it had. In 1991, the Soviet Union drastically cut its military aid to Vietnam. *Id.*

141. See *International Relationships*, POL. RISK SERVICES, Oct. 1992, available in LEXIS, Asiapc Library, Rbtibc File.

142. Chris Pritchard, *Vietnam: Welcoming a Capitalist Dawn*, BUS. REV. WKLY., Nov. 8, 1991, at 22.

143. See Teresa Poole, *Why Vietnam Needs America; They Want to Join the World But the United States Won't Let Them*, INDEPENDENT, Dec. 30, 1991, available in LEXIS, Asiapc Library, Allnws File.

VI. IMPLEMENTING STEPS FROM THE U.S./VIETNAMESE AGREEMENT TO END THE EMBARGO AGAINST CUBA.

In 1996, the United Nations voted 137-3 for a resolution calling for an end to the Cuban embargo by the United States.¹⁴⁴ Such a strong vote signified that the thirty-year embargo has not carried favor with the rest of the world. The advent of the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD) has not helped matters.¹⁴⁵ The attempt by the United States to proclaim through legislation that foreign investment in Cuba will have negative repercussions clearly represents a minority voice in the world today.¹⁴⁶ As one scholar notes, "the United States is the only major country that is not involved in the expansion of foreign investment in Cuba."¹⁴⁷

Currently, the question seems not to be whether the United States should lift the embargo against Cuba, but rather when and how the embargo will be lifted. The proposition may not be a simple one given that the United States has invested over three decades in a hard-line "full restitution or nothing" stance with Cuba.¹⁴⁸ However, the difficulties involved in the

144. UN: Assembly Again Calls for End of United States Imposed Embargo Against Cuba, M2 PRESSWIRE, Nov. 15, 1996, available in LEXIS, Allnws Library, Curnws File. The only three countries to vote against the resolution were the United States, Israel, and Uzbekistan. The resolution was based in obligations of the United Nations Charter and international law. *Id.*

145. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021-6091 (1996) [hereinafter Helms-Burton]; Lucien J. Dhooze, *Fiddling with Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 ARIZ. J. INT'L & COMP. L. 575 (1997); *Helms/Burton and D'Amato the European Response*, EXPORT PRACTITIONER, Dec. 15, 1996, available in 1996 WL 15975995. The controversy surrounding Helms-Burton stems from civil liabilities imposed on individuals or countries that "traffic in confiscated property" that purportedly still belongs to U.S. nationals. See Dhooze, *supra* at 576. Canada and Mexico, two NAFTA signatories, are especially perturbed by this policy, claiming that at its core, it is an extraterritorial exercise of power by the United States. *Id.* at 577.

146. See M2 PRESSWIRE, *supra* note 144.

147. See Travieso-Diaz & Ferrate, *supra* note 80, at 514.

148. See 22 U.S.C.A. § 1645 (West 1990). The statute effectively lays out the basic U.S. policy position towards Cuba and the embargo. The United States has stated that Cuba must have free elections, while permitting opposition parties to form, show respect for basic human liberties and civil rights, move towards a free market economic system, and commit itself to constitutional change. See Cuban Democracy Act of 1992, 22 U.S.C. § 6007(a) [hereinafter CDA]. This section of the CDA is buttressed by 22 U.S.C. § 6006, which allows for the provision of food,

lifting of the embargo should in no way deter the United States and Cuba from negotiating a BIT that would be profitable and comfortable for both nations.

Lifting the embargo as it stands today, with a multitude of statutes and regulations concerning its continuation and/or lifting, may not be as simple an issue as the lifting of the embargo against Vietnam. But an exploration of the practical steps necessary to lifting it reveals that the embargo against Cuba, if not the political repercussions, could be eliminated within one year after both countries begin to move toward issue settlement. This final section will examine the steps used by Vietnam and the United States to bring an end to the tensions between their governments, and how some of those same steps should be taken by the United States and Cuba.

