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Unintended Consequences for Reversing Rapprochement: Is the US Government Liable for a Loss of US Property in Cuba?

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Unintended Consequences for Reversing Rapprochement: Is the US Government Liable for a Loss of US Property in Cuba?

ABSTRACT

In 2014, the United States announced a historic reopening of ties with Cuba. This effort at rapprochement included restoring diplomatic relations and easing regulatory restrictions to facilitate greater business, trade, travel, and communication between the two nations. However, the US government's decision in 2017 to reverse course and reinstate the economic embargo against Cuba could result in significant legal and financial consequences for both US claimants who hold property in Cuba and the US government. One issue that arises is whether US corporations and individuals, who invested in property in Cuba following the Obama-era easing of restrictions, have a constitutional right to just compensation for their loss. Under the Fifth Amendment of the U.S. Constitution, if the government has expropriated one's property, a claimant can allege a regulatory taking and may seek fair compensation from the government. In addition to direct takings of US property overseas, the Fifth Amendment may have applications to takings by foreign governments, and therefore there is the potential of a court holding the United States liable for a foreign taking of US property in Cuba. Finally, if a court concludes that a US claimant has not demonstrated evidence of a foreign taking, there remain several alternatives for US claimants seeking compensation for their property that has been seized, frozen, or made inaccessible following the US regulatory shift preventing trade and travel with Cuba.

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I. INTRODUCTION

In December 2014, U.S. President Barack Obama announced a historic reopening of ties between the United States and Cuba.[1] This effort at rapprochement included plans to restore diplomatic relations and ease regulatory restrictions to facilitate greater business, trade, travel, and communication between the two nations.[2] Since 1962, an economic embargo had prevented the routine flow of goods, remittances, and people between the United States and Cuba.[3] The trade embargo, which was implemented largely in an effort to suppress and defeat the Castro regime, has a long and difficult history, exacerbated by Cuba's policies that nationalized American-owned

1. Matt Peppe, *How Obama Could End the Cuban Embargo*, COUNTERPUNCH (Jan. 12, 2015), https://www.counterpunch.org/2015/01/12/how-obama-could-end-the-cuban-embargo/ [https://perma.cc/X9EX-8M95] (archived Oct. 24, 2019).

2. *U.S.–Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/us-cuba-relations (last updated Mar. 7, 2019) [https://perma.cc/T76D-TEYB (archived Oct. 24, 2019).

3. *Id.*

properties and raised tariffs on US imports.[4] The initial embargo received sustained support through ten US administrations until President Obama took office.

When Presidents Obama and Raul Castro announced that their governments would restore full diplomatic ties and begin plans to liberalize trade and travel restrictions on Cuba, many US and multinational firms immediately began making investments and arranging business deals that would enable them to expand operations in Cuba as the market opened up to the United States.[5] Substantial business and investment opportunities developed across many industries, particularly in the travel, telecommunications, and agricultural sectors, as new policies favored such investments by reducing regulatory barriers and liberalizing market access between the two nations.[6] However, when President Donald Trump was elected in November 2016, his administration quickly reversed many of these Obama-era policies.[7] The policy shift left in its wake nonviable investments in Cuban property by US firms, like Google and Marriott Hotels, who had not expected that their ventures in Cuba would become frozen, and those economic interests potentially extinguished by future presidential administrations.[8]

President Trump's policy reversal, which channels US economic activities away from the Cuban government, had the practical effect of slowing down US business activities in Cuba, and for some US firms, the shift completely deprived them of their property in Cuba.[9] Corporations like AT&T and Starwood Resorts were suddenly unable to utilize their property or manage existing investments, despite regulatory assurances made during the Obama administration.[10]

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4. *See id.*; *see also* Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901 (1995).

5. Anya Landau French et al., *US Investment Climate in Cuba May Be Improving*, LAW.COM: DAILY BUS. REV. (Aug. 20, 2018), https://www.law.com/dailybusinessreview/2018/08/20/us-investment-climate-in-cuba-may-be-improving/ [https://perma.cc/5AY2-KCTW] (archived Oct. 24, 2019) [hereinafter *Cuba Investment Climate*].

6. *U.S.–Cuba Relations*, *supra* note 2.

7. *See* Jon Lee Anderson, *Cuba's Next Transformation*, N.Y. TIMES (Jan. 5, 2019), https://www.nytimes.com/2019/01/05/opinion/sunday/cubas-next-transformation.html [https://perma.cc/9TY2-PD5X] (archived Oct. 24, 2019).

8. *See* Alan Gomez, *Google Inks Deal with Cuba to Speed Up Internet Service*, USA TODAY (Dec. 12, 2016), https://www.usatoday.com/story/news/world/2016/12/12/google-cuba-sign-deal-speed-up-internet-service/95337148/ [https://perma.cc/V8AL-JSN9] (archived Oct. 24, 2019); *This New Luxury Hotel in Havana Is Making U.S.-Cuba History*, FORTUNE (June 28, 2016), https://fortune.com/2016/06/28/sheraton-hotel-havana-cuba/ [https://perma.cc/2CG6-R6KQ] (archived Oct. 24, 2019) [hereinafter *Marriott Hotel in Havana*].

9. *See* Anderson, *supra* note 7.

10. *See* Danny King, *Starwood, Marriott get government approval for Cuba hotels*, TRAVEL WKLY. (Mar. 20, 2016), https://www.travelweekly.com/Travel-News/Hotel-News/

Herein lies a potential constitutional challenge against the US government. The constitutional right to private property, and its underlying protection, is often challenged under the "takings clause" of the Fifth Amendment, which states that "private property [shall not] be taken for public use, without just compensation."[11] A takings claim provides US nationals legal footing to challenge the US government over their lost property, if a claimant has not been adequately compensated.[12] To determine whether a government action constitutes a Fifth Amendment taking, courts conduct a two-part analysis: first, a trial court determines whether the claimant has identified a cognizable property interest under the Fifth Amendment that is the subject of the taking, and then, if it finds that a cognizable property interest exists, it considers whether that property interest was taken by the government.

The Supreme Court has held that if the government expropriated one's property, a takings action may be justified against the United States and the claimant may seek his constitutional right to just compensation.[13] But what specific government action effectively amounts to a taking presents a challenging question, and thus is a central issue as it pertains to property in Cuba.[14] By expanding the jurisprudence around a takings claim to include "regulatory takings," the court has recognized that regulatory interferences with property rights can have severe economic effects for property owners to the same degree as appropriations and physical invasions of land, effectively depriving the owner of the utility or value of that property.[15] Moreover, because courts have found that Fifth Amendment protections can apply outside the United States, the regulation of non-real-estate property, including by means of an embargo, has prompted fresh and

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Starwood-Marriott-get-government-approval-for-Cuba-hotels [https://perma.cc/EMF5-SJ45] (archived Oct. 24, 2019); Aishwarya Venugopal, *AT&T Signs Deal to Offer Roaming Services in Cuba*, REUTERS, Aug. 22, 2016, https://www.reuters.com/article/us-cuba-usa-at-t/att-signs-deal-to-offer-roaming-services-in-cuba-idUSKCN10X1RO [https://perma.cc/VBE4-XG4P] (archived Oct. 24, 2019) [hereinafter Venugopal, *AT&T Deal*].

11. U.S. CONST. amend. V.

12. *See* Remsen M. Kinne, Note, *Making America Pay: Just Compensation for Foreign Property Takings*, 9 B.C. THIRD WORLD L.J. 217, 218–19 (1989).

13. United States v. Jones, 109 U.S. 513, 514–15 (1883).

14. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that a regulatory act constitutes a taking which requires just compensation depending on the extent of diminution in the value of the property).

15. *See* ROBERT MELTZ, CONG. RESEARCH. SERV., 97–112, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 1 (2015), https://fas.org/sgp/crs/misc/97-122.pdf [https://perma.cc/UMP9-CED2] (archived Oct. 24, 2019) [hereinafter SCOTUS TAKINGS DECISIONS]. Regulatory takings are those in which a government regulation limits the use of private property to such a degree that the regulation effectively deprives a property owner of economically reasonable use or value of his property to such an extent that it deprives him of utility or value of that property. *Id.*

heightened scrutiny of government conduct as it relates to private property.[16]

Courts have held that Fifth Amendment protections can apply extraterritorially.[17] In particular, a taking prompted by a foreign government constitutes a Fifth Amendment violation if the claimant can demonstrate that the taking was done on behalf of the US government.[18] But, the Fifth Amendment can also support a takings claim where the seizure of property abroad by a foreign government does not necessarily lead to the US government acquiring a possessory interest in the property.[19] The Fifth Amendment's scope has been extended to include "indirect" takings by foreign governments.[20] This suggests that the United States can be liable for a foreign taking (and just compensation) simply by encouraging foreign sovereigns to adopt domestic policies or programs that result in the seizure of a US claimant's property.[21] Accordingly, this Note examines the modern frameworks utilized by US courts to determine if a foreign taking has occurred, and then applies various judicial tests to determine whether US property losses in Cuba constitute a Fifth Amendment taking. It is also important to consider whether a taking exists in cases where the US government has extinguished a claimant's "live expropriation action" against a foreign government, as this would allow the claimant to seek just compensation.[22]

In the context of this policy dilemma, US investors and corporations must put forth enough proof to establish that US government involvement in the foreign expropriation was "sufficiently direct and substantial."[23] If there is clear evidence that the Cuban government seized or froze US citizens' property at the prompting of the US government or another foreign sovereign, this may confirm a Fifth Amendment taking in the eyes of the court.[24] However, if the US government can show that its policy changes do not amount to a clear-cut taking and are nonjusticiable questions, then it will be difficult, if

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16. *See id.*

17. *See, e.g.*, Turney v. United States, 115 F. Supp. 457, 463–64 (Ct. Cl. 1953); *see also* Seery v. United States, 127 F. Supp. 601, 606 (Ct. Cl. 1955).

18. *See Turney*, 115 F. Supp. at 464 (The Philippine government seized a US corporation's radar equipment located in the Philippines. Pursuant to a takings claim, the Court of Claims in *Turney* awarded the corporation just compensation because the court found that foreign sovereigns may be considered "agents" of the U.S. in foreign takings actions.).

19. Kinne, *supra* note 12, at 222–23.

20. Langenegger v. United States, 756 F.2d 1565, 1571–72 (Fed. Cir. 1985).

21. *See id.* (noting there is nothing to suggest that the United States cannot be held responsible for an expropriation of US citizens' property abroad by a foreign sovereign, but finding that in this case US involvement was insufficient to render liability for a "taking").

22. *See* Kinne, *supra* note 12, at 238 n.138 (citing *Langenegger*, 756 F.2d at 1573).

23. *Id.* at 238 (quoting *Langenegger*, 756 F.2d at 1571.

24. *See id.*

not impossible, for US property holders to demonstrate the existence of a regulatory taking for a foreign expropriation of property in Cuba.