VII. ENDING THE EMBARGO AGAINST VIETNAM

On January 28, 1995 Vietnam and the United States signed the "Agreement Concerning the Settlement of Certain Property Claims."¹⁴⁹ Article 2 of the Agreement states, "[i]n full and final settlement of the claims covered by this agreement, Vietnam shall pay the sum of U.S. \$208,510,481 to the United States and the United States shall unblock all assets of Vietnam that are blocked by the United States"¹⁵⁰ The signing of this document in Saigon was the end result of a process begun in 1992 by President George Bush and the Government of Vietnam to bring about normalization of the relationship between the United States and Vietnam.¹⁵¹

In 1992, President Bush allowed U.S. companies to sign contracts with Vietnamese entities if they held them until the lifting of the embargo and further allowed telecommunication

medicine, and medical supplies, if the President determines and certifies to the Committee on Foreign Affairs of the House of Representatives, and the Committee of Foreign Relations of the Senate, that Cuba has made a public commitment to free elections within 6 months, and has made a public commitment to respecting human rights, and is not providing weapons to any group or country that seeks the violent overthrow of the government of that country. See Travieso-Diaz, *supra* note 2, at 70.

149. Socialist Republic of Vietnam-United States Agreement Concerning the Settlement of Certain Property Claims, Jan. 28, 1995, U.S.-Vietnam, 34 I.L.M. 685, 686 (1995).

150. *Id.* at 687.

151. See EXPORT CONTROL NEWS, *supra* note 10.

links to be set up between the two countries.¹⁵² In February of 1994 President Clinton agreed to lift the nineteen-year-old trade embargo against Vietnam.¹⁵³ He cited Vietnam's co-operation on the MIA issue as the main reason for the lifting of the embargo, satisfying proponents of the embargo who viewed it as an effective bargaining tool in resolving the MIA issue.¹⁵⁴ Until then, the American public's perception had been that the MIA issue was unresolved and too important to be forgotten. Public opinion had thwarted attempts by Presidents Reagan and Bush to begin normalization talks or discussions of the expropriated property settlement claims of U.S. nationals.¹⁵⁵

While the embargo continued, American businesses forbidden from doing business in Vietnam were unable to tap a job market of 70 million well-educated and highly disciplined people, as well as natural resources, such as gas and oil.¹⁵⁶ Many other nations, out of either economic or political respect for the United States, refrained from doing business with Vietnam.¹⁵⁷ The effects of the U.S. embargo, coupled with the inefficiencies of the centrally planned economy caused Vietnam's economic production to stagnate into the 1980s.¹⁵⁸ Vietnam's standard of living dropped to a gross national product per capita of U.S. \$200.¹⁵⁹ As with Cuba and the rest of the Soviet Bloc, the collapse of the Soviet Union in 1991 helped create an atmosphere wherein the United States could realistically begin to look to normalize relations with these countries.

The Vietnamese Government, after the collapse of the Soviet Union, was faced with the need to revitalize their quickly dying economy. Vietnam devised new investment laws that were decidedly more relaxed than the previous ones.¹⁶⁰ These

152. *Id.*

153. See Castelli, *supra* note 112, at 297.

154. *Id.* at 316; Clinton Lifts Vietnam Embargo; Emphasizes Further POW/MIA Accounting, Daily Rep. for Executives (BNA), at A23 (Feb. 4, 1994).

155. See Lang, *supra* note 105, at 270.

156. *Id.* at 274; W. Gary Vause, *Doing Business with Vietnam—Prospects and Concerns for the 1990s*, 4 FLA. J. INT'L L. 231, 235 (1989).

157. See Lang, *supra* note 105, at 273.

158. ADAM FFORDE & STEFAN DE VYLDER, VIETNAM, AN ECONOMY IN TRANSITION 8-9 (1988).

159. VIETNAM'S DILEMMAS AND OPTIONS: THE CHALLENGE OF ECONOMIC TRANSITION IN THE 1990S 31 (Mya Than & Joseph L.H. Tan eds., 1993).

160. See Lang, *supra* note 105, at 274; Decree of the Council of Ministers Reg-

laws, drafted in 1988, had among their goals "the promotion of domestic economic development through increased exports, exploitation of natural resources, and encouraged broad foreign investment."¹⁶¹ As a result of the government's more relaxed attitude towards investment, foreign investment in Vietnam quickly increased from thirty-seven projects in 1988 totaling \$364 million, to over 150 projects in 1991 totaling \$1.2 billion.¹⁶² U.S. businesses recognized that foreign investment in Vietnam was growing steadily and these business interests began to pressure the American administration to allow them to show their intentions to deal with Vietnam if the embargo were lifted.¹⁶³