If US claimants cannot successfully meet this burden in a US court, the best course of action may be to litigate their claim under the Helms-Burton Act of 1996. Title III of Helms-Burton extended the territorial application of the embargo to apply to foreign companies trading with Cuba.[25] The act permits US companies and individuals to seek compensation in US federal court against those trafficking in expropriated property taken by the Cuban government.[26] Title III also covers property formerly owned by Cubans who have since become US citizens.[27] Alternatively, a US citizen seeking compensation could lobby the US government to negotiate with the expropriating country for an award on its behalf,[28] or can pursue a local action against the foreign sovereign for just compensation in cash.[29] Both approaches may be available to US property owners alleging a taking in Cuba. This Note explores each of these solutions in more depth and considers other remedies available to property owners in the U.S. Court of Federal Claims.[30]

While this Note discusses the United States' trade embargo with Cuba and examines the scope of a foreign taking, the determination of whether the embargo amounts to a constitutional taking—as a result of the government's decision to restore the embargo in 2017—may also have consequences for future US government actions. If a Fifth Amendment claim exists as a result of its regulatory action, the United States will undoubtedly face future takings challenges stemming from its policies or the policies of other sovereigns. In addition, any litigation that results from this shift in policy could have a considerable impact

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25. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton), Pub. L. No. 104–14, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–6091 (2000)).

26. *Id.* § 302.

27. *Id.* § 303.

28. *See* Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 249 (1983), *aff'd* 765 F.2d 159 (Fed. Cir. 1985).

29. *See* Kinne, *supra* note 12, at 223.

30. The U.S. Court of Federal Claims, formerly called the Claims Court, is the definitive arbiter of the Constitution's guarantee that private property shall not "be taken for public use, without just compensation" (Fifth Amendment takings claims). Claimants seeking monetary compensation for a foreign taking in the Court of Claims must satisfy the requirements of the Tucker Act, which grants the court special jurisdiction to hear those claims against the US government defined by Congress. Under the Tucker Act, the Court of Claims is responsible for determining whether the government's regulatory act constituted a "taking" under the Fifth Amendment—a factual inquiry—and deciding appropriate compensation liability. *See* Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549, 549–50 (1991). The Claims Court shares jurisdiction with US district courts for claims up to $10,000, but has exclusive jurisdiction for claims in excess of that amount. 28 U.S.C.A. § 1346 (West 2013). Because the Court of Claims lacks the authority to grant declaratory or injunctive relief, any foreign takings claim for equitable relief is thus removed from the court's jurisdiction. *See* Kinne, *supra* note 12, at 245.

on future decisions and might well result in the United States needing to consider the impact and costs of future takings challenges when deciding whether to adopt certain policy or regulatory actions.

This Note critically examines several property investments made in Cuba by various US corporations following President Obama's decision to ease trade restrictions and lift the economic embargo and whether the subsequent loss of investment opportunities under the Trump administration may amount to a taking by the US government.[31] Part II of this Note discusses the history of the United States' trade embargo against Cuba, focusing on its expansion during several US administrations. This section concludes with a discussion of the takings doctrine and its application extraterritorially. Part III analyzes foreign takings jurisprudence and the necessary elements for a successful claim and examines the remedies available to claimants. Part IV suggests that US corporations may be able to bring a Fifth Amendment takings claim as a result of their lost investments and the government's expropriation of future opportunities to use their property, and also proposes various alternative legal solutions for other US claimants with property rights in Cuba. Lastly, Part V considers the policy implications of this Note and provides a brief conclusion.

II. BACKGROUND

A. *The US Trade Embargo Against Cuba: from Past to Present*

Cuba, the island nation located only ninety miles south of Florida's coast, has a long and at times tumultuous relationship with the United States. Over the last sixty years, the United States–Cuba relationship has largely been shaped by a sustained trade embargo levied against Cuba that was imposed after the ascendency of the Castro regime.[32] On January 1, 1959, a group of Cuban revolutionaries overthrew the government of Fulgencio Batista, a regime supported by the United States, and established a socialist state closely allied with the Soviet Union.[33] The following year in October 1960, the US government blocked all oil exports to Cuba, leaving the regime of Fidel

31. In the context of the embargo, the total amount of money, real property and business opportunities lost as a result of this change in policy remains unknown. This Note merely makes the case that such business losses exist, and in response, considers whether such monetary loss or deprivation of real property can be litigated by US claimants and compensated under a Fifth Amendment takings claim.

32. An embargo is a government order that restricts commerce or the exchange of goods with a specific country, often designed to isolate a country politically and economically, and create difficulties for its governing regime. *See* Daniel Liberto, *An Embargo Defined*, INVESTOPEDIA (Jun. 26, 2019), https://www.investopedia.com/terms/e/embargo.asp [https://perma.cc/J5MN-EDTV] (archived Oct. 24, 2019).

33. *U.S.–Cuba Relations*, *supra* note 2.

Castro dependent on Soviet crude oil, which American firms on the island refused to refine.[34] In response, the Cuban government nationalized all American-owned oil refineries in Cuba without compensation.[35] This action prompted the US government to place an embargo on all exports to Cuba, except for food and medicine.[36] The Castro regime responded by nationalizing American businesses and a majority of the privately owned American properties on the island.[37] Despite these takings of American assets and property by the Cuban government, no compensation was issued for the seizures.[38] By 1961, Cuba and the United States severed diplomatic relations and the Eisenhower administration severely restricted travel from the United States to Cuba.[39] Shortly thereafter, on February 7, 1962, President John F. Kennedy expanded the terms of the embargo to ban nearly all Cuban trade and imports, including products completed or assembled outside of Cuba.[40]

In the years that followed, the United States maintained the trade embargo with Cuba. In 1963, the Kennedy administration issued the *Cuban Assets Control Regulations*, new economic sanctions that froze Cuban assets in the United States.[41] Despite a brief easing of restrictions under the Carter administration, President Reagan restored the economic embargo in 1982.[42] Subsequently, the Helms-Burton Act of 1996 reaffirmed the trade embargo on Cuba and broadened its scope to include foreign companies trading with Cuba.[43] The act penalized companies that do business with Cuba by preventing them from transacting in the United States.[44] The basis for this restriction was that foreign companies transacting with Cuba were "trafficking" in stolen American-owned properties confiscated by Cuba after the revolution, and thus should be excluded from conducting business in the United States.[45] The law also included a provision establishing civil liability in US courts for any person or company, foreign or domestic, trafficking in confiscated property claimed by US

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34. Gary Clyde Hufbauer et al., *Case Studies in Economic Sanctions and Terrorism: US v. Cuba*, PETERSON INST. FOR INT'L ECON. 1 (2011) [hereinafter *U.S.–Cuba Sanctions*].

35. Peppe, *supra* note 1.

36. *U.S.–Cuba Sanctions*, *supra* note 34.

37. Peppe, *supra* note 1.

38. Kevin J. Fandl, *Trading with the Enemy: Opening the Door to U.S. Investment in Cuba*, 49 GEO. J. INT'L L. 563, 588 (2018).

39. *U.S.–Cuba Sanctions*, *supra* note 34.

40. *U.S.–Cuba Relations*, *supra* note 2.

41. Fandl, *supra* note 38, at 569.

42. *See U.S.–Cuba Sanctions*, *supra* note 34, at 3–4.

43. *Id.* at 8–9.

44. *Id.*

45. The Helms-Burton Act defines "confiscation" to include any property seized by the Cuban government after January 1, 1959, without adequate compensation or permission of the owner or the claim being settled by an appropriate settlement procedure. Helms–Burton Act, 22 U.S.C. § 6023(4) (2018).

citizens.[46] While the embargo was slightly relaxed in 2000 to permit the export of agricultural products and medicine to Cuba for humanitarian purposes,[47] Congress maintained its strong support for the policy and the embargo remained largely intact over the course of ten US administrations.[48]

B. *The Obama Administration's Easing of Trade Restrictions on Cuba and the Resulting Investment Deals During the Obama-Era*

In December 2014, President Obama, the eleventh president to deal with the trade embargo, declared intentions to normalize bilateral relations and restore full diplomatic ties with the island nation.[49] During his first term in office, President Obama eased restrictions on remittances and travel, and loosened sanctions in other areas.[50] The new Cuban government under Raul Castro also signaled a willingness to liberalize and relax restrictions on some sectors of Cuba's largely state-run economy, such as agriculture and small businesses.[51] These changes formed the blueprint to restoring diplomatic relations between the two countries. The effort included new policies to loosen economic regulations that would facilitate increased travel, commerce, and the free flow of information to, and within, Cuba.[52] For example, the US government eased travel restrictions, authorized commercial US airlines to offer service to Cuba, raised limits on remittances, allowed US financial institutions to open correspondent accounts at Cuban financial institutions to process merchant and other transactions, and permitted several other activities to reduce regulatory barriers to providing financial, manufacturing, telecommunications, and shipping services.[53] The two governments also reopened their embassies in Havana and Washington, D.C.[54] Notably, however, the United States

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46. *Id.*; *see also* Fandl, *supra* note 38, at 588–89.

47. *See generally* Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549A-71 (codified as amended at 22 U.S.C. §§ 7201–7211 (2012)).

48. Greg Myre, *The U.S. and Cuba: A Brief History of a Complicated Relationship*, NAT'L PUB. RADIO (Dec. 17, 2014), https://www.npr.org/sections/parallels/2014/12/17/371405620/the-u-s-and-cuba-a-brief-history-of-a-tortured-relationship [https://perma.cc/F8FS-3SFF] (archived Oct. 24, 2019).

49. *See U.S.–Cuba Relations*, *supra* note 2.

50. *Id.*

51. *Id.*

52. Press Release, U.S. Dep't of the Treasury, Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions (Jan. 15, 2015) (on file with author) [hereinafter Treasury Press Release].

53. *Id.*

54. *U.S.–Cuba Relations*, *supra* note 2.

did not lift the trade embargo outright, despite requests by President Obama and many members of Congress.[55]

The government's announcement to loosen restrictions on trade and travel with Cuba was met with enthusiasm by tourists and businesses. US and other multinational corporations launched immediate efforts to gain a foothold in the Cuban market and begin dealings as soon as politically feasible.[56] With the opening of Cuba's market, there existed significant opportunities to expand business operations and make new investments, particularly for businesses in the hotel, airline, cruise line, telecommunications, and agricultural sectors.[57] While many of these corporations were newcomers to Cuba, several industries and companies operated extensively throughout Cuba prior to the rise of Fidel Castro's regime and the nationalization of US assets in Cuba.[58] In fact, when Castro came to power in 1959, a number of key portions of the Cuban economy were primarily under the control of US corporations, including a significant share of the island's natural resources, railroads, and farmland.[59]

In response to the Obama administration's shifting Cuba policy, US firms made sizeable economic investments in or relating to Cuba. For example, Carnival Cruise Line gained approval in May 2016 to sail from Miami to Havana, allowing travelers to sail aboard one of Carnival's cultural exchange programs to visit Cuba.[60] The announcement came "only hours after President Obama shook hands with Cuban president Raul Castro during President Obama's historic visit to the island."[61] However, approval from the Cuban government depended on examining and refining infrastructure at the island's ports to support cruise ships.[62] Carnival was required to transfer its smaller seven hundred–passenger ship from the United Kingdom because it was one of the only ships small enough to dock at Havana's ports.[63] In addition, American Express announced plans under the new regulations to expand its business operations into Cuba for the first

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55. *See* Barack Obama, U.S. President, Remarks by President Obama to the People of Cuba at Gran Teatro de la Habana (Mar. 22, 2016) (transcript available with the Office of the Press Secretary of the White House) ("As President of the United States, I've called on our Congress to lift the embargo.").

56. *See* Gomez, *supra* note 8; *Marriott Hotel in Havana*, *supra* note 8.

57. *See U.S.–Cuba Relations*, *supra* note 2.