In April 1991, President Bush proposed a four step "road map" to normalization of relations with Vietnam, including the eventual lifting of the embargo.¹⁶⁴ The first phase of the "road map," with which the Vietnamese Government was to comply, consisted of signing a peace accord with Cambodia, and resolving all American POW/MIA cases. The United States would then begin talks on normalizing relations, and allow its citizens to travel to Vietnam.¹⁶⁵ Phase two consisted of Vietnam continuing to resolve the POW/MIA issue, and the U.S. restoration of telecommunication links with Vietnam and allowing non-governmental organizations (NGOs) to export humanitarian goods to Vietnam.¹⁶⁶ During this phase, the United States also sent delegates to Hanoi to begin negotiating the details of the process.¹⁶⁷

Phase three began after the Cambodian peace agreement and continued into the Clinton administration.¹⁶⁸ Vietnam

ulating in Detail the Implementation of the Law of Foreign Investment in Vietnam (No. 139/HDBT), Sept. 5, 1988, *translated in* E. ASIAN EXEC. REP., June 1989, at 25, 30.

161. See Vause, *supra* note 156.

162. See *Vietnam's Transition to a Market Economy: Reform Priorities-Foreign Direct Investment*, E. ASIAN EXEC. REP., Dec. 1993, at 9.

163. See Tran-Trong, *supra* note 2, at 1590; Clifford J. Shultz II. et al., *American Involvement in Vietnam, Part II: Prospects for U.S. Business in a New Era*, BUS. HORIZONS, Mar.- Apr. 1995.

164. See Nayan Chanda, *'Road Map' To Renew Ties with Hanoi Could Lead to Some Trade by Year End*, WALL ST. J., Apr. 15, 1991, at A10.

165. *Id.*

166. See Castelli, *supra* note 112, at 312.

167. *Id.* at 313.

168. *Id.*

was required to withdraw troops from Cambodia, uphold the Paris Peace Agreement, and continue to work on the POW/MIA issue. The United States, in turn, retracted its opposition to international aid for basic human needs and would assist in rebuilding the infrastructure in Vietnam.¹⁶⁹ With the lack of U.S. opposition and the commitment to the rebuilding process, Vietnam was pledged over U.S. \$2.5 billion in loans from sources such as the International Monetary Fund and the World Bank.¹⁷⁰ Also in Phase three, American firms were allowed to bid on internationally financed projects in Vietnam, and by 1996 the United States had invested U.S. \$1.2 billion in Vietnam, making America the sixth largest investor in Vietnam.¹⁷¹

The embargo had yet to be lifted, and President Clinton faced staunch opposition by Vietnam Veterans groups and supporters, who viewed the POW/MIA issue as a barrier to any relations with Vietnam.¹⁷² President Clinton, sympathetic to these groups' concerns, resolved to ensure that Vietnam continued to be forthcoming on the MIA issue.¹⁷³ Bolstering administration efforts to bring the embargo to an end were several U.S. Congressmen who had served in Vietnam and who openly advocated for the lifting of the embargo.¹⁷⁴ Finally, on

169. *Id.* Ironically at this juncture of the "road map" process the United States and Vietnam had come full circle in the 1990s to follow the tenets of the Paris Peace Accords set forth almost 20 years earlier.

170. *See* Tran-Trong, *supra* note 2, at 1592.

171. *Id.* at 1593.

172. *Id.*; Merrill Goozner, *Clinton Opens the Door to Vietnam: Firms Get Access to 'Asian Tiger'; Some Vets Protest*, CHI. TRIB., Feb. 4, 1994, at 1.

173. *See* Castelli, *supra* note 112, at 315. Reminiscent of President Bush's "road map," President Clinton cited four specific requirements for Vietnam before the embargo would be lifted:

- (i) all American remains were to be returned to the United States, and Vietnam was to document efforts to recover these remains;
- (ii) There was an issue of 92 "discrepancy cases" of MIAs, as well as "live sightings" which were to be resolved;
- (iii) Vietnam was to investigate further POW/MIA records in Laos; and
- (iv) Vietnam was to increase efforts to provide all POW/MIA records from governmental archives.

Id.