58. *See* Ashley Morales, *The Future of U.S. Claims for Property Restoration in Cuba*, 24 U. MIAMI INT'L & COMP. L. REV. 159, 165 (2017); *Cuban Claims FAQs*, CERTIFIED CUBAN CLAIMS, http://www.certifiedcubanclaims.org/faqs.htm (last visited Jan. 16, 2019), [https://perma.cc/PN5R-KGQ5] (archived Oct. 24, 2019).

59. Fandl, *supra* note 38, at 572–73.

60. Chabeli Herrera, *Carnival Gets Approval to Start Cruising from Miami to Cuba in May*, MIAMI HERALD (Mar. 23, 2016), https://www.miamiherald.com/news/business/tourism-cruises/article67400067.html [https://perma.cc/QU2G-UL7J] (archived Oct. 24, 2019).

61. *Id.*

62. *Id.*

63. *Id.*

time.[64] Prior to the policy shift, American Express—a US company—was barred from doing business in Cuba.[65] But under the new guidelines, American Express began allowing US travelers to use its credit and debit cards on the island and launched a program that permitted US banks to open correspondent accounts in Cuba to process certain transactions.[66]

In another example, AT&T made investments to offer roaming services in the Cuban market, becoming the third US wireless carrier, after Verizon and Sprint, to provide such services in Cuba.[67] In August 2016, AT&T signed a deal with Cuba's state-owned telecommunications provider, *Empresa De Telecomunicaciones De Cuba* (ETECSA), to offer direct roaming services to customers in or visiting Cuba, which would reduce the costs of calls between the United States and Cuba for the telecommunication giant.[68] Additionally, Google signed an agreement with Cuba's state-run telecommunications company in 2016 to boost Internet and broadband access for Cubans using YouTube and other Google products.[69] This deal was announced by President Obama during his historic visit to the island nation.[70] The expansion of business ventures continued even after the close of the Obama administration. Google invested in several submarine cables to expand its connectivity and internet services on the island even after President Trump had been elected.[71] Each of these regulatory-backed investments and ventures was launched in reliance upon, and as a result of, President Obama's policy shift that opened Cuba to US travelers and businesses.

C. *The Trump Administration's Tightening of Trade Restrictions*

After assuming office in January 2017, President Donald Trump began to reverse key actions taken by the Obama administration that had liberalized trade with Cuba, with the prospect that further roll back of Obama-era policies might occur. Under new restrictions that took effect in November 2017, the Trump administration retightened

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64. Mimi Whitefield, *American Express Says Sí to Cuba*, MIAMI HERALD (Jan. 27, 2015), https://www.miamiherald.com/news/business/article8409144.html [https://perma.cc/GL9U-HE4G] (archived Nov. 3, 2019).

65. *Id.*

66. *Id.*

67. Venugopal, *AT&T Deal*, *supra* note 10.

68. *Id.*

69. *See* Gomez, *supra* note 8.

70. Melissa Chan, *Google Set to Expand Internet Access in Cuba, Obama Says*, TIME (Mar. 21, 2016), https://time.com/4265721/google-cuba-obama-internet/ [https://perma.cc/QU43-RHYT] (archived Oct. 24, 2019).

71. Nora Gámez Torres, *Google and Cuba Close to Finalizing Agreement to Expand Internet Access on the Island*, MIAMI HERALD (June 6, 2018), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article212660549.html [https://perma.cc/7TZ4-FHZV] (archived Oct. 24, 2019).

the economic embargo by banning US firms and citizens from doing business with dozens of entities tied to Cuba's military, intelligence, and security agencies.[72] The regulatory restrictions were applied to stores, hotels, marinas, tourist agencies, and rum factories frequently visited by Americans; all of these became off-limits to Americans because they are owned by or associated with the Cuban government.[73] The changes also ended "people-to-people" visas, which had allowed US travelers to visit Cuba without authorized tour operators, and restricted educational visas.[74]

In channeling economic activities away from entities connected to the Cuban government, the practical effect of this policy shift for US businesses was a slowdown, if not a complete shutdown, of their investments in Cuba.[75] The regulatory change came as a surprise to many US firms that did not expect their business interests to be linked to Cuba's governmental agencies, such as the state's national police—the investigative arm of Cuba's navy and border patrol agents.[76] For example, CleBer LLC, a United States–based company that manufactures tractors, built a small rear-engine tractor that it planned to sell to nongovernmental farming co-ops and independent farmers in Cuba's countryside—the first effort of its kind in Cuba.[77] In early 2016, the U.S. Department of the Treasury granted the company a license to

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72. *List of Restricted Entities and Subentities Associated with Cuba*, U.S. DEP'T OF STATE, BUREAU OF ECON. & BUS. AFFAIRS (Nov. 9, 2017), https://www.state.gov/cuba-sanctions/cuba-restricted-list/list-of-restricted-entities-and-subentities-associated-with-cuba-as-of-november-9-2017/ [https://perma.cc/E6CN-ZZBL] (archived Nov. 3, 2019).

73. *See id.*

74. Alan Gomez, *Trump Cracks Down on U.S. Business and Travel to Cuba*, USA TODAY (Nov. 9, 2017), https://www.usatoday.com/story/news/world/2017/11/08/trump-cracks-down-u-s-business-and-travelcuba/843419001/ [https://perma.cc/Y2MS-LWBZ] (archived Oct. 24, 2019).

75. *See* Rebecca Bill Chavez, *Trump's Cuba Sanctions Are a Mistake*, FOREIGN POL'Y (May 3, 2019), https://foreignpolicy.com/2019/05/03/trumps-cuba-sanctions-are-a-mistake/ [https://perma.cc/XU72-2JNG] (archived Oct. 24, 2019) (explaining that President Trump's decision to expand sanctions on Cuba represents a strategic error that will "alienate U.S. partners in the Western Hemisphere and Europe, harm U.S. businesses, and strangle Cuba's emerging private sector.").

76. *See List of Restricted Entities and Subentities Associated with Cuba*, *supra* note 72.

77. Richard Stradling, *They built a tractor for Cuban farmers, but others will use it instead*, NEWS & OBSERVER (May 17, 2018), https://www.newsobserver.com/news/local/article211110089.html [https://perma.cc/2GZY-H9W5] (archived Oct. 24, 2019). Co-founded by a Cuban American, CleBer was the first US company to be issued a license from the U.S. Office of Foreign Assets Control and the Commerce Department for a manufacturing project in Cuba after President Obama announced rapprochement between the two countries in 2014. On his visit to Cuba in March 2016, President Obama announced that CleBer "will be the first US company to build a factory here in more than 50 years." Mimi Whitefield, *Alabama Company Says Cuba Needs Its Tractors, But Approval Process Is Slow*, MIAMI HERALD (Apr. 26, 2016), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article74025982.html [https://perma.cc/L4FM-862N] (archived Oct. 18, 2019).

do business and lease property in Cuba under an exception to the US trade embargo created by the Obama administration.[78] But in 2018, frustrated with the recent American policy shift that restricted trade and commercial opportunities between the two countries, Cuba blocked CleBer from assembling the tractors in Cuba, and implied that CleBer could build and sell its tractors in Cuba only after the United States lifts the economic embargo.[79]

In addition to tightening trade and travel restrictions on US entities, the U.S. Department of State published a new list of 180 prohibited companies, hotels, and stores controlled by the Cuban military that were now off-limits to Americans.[80] As part of the new Trump policy toward Cuba, "no American citizen, firm, green-card holder or person otherwise under US jurisdiction is allowed to carry out direct financial transactions with any entity on the list."[81] The administration's investment restrictions specifically target the business arm of the Cuban Revolutionary Armed Forces (GAESA)—a Cuban conglomerate involved in all sectors of the economy and spearheaded by General Luis Alberto Rodriguez, the son-in-law of former Cuban President Raul Castro.[82] This recent policy shift has limited new US investments on the island and has damaged pro-engagement efforts by businesses that flocked to the "new Cuba" in search of new opportunities following the recent thaw in relations.[83]

One example of this downturn is in the Cuban hotel industry. Starwood Hotels & Resorts Worldwide, which is owned by Marriott International, Inc. and headquartered in Stamford, Connecticut, had signed a deal to manage a state-owned Gaviota hotel in Havana under

78. Stradling, *supra* note 77.

79. *Id.*

80. *List of Restricted Entities and Subentities Associated with Cuba*, *supra* note 72.

81. Mimi Whitefield, *Has President Trump's Year-old Cuba Policy Helped the Cuban People?*, MIAMI HERALD (June 14, 2018), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article212497419.html [https://perma.cc/HS4H-RDKS] (archived Oct. 18, 2019).

82. GAESA, the Spanish acronym for *Grupo de Administración Empresarial S.A.*, is the business branch of Cuba's Revolutionary Armed Forces and controls more than fifty enterprises. GAESA operates in virtually every area of the Cuban economy, controlling hotel chains, car rental agencies, banks, credit card services, remittances, supermarkets, clothing shops, real estate development companies, gasoline stations, import and export companies, shipping and construction companies, warehouses, and airlines. *See* Nora Gámez Torres, *High On Cuba Policy Proposal: Restricting U.S. Business Deals With Cuba's Military-Run Entities*, MIAMI HERALD (June 12, 2017), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article155772469.html [https://perma.cc/V7SC-DZ7G] (archived Oct. 18, 2019).

83. Marc Frank, *Cuban Military's Tentacles Reach Deep Into Economy*, REUTERS, June 15, 2017, https://www.reuters.com/article/us-usa-cuba-military/cuban-militarys-tentacles-reach-deep-into-economy-idUSKBN1962VK [https://perma.cc/L67K-X93S] (archived Oct. 24, 2019).

the Sheraton brand.[84] The oceanfront hotel opened in 2016 under the label "Four Points by Sheraton."[85] Gaviota, like many other hotel and tourism development projects in Havana, is part of GAESA and operates almost exclusively under its control. As a result of the US government's recent ban, Starwood Hotels was forced to suspend its business venture and will need to look elsewhere for another partner if it wishes to unite with Cuban hotels in the future.[86] Similarly, U.S. Gulf Coast ports and the Virginia Port Authority, which signed letters of intent in January 2016 to work with the Cuban National Port Authority on its newly opened Port of Mariel container terminal, will likely be forced to walk away from its shipping partnership, since the Cuban port is also controlled by GAESA.[87] The port terminal—visited by several US business delegations in 2015 after the easing of trade and travel restrictions—feeds Cuba's surrounding special development zone, which allows investors 100 percent ownership.[88] The slowdown in United States–Cuba trade relations, as a result of both travel and business restrictions, helps explain the loss of investment opportunities in Cuba following the Trump administration's new Cuba policy and regulatory barriers. This loss of expectation-backed investments has certainly had undesirable financial consequences for companies like Marriott and many others and raises the considerable possibility of a Fifth Amendment takings claim against the US government in regard to these consequences.

As recently as October 2019, the Trump administration continued to tighten sanctions on Cuba's economy. The U.S. Department of Commerce announced that it will further restrict the Cuban regime's access to commercial aircraft and other goods containing US content, including revoking existing aircraft lease licenses.[89] This will have implications for US airliners and other domestic operators.

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84. Lenore Adkins, *Starwood's Deal in Cuba Encourages Would-Be Investors*, BLOOMBERG NEWS (May 31, 2016), https://www.engagecuba.org/engage-mentions/2016/5/31/starwoods-deal-in-cuba-encourages-would-be-investors [https://perma.cc/7NKB-BGFP] (archived Oct. 24, 2019). *See also Marriott Hotel in Havana*, *supra* note 8.

85. Adkins, *supra* note 84.

86. *List of Restricted Entities and Subentities Associated with Cuba*, *supra* note 72.