174. *See* Goozner, *supra* note 172, quoting Senator John McCain of Arizona, "The United States gave its word that we would lift the embargo if the Vietnamese substantially cooperated with us to determine the fate of our missing. They have done so. It would be unfair, and beneath the dignity of the United States, to go back on our word now." *Id.*

February 4, 1994, President Clinton lifted the embargo against Vietnam. He did not cite any economic reasons for doing so, but instead cited progress by the Vietnamese Government on the POW/MIA issue as the impetus for its lifting.¹⁷⁵

The two countries are currently in phase four of President Bush's "road map."¹⁷⁶ During this final phase, the United States is to "oversee free elections in Cambodia, and will remove remaining restrictions on lending to Vietnam by international financial institutions."¹⁷⁷ Vietnam and the United States have taken great strides towards normalizing relations between the two countries after many years of tension, war and sanctions. Vietnam now has to look towards gaining designation first as a "beneficiary developing country," which brings with it tariff preferences, and eventually to "most favored nation" status, which will allow Vietnam the same "duty, or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement."¹⁷⁸

VIII. ENDING THE EMBARGO AGAINST CUBA

Vietnam's situation in dealing with the United States parallels that of Cuba's on many levels. To begin, both countries share an adversarial history with the United States, marked by comprehensive trade embargoes. Second, in the 20th Century, both countries adopted Communism as their national philosophy to the chagrin of the United States. The United States viewed both countries as rife with opportunity for investment and trade, yet took direct actions against their acceptance of Communist ideology. Third, and most importantly, both countries relied heavily on the Soviet Union for economic and military aid, so much so, that when the Soviet Union collapsed in the late 1980s, both countries once again began exploring capitalism and the flow of a free-market to boost their economies. This section will explore and discuss ways that the United States and Cuba could agree to disagree philosophically and ideologically, yet renew and revitalize each

175. *Id.*

176. *See* Castelli, *supra* note 112, at 316.

177. *See* Tran-Trong, *supra* note 2, at 1594.

178. *Id.* at 1593-94; Generalized System of Preferences, 19 U.S.C §§ 2461-2466 (1994) (allowing the United States to grant tariff preferences to imports from certain countries).

other's opportunities for investment and trade into the 21st Century.

In 1994, after the fall of the Soviet Bloc, a participant at the first "Base Parliamentary Assembly," nationwide "town meetings" that were organized by Fidel Castro, stated:

Political and economic life in Cuba is undergoing certain transformation. Pressed by the severing of its Soviet economic lifeline, the regime of Cuban President Fidel Castro has come to the recognition that it can no longer remain isolated from the global economy . . . The forces now at work in Cuba have created an opportunity for the island's reemergence that may be unprecedented since the Castro revolution nearly 35 years ago.¹⁷⁹

This attitude is reinforced by the Cuban Government's actions over the last several years. In 1995, the Cuban Government had entered into 212 joint ventures, forming partnerships with Spanish companies, Mexican investors, Canadian firms, British companies, and Israeli vendors.¹⁸⁰ This was seen as a clear shift away from the centrally planned economy of a hard-line Communist ideology.¹⁸¹

Previously in Cuba, 80% of the total arable land, suitable for farming, was in the state's hands; today, that number has reversed, with 80% of farm land in the hands of farming cooperatives.¹⁸² These agrarian reforms follow the model used in Vietnam to transfer property from the state's control: cooperatives are allowed use of the land in return for 50% of the profits.¹⁸³ Cuban sugar exports are still one of the main revenue producers for the economy.¹⁸⁴ One commentator has noted, however, that the true "bottleneck" to Cuban recovery is Cuba's lack of fuel.¹⁸⁵ In 1986, 98% of the 13 million tons of

179. See Philippi, *supra* note 30, at 317 (citing a translation of a participant at the first Base Parliamentary Assembly, the Hospital Enrique Cabrera, Havana, (Jan. 25, 1994)).

180. Ricardo Chavira, *Weathering Economic Chaos: Castro's Grudging Reforms Help Cuba Defy Predictions of Failure*, DALLAS MORNING NEWS, Oct. 8, 1995, at 1A.

181. See Philippi, *supra* note 30, at 322.

182. *Id.* at 322-23.

183. *Id.* The Cuban government acknowledged that land previously operated by the State at a loss, is now turning a profit. *Id.*

184. *Id.* at 323.

185. *Id.* at 324.

oil used in Cuba was imported from the Soviet Union.¹⁸⁶ In 1992, however, imports dropped to less than two million tons with Cuba's own domestic production for 1993 at slightly over one million tons.¹⁸⁷ Though certainly an indication of the economic problems that Cuba faces, it is not truly counter-indicative of the growth that Cuba has enjoyed. The United States is the only major country that is not investing in Cuba; Canada, Mexico, the U.K., and other trading partners of the United States openly invest and trade with Cuba. One scholar has noted that the United States could become Cuba's largest trading partner in the region, once the sanctions have been lifted.¹⁸⁸

For years, other major trading partners of the United States have traded with Cuba; U.S. companies have even traded with Cuba through their foreign subsidiaries.¹⁸⁹ Though the United States has attempted to quell the influx of foreign capital into Cuba from U.S. trading partners, the efforts do not appear to have been effective.¹⁹⁰ In fact, they have resulted in alienation from, and tensions with, many of these same trading partners.¹⁹¹ The United States should instead focus on measures such as the "road map" strategy with Vietnam that President Bush implemented to the success of both countries.

The embargo against Cuba is based on four major statutes, and several steps are required before the President can lift the embargo.¹⁹² The sanctions against Cuba under the TWEA are imposed directly by the President; thus the President could lift any sanctions governed by the TWEA unilaterally.¹⁹³ The oth-

186. *Id.*

187. *Id.*

188. THE ATLANTIC COUNCIL OF THE UNITED STATES, A ROAD MAP FOR RESTRUCTURING FUTURE U.S. RELATIONS WITH CUBA 19 (1995).

189. See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 Am. J. Int'l L. 419, 421 (1996).

190. This note does not explore the ramifications or the implications of the Helms-Burton Act. Rather, Helms-Burton is yet another in a line of regulations and statutes that the United States has implemented to buttress the existing embargo. For an authoritative exploration of Helms-Burton, see Dhooge, *supra* note 145; Antonella Troia, Note, *The Helms-Burton Controversy: An Examination of Arguments That the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 Violates U.S. Obligations Under NAFTA*, 23 BROOK. J. INT'L L. 603 (1997).

191. See generally Dhooge, *supra* note 145.

192. See TWEA, *supra* note 59; FAA of 1961, *supra* note 56; CDA, *supra* note 148; and Helms-Burton, *supra* note 145.

193. See Casetelli, *supra* note 112, at 304.

er statutes, however, could require action by both the President and the Congress.¹⁹⁴

To begin, the Foreign Assistance Act (FAA) does not appear to prohibit a President to unilaterally lift the embargo. The FAA of 1961 was enacted by Congress and gave the President specific authority to impose a trade embargo against Cuba, and like the TWEA, it follows that the President could unilaterally lift any measures under the FAA.¹⁹⁵ However, the legislation, when examined closely, shows that the Congress intended for the United States to deny assistance to any countries which remained under Communist rule.¹⁹⁶ This would seem to indicate that the President would, at least, have to make a report to Congress demonstrating that Cuba had taken measures to hold elections with opportunity for participation by other political parties.

The Cuban Democracy Act of 1992 (CDA) was enacted by Congress to promote a "peaceful transition to democracy in Cuba."¹⁹⁷ The CDA covers "limitations on trade with countries that: (i) receive assistance from the former Soviet Union (such as Cuba); and (ii) trade with Cuba (in the form of foreign subsidiaries)."¹⁹⁸ There is a "two-track" policy underlying it.¹⁹⁹ One track consists of the sanctions against Cuba. The other track, reminiscent of Bush's Vietnam "road-map," is the U.S. resolve to assist Cuba if it decides to take on a democratic form of government.²⁰⁰ There are sections of the CDA that require the President to report to Congress that Cuba has met the conditions of the Act.²⁰¹ The Congress would need to receive notice of the President's intentions to lift the sanctions under it.²⁰² However, there is no provision in the CDA that Congress could countermand the President if there was a disagreement.²⁰³

194. See Travieso-Diaz, *supra* note 2, at 85.

195. *Id.* at 66.

196. *Id.*

197. *Id.* at 69.

198. *Id.* at 69-70.

199. *Id.* at 70.