87. Frank, *supra* note 83.

88. Press Release, Office of Va. Governor Terry McAuliffe (Jan. 5, 2016) (on file with the Virginia Maritime Association).

89. Press Release, U.S. Bureau of Indus. & Sec., U.S. Department of Commerce Further Tightens Cuba Sanctions (Oct. 18, 2019), https://www.commerce.gov/news/press-releases/2019/10/us-department-commerce-further-tightens-cuba-sanctions [https://perma.cc/UZ8X-9KUB] (archived Jan. 17, 2020).

III. THE TAKINGS DOCTRINE

A. *The Takings Clause and its Application Extraterritorially*

As a direct result of undoing the Obama-era trade and economic policies towards Cuba, access to many of the US investment-backed business projects, as well as to the actual physical assets (i.e., real property), in Cuba became blocked. Whether this loss of access to property and investment interests as a result of this policy reversal can amount to a regulatory taking under the Fifth Amendment is considered here.[90]

The right to have private property is protected under the U.S. Constitution, and the loss of such property to public use is often challenged under the Fifth Amendment's Takings Clause provision. The clause states that "private property [shall not] be taken for public use, without just compensation."[91] Initially, the U.S. Supreme Court limited takings claims only to *condemnation* (also called "formal condemnation")—the government's formal exercise of its eminent domain power to take property coercively, upon payment of just compensation to the property owner.[92] In a condemnation action, there is no issue as to whether the property is "taken" in the Fifth Amendment sense; the government concedes as much by filing the action. The only "taking" question is what constitutes "just compensation" in each case.[93]

However, over time the U.S. Supreme Court began finding compensable takings among a broader set of claims. The court held that government expropriation or physical invasion of one's property—for instance, when a government dam floods private land and causes damage[94]—does constitute a "taking" akin to formal condemnation of that property by the government.[95] In such cases, the court has permitted property owners to preserve and redress their constitutional right to compensation by bringing a takings action against the government, rather than requiring the government to initiate the suit as occurs under formal condemnation actions.[96] Accordingly, the central issue in takings claims is whether the impact of the government action on a particular property amounts to a taking in the constitutional sense. If a taking is found, only then, of course, does the question of just compensation arise.

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90. *See infra* Part IV.
91. U.S. CONST. amend. V.
92. *See* SCOTUS TAKINGS DECISIONS, *supra* note 15, at 1.
93. *See id.*
94. United States v. Jones, 109 U.S. 513, 514–15 (1883). *See also* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32, 38 (2012) (holding that temporary government-induced flooding is *not* categorically exempt from Takings Clause liability).
95. *See* SCOTUS TAKINGS DECISIONS, *supra* note 15, at 1.
96. *See, e.g.*, *Jones*, 109 U.S. at 513.

In the landmark case *Pennsylvania Coal Co. v. Mahon*, the Supreme Court expanded the application of takings claims from government appropriations and physical invasions of property to include the *mere regulation* of property use.[97] By expanding its takings jurisprudence to include "regulatory takings," the court recognized that regulatory interferences with property rights can have economic and other consequences for property owners to the same degree as formal appropriations and physical invasions of land.[98] Under this framework for example, frequent flights by military aircraft over private land at low altitude constitute regulatory takings because such flights amount to direct and immediate interference with the use and enjoyment of one's land, thereby effecting a taking.[99] Moreover, under the broader takings doctrine announced in *Pennsylvania Coal*, temporary seizure and operation of a coal mine by the US government during wartime (in an effort to avert a coal miners' strike) amounted to a regulatory taking in the court's eyes because the government asserted total dominion and control over the mines.[100]

The concept of a regulatory taking expanded the availability of new legal actions for property owners and underlies many of the Supreme Court's takings decisions over the last fifty years. One notable case in which the court attempted to chart a clear framework for analyzing regulatory takings was *Penn Central Transportation Co. v. New York City*, where the court declared that whether a regulatory taking has occurred depends on weighing three principal factors: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with a property owner's distinct investment-backed expectations, and (3) the "character" of the government action.[101] The growth and number of regulatory takings claims is hardly surprising, especially given its application to comprehensive federal and local zoning ordinances, wildlife habitat preservation, drilling and mining restrictions, and wetlands and coastal regulations.[102] Most importantly, the regulation of non-real-estate property, including by means of a trade embargo, has prompted fresh

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97. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

98. *See* SCOTUS TAKINGS DECISIONS, *supra* note 15, at 1.

99. United States v. Causby, 328 U.S. 256, 259 (1946) (holding that frequent military aircraft flights over a property owner's chicken farm at low altitude constituted a regulatory taking); *see also* Griggs v. County of Allegheny, 369 U.S. 84, 85 (1962) (holding that low and frequent flights over a home near the county-owned airport amounted to a taking of an air easement, with the county, rather than United States, assuming compensatory liability).

100. United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951).

101. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). For a more thorough discussion and analysis of *Penn Central* and its application to land use regulations, *see* Christopher Serkin, *Existing Uses and The Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1229 (2009).

102. *See, e.g.*, SCOTUS TAKINGS DECISIONS, *supra* note 15, at 1–2.

and heightened scrutiny of government conduct as it relates to private property.

But does the takings clause apply extraterritorially, and is there a constitutional guarantee that the US government compensate individuals whose property was taken outside the United States? Courts have held that Fifth Amendment protections do apply to property located abroad.[103] Since World War II, US property owners have brought claims for takings arising in foreign countries and have received compensation from the US government.[104] In particular, a taking prompted by a *foreign government* constitutes a Fifth Amendment violation if the claimant can prove that the taking was done on behalf of the US government.[105] Further, the Fifth Amendment can also protect a taking where the seizure of property overseas by a foreign government does not necessarily lead to the US government acquiring a possessory interest in that property.[106] In *Langenegger v. United States*, the U.S. Court of Appeals for the Federal Circuit recognized that the United States could be liable for a compensatory taking by "encouraging the El Salvadorian government to implement a land reform program resulting in seizure of the claimant's plantation."[107] The court thereby extended the scope of the Fifth Amendment to include "indirect" takings and suggested that in certain circumstances the US government's participation in a foreign sovereign's policymaking activity may be sufficient to constitute a regulatory taking.[108] Accordingly, a takings claim may arise from foreign expropriation of property, if it is established that such takings would not have occurred but for the United States' direct or indirect policymaking involvement in the overseas expropriation.[109]

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103. Kinne, *supra* note 12, at 218; *see also infra* Part III.B.

104. *See* Turney v. United States, 115 F. Supp. 457, 463–64 (Ct. Cl. 1953); *see also* Seery v. United States, 127 F. Supp. 601, 606 (Ct. Cl. 1955).

105. *See Turney*, 115 F. Supp. at 464 (The Philippine government seized a US corporation's radar equipment located in the Philippines and turned it over to the United States. Pursuant to a takings claim, the Court of Claims awarded the corporation just compensation because the court found that foreign sovereigns may be considered "agents" of the US in foreign takings actions.).

106. Kinne, *supra* note 12, at 222.

107. *Id.* at 223 (citing Langenegger v. United States, 756 F.2d 1565, 1571 (Fed. Cir. 1985)).

108. *See Langenegger*, 756 F.2d at 1571–72 (noting the United States can be held responsible for an expropriation of US citizens' property by a foreign sovereign but finding nonetheless that US involvement in this case was insufficient to constitute liability for a takings action).

109. *See id.* at 1571 ("When considering a possible taking, the focus is *not on the acts of others*, but on whether sufficient direct and substantial United States involvement exists.") (emphasis removed); *see also infra* Part III.A.

B. *The Basis of a Foreign Taking: Judicial Frameworks for Evaluating a Taking of US Property Abroad*

1. The *Langenegger* Test

The question of foreign takings arose as a byproduct of America's efforts to influence political outcomes and policymaking decisions in foreign jurisdictions (particularly developing countries), through which the United States was involved in the destruction or seizure of private property.[110] Consequently, US courts have steadily broadened the definition and scope of a foreign taking. As noted in *Langenegger*, US citizens brought a takings action against the US government in the Court of Claims to recover the value of their land in El Salvador, which the Salvadoran government expropriated pursuant to an agrarian land reform program.[111] The claimants contended that the Salvadoran government expropriated their farmland at the prompting of US government officials in exchange for US military and economic support, and thus the United States should be liable for providing just compensation to the claimants under the Fifth Amendment.[112] On the takings question, the Court of Claims held that the seizure of plaintiffs' land by the government of El Salvador did not support a takings claim against the United States, and the United States only derived an incidental benefit.[113] Reviewing the lower court's decision, the U.S. Court of Appeals for the Federal Circuit found that the case did present a justiciable question,[114] but ultimately determined that the US government's support for El Salvador's land reform program *did not* give rise to takings liability on the part of the United States.[115]

Importantly, the Federal Circuit's holding in *Langenegger* articulated a new judicial approach and standard by which to evaluate whether a foreign taking of US citizens' property abroad has occurred.[116] On the issue of just compensation, the court specified that a claimant must demonstrate that the US government had "sufficiently direct and substantial involvement" in a foreign expropriation in order

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110. Kinne, *supra* note 12, at 217 (discussing US efforts to influence the political process and policymaking specifically in developing countries).

111. *Langenegger*, 756 F.2d at 1567.

112. *Id.*

113. Langenegger v. United States, 5 Cl. Ct. 229, 232 (1984), *aff'd in part and vacated in part*, 756 F.2d 1565 (Fed. Cir. 1985).

114. The political question doctrine does not bar judicial review of foreign takings claims. A foreign takings claim is justiciable so long as it "seeks only a determination of the lawfulness of the executive's deprivation of [the plaintiff's] private property without just compensation." *Langenegger*, 756 F.2d at 1570 (applying the holdings in Goldwater v. Carter, 444 U.S. 996 (1979) and Baker v. Carr, 369 U.S. 186 (1962)).

115. *Langenegger*, 756 F.2d at 1571.

116. Kinne, *supra* note 12, at 238.

to trigger liability for a foreign-based taking.[117] The court developed this test by applying the framework set out by the Supreme Court in *Y.M.C.A. v. United States*, in which plaintiffs alleged that the US government effected a taking by depriving the plaintiffs of the use of their private property in the Panama Canal Zone.[118] In *Langenegger*, the Federal Circuit noted that the standard for government involvement emphasized by the Court in *Y.M.C.A.*—"sufficiently direct and substantial"—was significant and should guide lower courts in evaluating whether the United States caused a deprivation or expropriation of property in the first place.[119] It follows, therefore, that the *Langenegger* test requires an inquiry into the causation of any foreign taking to determine whether the United States caused a deprivation or loss of property.

The court in *Langenegger* articulated a two-pronged analysis to determine whether US government participation or activities constitute "sufficiently direct and substantial" involvement in an overseas expropriation. First, the court examined the "nature" of the US government's activity alleged to have caused the taking.[120] The court concluded that where US involvement amounts only to "friendly persuasion," the expropriation likely does not trigger just compensation liability for the United States.[121] Therefore, based on the allegations made by the plaintiffs in *Langenegger*, the court found that US encouragement of El Salvador's government to implement national land reform programs did not constitute anything more than "friendly persuasion."[122]

Second, the court considered the amount of "benefit" received by the US government as a result of the foreign expropriation.[123] For example, in *Turney v. United States*, where the US government sought the return of its radar equipment and pressured Philippine authorities to assist in its seizure from the plaintiff, the Court of Claims determined that the plaintiffs properly alleged a taking, since the United States secured a clear "benefit" as a result of the taking.[124] In

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117. *See Langenegger*, 756 F.2d at 1571; *see also* Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953).

118. Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 93 (1969) (noting that "[I]n any case where government action is causally related to private misconduct which leads to property damage – a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment.").

119. Kinne, *supra* note 12, at 239 (quoting *Langenegger*, 756 F.2d at 1572).

120. *See Langenegger*, 756 F.2d at 1571–72 (explaining that the nature of the governmental action is a standard factor courts consider in takings claims, both foreign and domestic).

121. *Id.* at 1572.

122. *Id.*

123. *Id.*

124. *See* 115 F. Supp. 457, 465 (Ct. Cl. 1953) (holding that the plaintiff was in a unique position for recovery even though there was no present market for resale because the government gained an advantage by destroying the plaintiff's market and then

contrast, in *Anglo Chinese Shipping Co. v. United States*, the Court of Claims found the US government *not* liable for a taking when its military ordered the Japanese government to seize a private British ship and use it to lay and repair submarine cables.[125] There, the Japanese reaped the long-term benefits of such work, not the United States.[126] In *Langenegger*, the court explained that where the only benefit conferred on the federal government is the enhanced political stability of its neighboring sovereigns, a finding of "sufficiently direct and substantial" involvement is not justified.[127] The court's holding made clear that diplomatic persuasion among allies is a common occurrence; and as a matter of law, such a benefit cannot warrant a finding of direct and substantial involvement here and is insufficient to hold a defendant constructively responsible for the alleged taking.[128] Thus, both prongs—the "nature" of US activity and the public "benefit" secured by the US government—must be satisfied in order to demonstrate the existence of a foreign taking. Nevertheless, the Supreme Court has also held "that the federal government need not take property for its own use" in order to establish a compensable taking.[129]

2. Claim Extinguishment

A claimant may also initiate an independent takings action by demonstrating that the US government extinguished his or her otherwise "live expropriation action" against a foreign sovereign.[130] This alternate basis for establishing a Fifth Amendment taking is referred to as "claim extinguishment" in litigation.[131] For example, the plaintiffs in *Langenegger* asserted an alternative claim that the US government's "encouragement" of El Salvador extinguished any potential recovery under international law.[132] They argued that

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taking the property); *see also* Monroe Leigh, *Expropriation-Just Compensation-Political Question Doctrine-Responsibility of U.S. Government for Taking of U.S. Citizens' Property by Foreign Government*, 79 AM. J. INT'L L. 1060, 1062 (1985) (explaining that the Claims Court used US benefit as a metric for determining whether there was a taking in several cases).

125. 127 F. Supp. 553, 557 (Ct. Cl. 1955).

126. *See* Leigh, *supra* note 124 (explaining that the United States was not liable for a taking because the Japanese reaped the long-term benefits, among other reasons such that the Japanese outfitted the ship and used it daily).

127. *Langenegger*, 756 F.2d at 1572.

128. *Id.*

129. Kinne, *supra* note 12, at 242. *See generally* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (holding that the state legislature did not violate the public use limitations of the Fifth and Fourteenth Amendments when it permitted redistribution of land through eminent domain to correct for an oligopoly in land ownership).

130. Kinne, *supra* note 12, at 238 (citing *Langenegger*, 756 F.2d at 1573).

131. For a further discussion of claim extinguishment cases resulting in takings liability, *see infra* Part III.B discussing the claim in Shanghai Power Co. v. United States.

132. *Langenegger*, 756 F.2d at 1573.

extinguishing that right constituted a taking in violation of the Fifth Amendment. However, the Federal Circuit held that the State Department's refusal to enter a diplomatic settlement with El Salvador's government *did not* result in claim extinguishment and that extinguishing a claim under international law cannot amount to a taking.[133] Accordingly, the appellate court's ruling seemed to imply that all foreign takings claims against the US government should be subject to, and satisfy, the two-pronged "sufficiently direct and substantial" framework.[134]

In *Langenegger*, as in *Anglo Chinese Shipping*, the Court of Claims concluded that the plaintiffs failed to establish both the necessary level of participation by the US government and a tangible benefit received by the United States in this instance.[135] The United States' activities toward the Salvadoran government constituted "diplomatic persuasion among allies," which was insufficient in the eyes of the court to warrant a finding of "direct and substantial involvement."[136] Moreover, it was determined that expropriation by the Salvadoran government primarily benefited the national interests of its leaders, while the benefit of hemispheric stability attained by the United States was only incidental.[137]

However, the Federal Circuit determined on appeal that extinguishment of plaintiffs' claims under international law *could* still amount to a constitutional taking.[138] But, the issue of whether a taking occurred depended on if the claim had in fact been extinguished, a determination that must be made "on the basis of the particular circumstances [of each] case."[139] In *Langenegger*, the Federal Circuit found that El Salvador had agreed to abide by US laws authorizing international arbitration for such claims, and that the plaintiffs could proceed independently with an arbitration without the assistance or approval of the US government.[140] Accordingly, the appellate court held that an international forum was still available to plaintiffs and that their claim had thus not been extinguished.[141]

The application of Fifth Amendment jurisprudence in *Langenegger* suggests that if US claimants are able to demonstrate

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133. *Id.*

134. Kinne, *supra* note 12, at 238.

135. Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553, 557 (Ct. Cl. 1955); Leigh, *supra* note 124.

136. *Langenegger*, 756 F.2d at 1572.

137. Leigh, *supra* note 124.

138. *Langenegger*, 756 F.2d at 1573 ("[T]he lower court's *Shanghai Power* decision does not present an absolute rule that the extinguishment of a claim under international law can never amount to a taking").

139. Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 242 (1983) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

140. *See* Leigh, *supra* note 124, at 1062–63 (citing Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Title II, 97 Stat. 384 (1983)).

141. *Langenegger*, 756 F.2d at 1573.

that international adjudication and resolution of their claim is foreclosed, then they may argue in court that the United States was responsible for extinguishing their claim. In *Langenegger*, however, the plaintiffs ultimately faced considerable hurdles in proving that the US government owed compensation for the taking, since the plaintiffs were required to demonstrate the same two elements (the "nature" of US activity and the "benefit" that accrued to the government) that thwarted their initial expropriation claim.[142]

C. *The Scope and Limits of Recovery for a Foreign Taking*

The scope of effective foreign takings and the amount of compensation for such claims that courts consider to be adequate has evolved, especially in light of the *Langenegger* decision. Following the decision in *Turney*, courts have maintained that a foreign taking applies when the United States secures possession of private property through the action of foreign sovereigns.[143] In addition, a taking can arise because of the US government's decision to settle pending claims with a foreign government (claim extinguishment).[144] The president of the United States has broad, but not unlimited, authority to settle claims against foreign sovereigns for the uncompensated taking of property belonging to US citizens.[145] In claim extinguishment cases, the U.S. Department of State, under the president's authority, acts on behalf of US claimants to negotiate their claims with the expropriating foreign country.[146] Per the "doctrine of espousal," negotiations are binding and US claimants may not opt out of the settlement reached by the US government.[147] Moreover, the settlement that is reached constitutes the claimants' sole remedy.[148] Thus, courts have held that

142. *See id.* (explaining that the claim lacked substance because there was no extinguishment).

143. Kinne, *supra* note 12, at 222. *See also* 115 F. Supp. 457, 465 (Ct. Cl. 1953) (holding that the US benefitted from the actions of the Philippine government, so recovery for a taking was permissible).

144. *See infra* Part III.B.2 for a discussion of claim extinguishment. *See also* Kinne, *supra* note 12, at 224 (noting that claim extinguishment actions seek compensation in the amount that the claimant would have received if the underlying claim had not been settled by the US government, and that such actions are related to foreign takings claims to the extent that both are just compensation claims arising out of US foreign policy acts).

145. Matias F. Travieso-Diaz, *Resolving U.S. Expropriation Claims against Cuba: A Very Modest Proposal*, 22 L. BUS. REV. AM. 3, 12 (2016). The President's authority is limited by the rarely exercised power of Congress to enact legislation requiring that a settlement seen as unfavorable be renegotiated. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 688–89 (1981) (holding that the President had the power to settle claims because doing so was important to foreign relations and Congress did not object); Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 244–48 (1983) (holding that the President's power to settle foreign claims is well established and largely self-regulated).

146. Travieso-Diaz, *supra* note 145.

147. *Id.*

148. *Id.*

extinguishment of a plaintiff's claim by the government, as well as a taking for the expropriation of a US citizen's property abroad, presents a justiciable question for the courts.[149]

In past agreements negotiated by the US government on behalf of US property owners who lost property abroad, the United States and the expropriating country have arrived at a settlement—with payment by the expropriating country to the United States—in an amount usually constituting a fraction of the total estimated value of the confiscated assets.[150] For example, Shanghai Power, a United States–based corporation that at one time owned and operated a power plant in Shanghai, China, and distributed electricity in the region, had an expropriation claim pending against the People's Republic of China (PRC) for the value of its confiscated power plant.[151] But in 1979, the United States (under President Carter) and the PRC agreed to discharge and settle all outstanding claims against the PRC as part of the normalization process between the two nations.[152] In a subsequent lawsuit, Shanghai Power Company contended that the US government expropriated its property interest in violation of the Fifth Amendment by extinguishing its claim through the treaty settlement for the excess amount due for plaintiff's seized power plant.[153]

In *Shanghai Power Co. v. United States*, the Claims Court held that the corporation's claim against the PRC constituted "property" for purposes of the Fifth Amendment,[154] and that the value of the seized property (approximately $197 million) was much greater than the

149. *See* Langenegger v. United States, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (holding that a takings claim for the expropriation of a US citizen's property abroad presents a justiciable question, and that the issue of whether the US government extinguished the plaintiffs' claim against El Salvador was justiciable); *see also* Alimanestianu v. United States, 124 Fed. Cl. 126, 134 (2015) (holding that a takings claim for the expropriation of a US citizen's property in Libya pursuant to a Claims Settlement Agreement was justiciable).

150. *See Shanghai Power*, 4 Cl. Ct. at 239–40 (explaining that the settlement negotiated by the President would provide the plaintiff with $124 million less than Cuba owed).

151. *Id.* at 239 ("In 1950, the People's Republic of China confiscated all property within its borders belonging to U.S. nationals, including plaintiff's power plant. From that time until 1979, when the United States normalized relations with the PRC, plaintiff received no compensation for the loss of its property.").

152. *Id.*

153. *Id.* at 240. The US government settled US nationals' outstanding claims against the PRC for $80.5 million, which represented about 40% of the total value of property seized by the PRC ($197 million), as certified by the Foreign Claims Settlement Commission of the United States. *Id.* at 239. *See* Agreement on the Settlement of Claims, U.S.–China, 18 I.L.M. 551 (May 11, 1979), https://www.justice.gov/sites/default/files/pages/attachments/2014/06/27/china_as.pdf (last visited Oct. 27, 2019) [https://perma.cc/PC5E-FTHT] (archived Oct. 27, 2019).