200. *Id.*

201. See María L. Pagán, *U.S. Legal Requirements Affecting Trade with Cuba*, 7 PACE INT'L L. REV. 485, 501-02 (1995).

202. *Id.*

203. Travieso-Diaz, *supra* note 2, at 91.

Finally, the most punitive measure regarding the Cuban embargo is LIBERTAD.²⁰⁴ LIBERTAD is based on punitive measures against foreign investors who "traffic" in expropriated property located in Cuba.²⁰⁵ The measures include the exclusion from the United States of foreign investors who "participate in the trafficking."²⁰⁶ The trafficking is defined as the purchase of property from Cuba that Castro has confiscated in the past thirty-eight years.²⁰⁷ To countermand the measures set forth in LIBERTAD, the President would need to determine that Cuba has a transition government in place, and then report to the Congress on his determination before the Act could be repealed.²⁰⁸ Following a determination by the President that all statutory requirements have been met, an executive order could be issued instructing all the executive departments and agencies currently enforcing the embargo to begin termination measures.²⁰⁹

The obstacles that prevent a President from lifting the embargo against Cuba arbitrarily would appear to be no more than a facade of legislation.²¹⁰ If the President determines that it is prudent for the United States to once again open trade relations with Cuba, then the President may, after the appropriate reports to Congress, lift the embargo.²¹¹ Of course the American Congress has the power to override a Presidential decree by a two-thirds majority, and it seems that no President would take such a politically volatile step without extensive consultation with, and acquiescence of, Congressional leadership.²¹² Given the normalization of relations with the Communist leadership of Vietnam, America's reasons for imposing the embargo against Cuba can no longer be said to hinge on the Communist ideology of Cuba's leadership. Rather,

204. See Helms-Burton, *supra* note 145.

205. *Id.* § 6091.

206. *Id.* § 6091(a).

207. *Id.*; Ann Devroy, *Clinton to Tighten Sanctions on Cuba; Charter Flights Halted, Legislation Backed*, WASH. POST, Feb. 27, 1996, at A1.

208. See Helms-Burton, *supra* note 145 at § 6085.

209. *Id.* § 6085. These agencies include, *inter alia*, the Departments of State and the Treasury.

210. Closely examined, it appears that the President could circumvent Congressional intent and mandates if the atmosphere of the tensions between the United States and Cuba were to change.

211. See generally Travieso-Diaz, *supra* note 2.

212. U.S. CONST. art. II, §2, cl.2.

the final issue yet to be resolved, or discussed by the United States and Cuba, surrounds the property claims resulting from the expropriation of property during the Castro revolution.

As the statutory authority, specifically LIBERTAD, suggests, the settlement of claims for property seized during the beginning of Castro's rise to power are as yet unsettled.²¹³ International law is made up of international custom and international agreement.²¹⁴ Only states consenting to such agreements are bound by the agreements.²¹⁵ Accepted practices among states, as well as international tribunal decisions, can give rise to international custom.²¹⁶ International law requires a state to pay full compensation for "takings" of foreign owned property.²¹⁷ The Restatement (Third) of the Foreign Relations Law of the United States provides that a taking that is discriminatory, not for a public purpose, and not accompanied by "prompt, adequate, and effective" compensation is unlawful.²¹⁸ The United States maintains that the property seized by Cuba was part of an expropriation program that discriminated against U.S. nationals, was not for a public purpose, and compensation that was to have been prompt, adequate, and effective, has never been paid.²¹⁹ Though there are arguments from developing nations that "full" compensation should be a relative term so as not to upset a developing econo-

213. See Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lesson for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 623 (1996); MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF PROPERTY RIGHTS IN CUBA* (1975).

214. See Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945). The first, second, and fourth sources of international law are: first, "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;" second, "international custom, as evidence of a general practice accepted as law;" and fourth "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *Id.* arts. 38(1)(a), (b), (d).

215. *Id.* art. 38 (1)(a).

216. *Id.* art. 38 (1)(b).

217. See RESTATEMENT, *supra* note 17.

218. *Id.*; Smagula, *supra* note 26, at 78.

219. See generally Smagula, *supra* note 26. There is debate among the international community that the U.S. standard, "prompt, adequate, effective," is just that—a U.S. standard. There is much evidence in international law, and custom that uncompensated takings are illegal, and should be rectified—the debate is over which standard will be applied. *Id.*; S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal Law?*, 55 AM. J. INT'L. L. 863 (1961).

my, international tribunals have held that full compensation is the standard under international law.²²⁰

The issue of settling the property claims against Cuba would seem to be as simple as Cuba signing an agreement with the United States, much as Vietnam did, promising to compensate the U.S. Government and its national claimants what it owes them.²²¹ For Vietnam, the amount was U.S. \$208 million, in Cuba's case the amount is approximately U.S. \$13 billion.²²² The amount of money owed by Cuba for the takings brings about a dilemma for the United States. Cuba, in its current economic state, would not be able to pay U.S. \$13 billion; conversely, if the U.S. Government were to settle with Cuba for an amount less than that owed, the U.S. Government could be held liable to any of the over 5000 claimants to the taken property for the difference.²²³