154. David L. Schwartz, Belk v. United States*: Obtaining Monetary Relief for Americans Held Hostage in Iran*, 4 AM. U. INT'L L. REV. 207, 210, 221 (2011) (noting that President Carter settled plaintiffs' claim for a reduced amount of $20 million for each claimant).

amount the plaintiffs received from the US government in the treaty settlement ($20 million of the total $80.5 million settlement amount).[155] However, the court found that plaintiffs failed to establish a cause of action that the president's settlement of its claim for a mere fraction of its actual value amounted to a "taking."[156] In fact, in the court's assessment, the settlement sum of $20 million—each claimant's *pro rata* share of the amounts received from the PRC—constituted adequate compensation in this instance so as to render the taking by claim extinguishment constitutional.[157] It is important to recognize that while a finding of a taking was inconclusive in *Shanghai Power*, courts determine whether a compensable taking occurred by claim extinguishment on a case-by-case basis.[158] Here, the court deemed the compensation award to be adequate. But despite the potential to receive just compensation for losing one's property, the traditional settlement negotiation process may not be adequate to satisfy the expectations of US parties who have invested in property in Cuba.

Moreover, recent litigation has relied on *Shanghai Power* to suggest that even *unfiled* causes of action may constitute property interests under the Fifth Amendment.[159] In *Shanghai Power*, the court interpreted the notion of Fifth Amendment property broadly, finding that any interest will amount to "property for the purposes of the [Fifth Amendment] unless that interest is devoid of a legally enforceable right or recognition of a property interest would contravene public policy."[160] Thus, the court held that a claim for compensation, based on foreign expropriation, satisfied this standard and "found the stage of the claim relevant only to its value, considering factors like forum availability and likelihood of success" to decide damages.[161] Accordingly, in a subsequent case involving a claim against the

155. Based on evidence presented by the claimants, the Foreign Claims Settlement Commissions (FCSC) concluded that the value of the property seized was nearly $197 million, with the plaintiff's share totaling more than $144 million after interest. *Shanghai Power*, 4 Cl. Ct. at 239 (noting that the FCSC determined that the claimants were entitled to 6 percent simple interest from the date of the taking).

156. *Id.* at 249.

157. *See id.* at 246 n.16.

158. *See id.* at 242–43 (noting that the factors courts consider include the degree to which property rights were impaired, the extent to which the property owner benefitted from the governmental action, whether the governmental power was novel or traditional, and whether other rights or remedies were substituted in place of the ones lost).

159. *See, e.g.*, Aviation & Gen. Ins. Co. v. United States, 121 Fed. Cl. 357, 364–66 (2015) (citing *Shanghai Power*, 4 Cl. Ct. at 240) (finding *Shanghai Power* instructive in holding that the plaintiffs had a cognizable property interest in a cause of action before a final judgment was entered); Aureus Asset Managers, Ltd. v. United States, 121 Fed. Cl. 206, 211–13 (2015) (citing *Shanghai Power*, 4 Cl. Ct. at 240) (using *Shanghai Power* to support the conclusion that a cause of action constituted a property interest even before a final judgment was entered).

160. *Aviation & Gen. Ins. Co.*, 121 Fed. Cl. at 364 (quoting *Shanghai Power*, 4 Cl. Ct. at 240).

161. *Id.*

government of Libya for lost property, the Court of Claims relied on this standard to confirm the existence of the plaintiffs' property interest in their suit, and noted that the "finding of a property interest in *Shanghai Power*" was instructive in this situation.[162] Therefore, in instances where claimants are excluded from recovering any compensation, it is within the court's authority to determine whether the government has violated the Fifth Amendment prohibition on takings without due process of law or just compensation.[163]

D. *Available Remedies for a Regulatory Taking*

To be clear, takings claims do not always result in an award of just compensation; other remedies are available to courts and will be discussed later in this subpart. Regardless of the way in which the takings action arises, if the plaintiff can establish a successful claim against the government, the most common remedial method is to award just compensation.[164] For example, in *Turney v. United States*, the Court of Claims awarded the corporation whose radar equipment had been seized abroad just compensation pursuant to a takings claim.[165] While foreign sovereigns may be considered as "agents of the [United States] in foreign takings claims such as *Turney*, the Constitution does not reach the independent actions of foreign government officials."[166] Thus, in order to receive monetary compensation, the claimant must prove that the taking effected by a foreign government was on behalf of the US government.

In addition, compensable takings claims can arise out of direct seizures of overseas property by the US government. For example, in *Seery v. United States*, an individual US citizen whose Austrian residence was appropriated by the US military received monetary compensation under the Fifth Amendment's just compensation clause.[167] Thus, it would follow that if the US government appropriated US residents' or corporations' property in Cuba, there may be sufficient grounds to seek monetary compensation, assuming that a proper takings claim can be alleged and established under *Langenegger*'s two-prong test.

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162. *Id.*

163. *Id.* at 367.

164. *See* Travieso-Diaz, *supra* note 145, at 11–12.

165. *See* 115 F. Supp. 457, 464 (Ct. Cl. 1953) (where the Philippine government seized a corporation's radar equipment located in the Philippines, and turned the equipment over to the United States).

166. Kinne, *supra* note 12, at 222 (citing Huther v. United States, 145 F. Supp. 916 (Ct. Cl. 1956)) (finding the United States not liable for just compensation where Canada constructed a dam that caused flooding of plaintiffs' land).

167. *See* 127 F. Supp. 601, 606 (Ct. Cl. 1955) (holding that an executive agreement could not impair constitutional rights).

But even where a foreign government's seizure of property abroad does not lead to the US government acquiring a possessory interest in the land, a takings claim under the Fifth Amendment may still stand. The Court of Claims has noted that the United States could incur just compensation liability by emboldening a foreign government to enact a domestic policy or program that results in the loss, damage, or seizure of the claimant's property.[168] Thus, by "extending the Fifth Amendment's scope to such 'indirect' takings,"[169] it is conceivable to suggest that US government involvement in a foreign government's policymaking may be sufficient to result in liability and the award of monetary compensation for a foreign taking.

Lastly, equitable remedies such as injunctive relief or a declaratory judgment are alternative solutions available to US courts in connection with a foreign takings claim, if the action is not filed in the Court of Claims.[170] In order to award monetary compensation for a foreign taking, the claim must first be adjudicated in the Court of Claims.[171] In contrast, other US courts often grant equitable relief only after exercising the doctrine of equitable discretion to the claim.[172] For example, claimants before the U.S. Court of Appeals for the District of Columbia Circuit sought equitable relief for a taking to "prevent the United States . . . from running military training operations on *their* property," which they argued had not been lawfully expropriated.[173] The court held that declaratory and injunctive relief constituted appropriate remedies for a taking in this case, which would prevent US military officers from occupying a Honduran ranch belonging to a US entity.[174] The federal court concluded that based on the unique circumstances of the case, equitable relief would be an effective remedy for the claimants and could be granted without compromising US foreign relations with any Central American country or its military policy in the hemisphere.[175] Accordingly, both just compensation and equitable relief constitute adequate methods of relief for a foreign taking under the Fifth Amendment.

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168. *See* Langenegger v. United States, 756 F.2d 1565, 1571 (Fed. Cir. 1985) (notwithstanding El Salvador's implementation of a domestic land reform program, "There is nothing to suggest, as the [United States government] contends, that whenever the final act of expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible.").

169. Kinne, *supra* note 12, at 223.

170. *Id.* at 225 (noting that the U.S. Claims Court generally lacks the power to grant equitable relief).

171. Marzulla & Marzulla, *supra* note 30, at 549.

172. *See* Kinne, *supra* note 12, at 225 (noting that the doctrine of equitable discretion "ensures that grants of extraordinary relief will not violate the constitutional separation of powers," since the constitution commits control over foreign affairs actions exclusively to the executive branch).

173. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1531 (D.C. Cir. 1984).

174. *Id.* at 1505.

175. *Id.* at 1521, 1531.

IV. LEGAL ARGUMENTS AVAILABLE TO US CLAIMANTS AND ALTERNATIVE SOLUTIONS

A. *Can US Claimants Establish an Effective Foreign Takings Claim in US Courts?*

Do US investors and businesses have sufficient evidence to establish a Fifth Amendment taking abroad? The answer to this question remains ambiguous, but the relevant case law provides some guidance. The two-prong analysis emphasized in *Langenegger* and *Y.M.C.A.*—"sufficiently direct and substantial" US involvement in a foreign expropriation—should be applied to Fifth Amendment taking actions raised by US claimants for property losses in Cuba.[176] This analysis, together with the factors emphasized in *Shanghai Power*, should guide lower courts in evaluating whether the United States caused a deprivation or expropriation of property in Cuba in the first place.[177] It follows then that any claim would require an inquiry into the causation of a foreign taking. If successfully established, the court must then determine the appropriate level of compensation for the claimants, or alternative remedies in the interests of justice and fairness.[178]

In order to answer the question raised above, exploring a hypothetical case may be useful. Assume, for example, that a company like Marriott International asserts a Fifth Amendment taking against the US government for the loss of its hotel property in Cuba as a result of the embargo, and now the property is controlled by GAESA (the business wing of the Cuban government).[179] First, the Court of Claims should assess the "nature" of the US government activity alleged to

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176. *See, e.g.*, Kinne, *supra* note 12, at 244 (citing Langenegger v. United States, 756 F.2d 1565, 1572 (Fed. Cir. 1985)).

177. *See id.* at 239 (explaining that the two-part test from *Langenegger* was influenced by *Shanghai Power*).

178. *See* Schwartz, *supra* note 154, at 210–11 (articulating five factors that help identify whether justice and fairness require compensation for the plaintiffs).

179. Marriott Hotels illustrates a worthwhile hypothetical claimant in this context because Starwood Hotels & Resorts currently holds certified claim No. CU-2-002, which was certified by the FCSC in 2006 to be worth nearly $51.1 million (plus six percent annual interest) for property lost in Cuba. *See* Jason I. Poblete, *Sale, Purchase, or Other Transfer of Certified Cuba Claims Held by U.S. Nationals*, CLIENT BULL. 08-041 (Reed Smith, Washington, D.C.), Mar. 2008, at 1. *See also* U.S. DEP'T OF JUSTICE, 2016 ANNUAL REPORT OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES 37–38 (2016), https://www.justice.gov/fcsc/page/file/984371/download [https://perma.cc/VTD9-RHV7] (archived Oct. 27, 2019); CREIGHTON UNIV. SCH. OF LAW & DEP'T OF POLITICAL SCI, REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES 108 (2007), https://pdf.usaid.gov/pdf_docs/PNADK412.pdf (last visited Oct. 27, 2019) [https://perma.cc/HBT3-4YG4] (archived Oct. 27, 2019) [hereinafter REPORT ON PROPERTY CLAIMS IN CUBA] (explaining that two takings claims by US citizens were certified in August 2006 after the US government requested a second Cuban Claims Program to adjudicate and certify takings claims against the Cuban government).

have resulted in the taking.[180] In this context, the claimants may assert that the Trump administration's decision to restore economic restraints and reverse key Obama-era regulations—namely the easing of trade and travel restrictions—constitutes involvement in policymaking that ultimately led to seizure of their property. Alternatively, a corporation such as Marriott could argue that their property on the shoreline was expropriated by the Cuban government pursuant to a domestic tourism development project by GAESA, similar to the plaintiffs in *Langenegger*.[181] In either context, the court can interpret the notion of Fifth Amendment property broadly, finding that any such interest will likely amount to property for the purpose of a takings claim.[182] If there is evidence that the Cuban government had expropriated or frozen US citizens' property at the prompting of the US government or another foreign sovereign (for example, on the promise of fiscal or military support), this would serve to bolster the plaintiffs' takings claim.[183]

The determination of whether regulatory intervention by the US government would constitute "direct and substantial" involvement is a factually intensive inquiry left to the court's discretion. For example, in *Turney*, the Court of Claims was presented with circumstances that were sufficient to constitute a taking.[184] The taking rested upon the court's finding that the Philippine government, persuaded by the U.S. Army's desire to repossess its radar equipment, placed an embargo on the exportation of the radar which thus amounted to direct and substantial US involvement.[185] But in *Langenegger*, the court asserted that where the actual expropriation is carried out by a foreign sovereign, the involvement is *not* "direct and substantial," and the United States is not responsible for a taking where its activity merely amounts to "'friendly' persuasion regarding general policy."[186] These decisions suggest that a US court will likely acknowledge that diplomatic persuasion among adversarial nations is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of direct and substantial involvement. Such "nebulous forms of United States influence" are insufficient to

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180. Langenegger v. United States, 756 F.2d 1565, 1571–72 (Fed. Cir. 1985).

181. *Id.* at 1567.

182. *See* Aviation & Gen. Ins. Co. v. United States, 121 Fed. Cl. 357, 364–67 (2015) (citing *Shanghai Power*, 4 Cl. Ct. at 240) (holding that courts have the power to find a cognizable property interest in a cause of action that does not yet have a final judgment).

183. *See Langenegger*, 756 F.2d at 1567 (explaining that action by another sovereign may constitute a taking by the US government when in response to irresistible pressure to come to the terms of the United States).

184. Turney v. United States, 115 F. Supp. 457, 463–64 (Ct. Cl. 1953) (finding a taking and forcing the corporation to exchange the radar for just compensation).

185. *Id.* (holding that the United States government was functionally taking the property because the US placed irresistible pressure on the Philippine government to act).

186. *Langenegger*, 756 F.2d at 1572.

make a governmental-defendant constructively responsible for the alleged taking.[187] Accordingly, the US government could potentially assert that any property seizures or economic restrictions abroad initiated by the Cuban government (in response to the embargo) amount only to "friendly persuasion" in the diplomatic context or indirect lobbying by the US, which would not be enough to trigger just compensation liability.[188] Ultimately, the core of a successful Fifth Amendment taking may depend on a court's interpretation of "friendly persuasion" as it relates to domestic policy initiatives.

In addressing whether a taking has occurred, the court should also examine the "benefit" that accrued to the United States as a result of the alleged taking of Marriott's property and the tightening of restrictions in Cuba.[189] In *Turney*, the benefit to the United States was clear: the U.S. Army reacquired the radar it mistakenly had sold.[190] But in *Langenegger*, the court held that the claimed "benefit of hemispheric stability" attained by the United States was only incidental to the foreign sovereign's expropriation, and was not for the United States' public benefit.[191] Accordingly, a claimant such as Marriott would need to articulate a benefit beyond just "regional stability." For instance, plaintiffs could argue that the US government obtains a clear benefit by reinstituting the economic embargo—for example, attaining greater economic control over a communist regime, garnering public support and enhanced credibility from human rights advocates for reestablishing restrictions in response to human rights violations by the Cuban government, or gaining a bargaining advantage in future sanctions negotiations. However, *Langenegger*'s holding makes clear that where the sole benefit to the United States amounts to "enhanced political stability of [a] neighboring sovereign, a finding of 'sufficient direct and substantial' involvement is not warranted."[192] As such, the benefit obtained by achieving political stability or control in the region may be meritless—Cuba does not present a significant military or nuclear threat at the moment and does not threaten US policy in Latin America or the Caribbean.[193] Thus,

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187. *Id.* (quoting Porter v. United States, 496 F.2d 583, 592 (Ct. Cl. 1974)).

188. *See id.* (noting that US backing and encouragement of a domestic policy proposal in El Salvador to implement land reforms *did not* rise above the level of "friendly persuasion").

189. *Id.* at 1572–73.

190. Turney v. United States, 115 F. Supp. 457, 463 (Ct. Cl. 1953).

191. *Langenegger*, 756 F.2d at 1567, 1572.

192. *See, e.g.*, Kinne, *supra* note 12, at 239 (citing *Langenegger*, 756 F.2d at 1572).

193. *Worldwide Threat Assessment of the US Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 116th Cong. 14, 42 (2019) (statement of Daniel R. Coats, Dir. of Nat'l Intelligence), https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf [https://perma.cc/W3GP-APSE] (archived Oct. 27, 2019) (observing that Cuba presents very minimal threats to the US in 2019). *See also* Mimi Whitefield, *Trump officials say Cuba meddles in Venezuela, but Havana almost ignored in threat report*, MIAMI HERALD (Feb. 1, 2019), https://www.miamiherald.com/news/nation-

without satisfying both prongs—the "nature" of the US activity and the "benefit" received by the US government—it will be difficult, if not impossible, for US companies like Marriott to demonstrate the existence of a regulatory taking for foreign expropriation of property in Cuba. The lack of a true "benefit" accrued by the US government will more than likely prove fatal for any Fifth Amendment takings claim.

In the alternative, however, if a court does find that plaintiff's claim constitutes property under the Fifth Amendment, the court must then determine what amount satisfies just compensation—assuming the claimant has yet to be compensated.[194] In deciding whether justice and fairness require that a claimant receives compensation for the taking of their property in Cuba, lower courts can look to *Shanghai Power*. In that case, the Court of Claims relied on five factors to assess the nature of compensation: (1) the degree to which the government impaired the property owner's rights; (2) the extent to which the property owner was an incidental beneficiary of the governmental action; (3) the importance of the public interest that the governmental action would serve; (4) whether the governmental action was novel or unexpected, or fell within traditional boundaries; and (5) whether the governmental action substituted any rights or remedies for those that it destroyed.[195] In considering the factors above, if no triable issue of fact exists for the court, the five elements may still be evaluated to determine if, as a matter of law, compensation is in the interest of justice and fairness.[196] In considering a Fifth Amendment taking of US corporate property seized in Cuba, lower courts should apply this five-part takings analysis together with *Langenegger's* two-pronged test as a guide to determine whether a taking of property occurred without just compensation.[197]

With regard to property loss in Cuba, the US government's decision to reinstate the embargo with Cuba was likely unexpected for many US parties, at least when the property investments had been made by US nationals and before the election of President Trump. Therefore, it is certainly possible that a takings claim by US nationals or corporations for lost property rights in Cuba could rise to the level of a constitutional taking under the application of past takings decisions. Alternatively, it may also be the case that by reimposing the embargo on US companies that once did business in Cuba, the US

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world/world/americas/cuba/article225365020.html [https://perma.cc/7CRU-FXS6] (archived Oct. 27, 2019) ("Cuba got scant attention in the U.S. intelligence community's 2019 'Worldwide Threat Assessment' and there was no mention of the threat of a Cuba-Venezuela nexus.").

194. *Langenegger*, 756 F.2d at 1569.

195. Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 242–43 (1983).

196. Schwartz, *supra* note 154, at 210–13.

197. *See Langenegger*, 756 F.2d at 1567; *see also* Schwartz, *supra* note 154, at 210 (explaining that courts use the two-part test to evaluate justiciability and the five-part test to determine whether a taking occurred).

government substituted the rights of US citizens based on their regulatory expectations. Given this analysis, it is more likely than not that a US court would not dismiss a US claimant's takings claim outright, and that the government's motion to dismiss—assuming a claimant could meet the evidentiary threshold—would likely fail. While the issue of property loss in Cuba is not currently a case of claim extinguishment by the US government, as property owners have not yet received compensation and no "live expropriation" has been quashed yet, a court could still rely on the five-part analysis set forth in *Shanghai Power* as a guide to determine whether a taking occurred without just compensation.[198]

B. *Alternative International Frameworks for US Claimants without the* Langenegger *Test*

If a court should decide to reject a petitioner's takings claim as insufficient, or dismiss it entirely, there remain several alternatives available to property owners. US claimants seeking compensation for their loss of property in Cuba as a result of the current embargo would likely have at least three options for compensation or settlement: (1) filing suit and litigating in a Cuban court; (2) obtaining noncash compensatory remedies; and (3) pursuing legal action under Title III of the Helms-Burton Act. It is important to add that while this Note has not focused on these other approaches in significant detail up until this point, these domestic and international remedies available to US claimants are widely discussed by numerous US and international law scholars in other works, and thus have not served as the basis of extensive analysis in this Note.[199]

First, in place of filing a takings claim in the Court of Claims, a US citizen could bring an action for compensation in a Cuban court. Given the potential flood of litigation on issues such as property rights, Cuba could establish courts of limited jurisdiction to hear these specialized matters and ease the burden on regular Cuban courts.[200]

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198. *See* 4 Cl. Ct. at 242–43 (suggesting that a government may be liable for a taking when acting as an arbiter if it frustrates investment expectations).

199. *See, e.g.*, Richard E. Feinberg, *Reconciling U.S. Property Claims in Cuba: Transforming Trauma Into Opportunity*, LATIN AM. INITIATIVE AT THE BROOKINGS INST. (Dec. 2015), https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf [https://perma.cc/SMA7-T7W4] (archived Oct. 27, 2019); Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 342 (2000) (suggesting multiple possible restitution schemes for different claimants); Morales, *supra* note 58, at 16 (identifying several key points for discussion about possible remedies for US Claimants against Cuba).

200. Matias F. Travieso-Diaz & Armando A. Musa, *Courts of Limited Jurisdiction in a Post-Transition Cuba*, 39 VAND. J. TRANSNAT'L L. 125, 125 (2006). Travieso-Diaz and Musa note that as Cuba progresses closer toward a free-market society, there will arise

While Cuban law would allow this, current US regulations would require a US citizen to obtain a license from the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) to travel to Havana for this purpose.[201] Even if the government granted the property holder a license, a plaintiff would be required to retain local counsel and endure lengthy litigation in order to establish legal rights to compensation.[202] The Cuban government would then need to make a determination as to the value of the claim.[203] If the action proves successful, the land owner would most likely receive sovereign bonds (rather than cash) as compensation for the property seized or lost.[204] As a result, pursuing local action in Cuba for the loss of property may prove challenging and ultimately is not likely to be successful.

Alternatively, corporations that have lost private property as a result of the embargo and its associated restrictions may be able to seek payment in ways that do not involve the transfer of cash or bonds. In 1981–1982, following the Iran Hostage Crisis, the United States agreed to cease all litigation against Iran and release Iranian assets frozen by the Carter administration.[205] As part of this process, the Iran–United States Claims Tribunal was established to resolve US nationals' expropriation claims against Iran.[206] By establishing a similar Cuba–United States claims tribunal, which could have legal authority as an arbitral body, US claimants could be awarded remedies in the form of tax credits, development rights, and other incentives to invest in property in the new Cuba.[207] This framework could be employed if the two governments agree in advance to a procedure analogous to that used by the Iran–United States Claims Tribunal.

One key feature of the Iran–United States Tribunal was its adoption of the United Nations Commission on International Trade Law's Arbitration Rules, which address international commercial

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"a need to create specialized tribunals to handle disputes in areas such as taxation, bankruptcy, and intellectual property." *Id.*

201. *See* Helms-Burton Act § 302(a)(7)(B), 22 U.S.C. § 6082 (2018) (explaining liability for trafficking in confiscated property claimed by US nationals).

202. Timothy Ashby, *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms*, 40 U. MIAMI INTER-AM. L. REV. 413, 425 (2009).

203. *Id.*

204. *Id.*; *see also* 31 C.F.R. § 515.311(a) (2018) (listing the various types of property interests available).

205. *See* Schwartz, *supra* note 154, at 207–08.