The potential liability of the U.S. Government may be the motivation that has kept the United States from negotiating a settlement with Cuba. As Cuba's economy has continued to grow, albeit at a slow pace, there appears to be little chance that the United States could negotiate a one-time payment from Cuba for what has continued to grow to well over U.S. \$13 billion. However, utilizing a carefully planned business investment treaty, as well as a "road map" modeled on the tactics used with Vietnam, the United States could approach Cuba with a plan that would not only satisfy the claims for taken property and avoid American liability and litigation with the former property owners, but would sufficiently bolster the Cuban economy so that full compensation could be paid over time.

The U.S. statutes currently in place do not require full

220. See Smagula, *supra* note 26, at 83.

221. See Chanda, *supra* note 164.

222. See 1987 Foreign Claims Settlement Comm. Ann. Rep. 55. This figure is the value of the property at the time of taking multiplied by the internationally accepted standard of six percent interest compounded annually, as of 1995. See Smagula, *supra* note 26, at 68.

223. See *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (holding that the office of the President does have the power to "settle" claims against another country in the interest of settling an international dispute). *But see* *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960) (holding the destruction of a property's value to its former owner due to a federal government settlement with a foreign country leaves the federal government liable to the former owners under the Fifth Amendment's "Takings Clause").

compensation for taken property before the embargo against Cuba may be lifted.²²⁴ Phase one of the "road map" with Cuba, therefore, would consist of the United States approaching Cuba with a draft BIT,²²⁵ as well as indications that the embargo will be lifted if certain steps are followed: Cuba will have to facilitate a change in policy towards the United States and indicate a willingness, by signing the BIT, to begin compensation for the taken property, as well as a willingness to consider multi-party elections.

Phase two of the "road map" would consist of the partial lifting of the embargo against Cuba by having the United States alleviate travel restrictions, and open telecommunications lines and services with Cuba. This would begin to fuel the Cuban tourism economy, and would allow Cuba to begin updating its obsolete communications technology systems.²²⁶ Conversely, Cuba would begin payments into a central compensation fund of a set amount per year, to be determined by the two governments. These payments would be compensation for any properties that Cuba is unwilling, or unable to restore, to the former owners. Cuba would also have to hold free elections with at least one other viable political party other than the Communist party.

Phase three, the final phase, would consist of the transition of Cuba's Government from a one party oligarchy to a freely elected ruling body. The United States would then lift all trade restrictions against Cuba, as per the BIT. The influx of trade from the United States would strengthen Cuba's economy sufficiently so that the graduated repayments to former owners of property in Cuba would compensate them for their losses, and the U.S. Government would not be liable for any losses.

224. See TWEA, *supra* note 59; FAA of 1961, *supra* note 56; CDA, *supra* note 148; and Helms-Burton, *supra* note 145.

225. Bilateral investment treaties protect U.S. interests in foreign investment agreements with other countries, specifically containing "explicit provisions that ensure compensation for expropriated property." Smagula, *supra* note 26, at 86; Kathleen Kunzer, *Developing a Model Bilateral Investment Treaty*, 15 L. & POL'Y INT'L BUS. 273, 273 (1983).

226. As of 1993, there were 21 telephones per 1,000 persons. KCWD, *supra* note 14.

IX. CONCLUSION

Admittedly, the resolution presented above takes a simplistic view of the diplomatic and political processes necessary before the steps to lifting the Cuban embargo are taken by either nation. There is no discussion of the anti-Castro lobby in the United States and the ramifications faced by politicians who appear to support the normalization of relations with Cuba. There also is not a discussion of Castro's repeated statements regarding his refusals to "deal" with the United States. The reason for censoring the debate in this way is not to water down issues that are politically important to both sides, but rather to present an argument in the context of hindsight, looking at the relations between the United States and Vietnam without the seemingly requisite accompanying political rhetoric.

At roughly the same time that Cuba became a Communist state, the United States and Vietnam began a military conflict that resulted in the loss of thousands of lives on both sides. Two decades later both countries were able to begin to work out their differences in the best long-term business and investment interests of each. Cuba and the United States, two countries who have only waged a war of words, are urged to do the same.

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