206. *Id.* at 218. The Iran-U.S. Claims Tribunal had legal authority to arbitrate unresolved US and Iranian private commercial claims against one another relating to contracts or debts. Decisions of the tribunal were final and binding on the parties. *Id.* at 207–08. For a further discussion on this topic, *see* Peter W. Adler, Note, *The U.S.-Iran Accords and the Takings Clause of the Fifth Amendment*, 68 VA. L. REV. 1537, 1539–40 (1982) [hereinafter Adler, *U.S.-Iran Accords*].

207. REPORT ON PROPERTY CLAIMS IN CUBA, *supra* note 179, at 5–6, 146; *see also* Marco Antonio Dueñas, *Charting a New Course in Cuba? Why the Time is Now to Settle Outstanding American Property Claims*, 43 BROOK. J. INT'L L. 545, 568–69 (2018) (suggesting possible remedies in a US–Cuba Claims Tribunal).

arbitration procedures.[208] However, one significant impediment to establishing a tribunal to adjudicate disputes between a US claimant and the government of Cuba would be crafting a provisional agreement whereby Cuba promises to guarantee government funds to satisfy tribunal awards.[209] This proposal has been advanced in the past by Cuban Americans with uncertified claims whose property was seized as a result of Castro's nationalization campaign. Nevertheless, it would stand to reason that such an approach could also aid current US claimants who have lost property and are seeking compensation due to the embargo's reinstatement.[210]

A second possibility that exists in place of a takings claim is the option to buy claimants' property interests at a discount from the original property owner, and then use those property claims to broker a private settlement with the Cuban government.[211] This approach, which would require a negotiated group settlement, remains legally feasible—as long as it is carried out by the US government in accordance with existing law.[212] From a policy standpoint, both of these noncash compensatory remedies would offer modest victories for US property owners as well as for the Cuban government—they would compensate current US claimants who allege a foreign taking while simultaneously stimulating the Cuban economy.

Lastly, Title III of the Helms-Burton Act may provide a property holder, whose takings claim fails and who does not possess a US certified claim,[213] with an alternative course of action to recover lost property in Cuba that is perhaps the most likely to succeed. Title III authorizes US companies and nationals to sue the Cuban government in US federal court for "trafficking" in property "nationalized, expropriated, or otherwise taken by the Cuban Government on or after January 1, 1959."[214] This includes penalizing foreign companies that currently profit from Cuban property formerly owned by US nationals, but which was confiscated by the Cuban government following the

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208. *See* Adler, *U.S.-Iran Accords*, *supra* note 206, at 1539 n.13.

209. *See* Travieso-Diaz, *supra* note 145, at 19–20 (suggesting that Cuba would need to set up an independent fund for tribunal awards).

210. *See* Dueñas, *supra* note 207, at 555–56 (explaining the Cuban nationalization process of US interests in the 1950s and 1960s).

211. Ashby, *supra* note 202.

212. *Id.*

213. The term "US certified claim" refers to claims of US nationals against the Cuban government that have been certified by the Foreign Claims Settlement Commission (FCSC) at the Department of Justice under Title V of the International Settlement Claims Act of 1949. *See Foreign Claims Settlement Commission of the U.S.*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/fcsc/claims-against-cuba (last visited Feb. 26, 2019) [https://perma.cc/W5JY-G6JP] (archived Oct. 27, 2019). A claim holder may obtain compensation for a certified claim through a bilateral settlement agreement between the United States and Cuba, whereby Cuba agrees to settle the claim. *See id.*

214. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton), 22 U.S.C. §§ 6021–6091 (2000).

1959 revolution.[215] Importantly, litigation would not be limited to the 5,913 certified claimants whose Cuban property rights have already been certified by the Foreign Claims Settlement Commission.[216] Rather, the filings could be made by nearly anyone with potential claims to lost property in Cuba, including individuals who are of Cuban descent but were not yet born when their parents or grandparents' assets were expropriated by the Cuban government decades ago.[217] Stated simply, what is currently limited to 5,913 certified claims could quickly become hundreds of thousands of potential claims.[218]

Title III, incorporated into the embargo in 1996, consists of a provision that allows US presidents to suspend Title III every six months.[219] Since President Bill Clinton, every US president has suspended the clause due to the negative diplomatic and legal effects that such claims could have on the Cuban economy and the US court system.[220] However, on April 17, 2019, in a surprising move that departed from the US government's twenty-three year tradition of suspending the provision, the Trump administration announced that it would activate Title III of the Helms-Burton Act.[221] The decision to activate the 1996 provision authorizes a private cause of action in US courts and allows any Cuban American whose land was nationalized or confiscated by the Cuban government after 1959 to sue any person or company who "traffics" or economically benefits from their previously held property.[222]

The immediate effect of this policy shift remains uncertain at the time of publishing this Note. The administration's decision to activate Title III means that the US government will now allow lawsuits in US courts against foreign companies that use property confiscated by the

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215. *Id.*

216. *See, e.g., Foreign Claims Settlement Commission of the U.S., supra* note 212.

217. *See Memo from NSC to POTUS: This Week for Title III Suspension; Capitulate, Incapacitate or Negotiate?*, U.S.-CUBA TRADE & ECON. COUNCIL: ECON. EYE ON CUBA (July 11, 2017), https://www.cubatrade.org/blog/2017/7/11/memo-from-nsc-to-potus-this-week-for-title-iii-suspension-capitulate-incapacitate-or-negotiate?rq=certified%20claims [https://perma.cc/PFG8-YE89] (archived Oct. 27, 2019) (suggesting that a large number of litigants could be reached by Title III).

218. *Id.*

219. Paul Guzzo, *U.S. Might Allow Lawsuits Over U.S. Properties Nationalized in Cuba*, TAMPA BAY TIMES (Jan. 17, 2019), https://www.tampabay.com/news/cuba/us-might-allow-lawsuits-over-us-properties-nationalized-in-cuba-20190117/ [https://perma.cc/G4TJ-7T5T] (archived Oct. 27, 2019).

220. Austin Klawitter, *Trump Administration Considering Plan to Scare Off Investors in Cuba*, THE GLOBE POST (Jan. 28, 2019), https://theglobepost.com/2019/01/28/cuba-us-property-rights/ [https://perma.cc/BQ8V-NU2Y] (archived Oct. 27, 2019).

221. William M. LeoGrande, *Trump Declares Economic War on Cuba*, THE CONVERSATION (Apr. 18, 2019), http://theconversation.com/trump-declares-economic-war-on-cuba-115672 [https://perma.cc/9S8Y-7SRZ] (archived Oct. 27, 2019).

222. *Id.* The author notes that most Cuban Americans will gain nothing from Trump's latest sanctions decision against Cuba because Title III exempts private residences from seeking compensation. *Id.*

Cuban government after the Cuban Revolution sixty years ago.[223] Lifting the long-frozen clause will certainly have a considerable impact in US courts and has already resulted in a flurry of new litigation against US, European, and Canadian companies.[224] Title III requires that the Cuban government either nationalized or otherwise seized the property in question.[225] Normally, US courts have no jurisdiction over property owned by noncitizens that was nationalized by a foreign government, as that would constitute a challenge to that government's sovereignty.[226] But under Title III, the statute's expansive extraterritorial application allows for lawsuits against foreign companies engaged in business deemed lawful in Cuba, in their home countries, and under international law to be subject to US jurisdiction.[227] For example, in May 2019 members of the Mata family (now Cuban-Americans) filed a claim in US federal court against the Spanish hotel company Meliá Hotels seeking compensation for its use of the beachfront hotel (since renamed the Meliá San Carlos).[228] The Cuban government confiscated the San Carlos Hotel in December 1962 from the Mata family, one of the wealthiest families in Cuba at the time.[229] The Mata family is also suing Trivago, a subsidiary of the online-booking company Expedia Inc., for "unlawful trafficking" in their family's hotel property and to recover commissions, fees and, other remuneration earned via Trivago's business dealings involving the hotel.[230] In another possible case, former owners of Cuba's nickel

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223. Matt Spetalnick & Sarah Marsh, *In Major Shift, Trump to Allow Lawsuits Against Foreign Firms in Cuba*, REUTERS, Apr. 16, 2019, https://www.reuters.com/article/us-usa-cuba/in-major-shift-trump-to-allow-lawsuits-against-foreign-firms-in-cuba-idUSKCN1RS1VY [https://perma.cc/6ZEV-YRJD] (archived Jan. 21, 2020).

224. Dylan Jackson, *Attorneys Prepare to File Lawsuits on Behalf of Cuban-Americans Whose Property Was Confiscated by Castro*, LAW.COM: DAILY BUS. REV. (Mar. 6, 2019), https://www.law.com/dailybusinessreview/2019/03/06/attorneys-prepare-to-file-lawsuits-on-behalf-of-cuban-americans-whose-property-was-confiscated-by-castro/ (subscription required) [https://perma.cc/7U48-NLWZ] (archived Oct. 27, 2019).

225. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton), 22 U.S.C. §§ 6021–6091 (2000).

226. LeoGrande, *supra* note 221.

227. Jackson, *supra* note 224.

228. Nora Gámez Torres, *Spanish Meliá Company May Be Sued in U.S. Over Its Use of Confiscated Hotel in Cuba*, MIAMI HERALD (May 20, 2019), https://www.miamiherald.com/latest-news/article230624529.html [https://perma.cc/7JSQ-D799] (archived Oct. 27, 2019).

229. Hank Tester, *Miami Family Suing Cuban Government, Spanish Hotel Chain Over Business Confiscated by Castro Regime in 1960's*, CBS MIAMI (May 20, 2019), https://miami.cbslocal.com/2019/05/20/miami-family-suing-cuban-government-business-confiscated-castro-regime [https://perma.cc/6QWJ-EVUD] (archived Oct. 27, 2019); Gámez Torres, *supra* note 228.

230. Jonathan Levin, *Exiles Sue Expedia's Trivago for 'Trafficking' in Cuban Property*, BLOOMBERG (June 19, 2019), https://www.bloomberg.com/news/articles/2019-06-19/exiles-sue-expedia-s-trivago-for-trafficking-in-cuban-property [https://perma.cc/3247-EJQT] (archived Oct. 27, 2019). *See also* Class Action Complaint

mines could seek damages from Sherritt International, a Canadian corporation, which has invested and trafficked in Cuba's nickel mining industry in recent years.[231]

Several other lawsuits have also recently been filed as a result of Title III's activation. In May 2019, Havana Docks Corporation filed suit in the Southern District of Florida against US cruise company Carnival ('Carnival Cruise Lines') for trafficking in Plaintiff's confiscated property in Cuba—commercial waterfront property in the Port of Havana known as the "Havana Cruise Port Terminal."[232] Plaintiff—the former owner of Havana's ports—alleges that Carnival knowingly and intentionally trafficked in the confiscated property, and profited from it, by regularly taking its passengers to and from Havana's port without the authorization of the plaintiff or any US national who holds a claim to the harbor.[233] Similarly, ExxonMobil has filed suit in US federal court against two Cuban companies for their illicit use of an oil refinery in Havana and other properties seized six decades ago.[234] According to one U.S. State Department report, "implementing Title III could flood US federal courts with as many as 200,000 lawsuits" and thus raises heightened concerns for both US courts and policymakers.[235] Ultimately, every US and foreign company that does business with Cuba—now or in the future—risks being sued under Title III if they make use of property once owned by a Cuban exile who is now a US citizen.[236]

So, as a result of Title III's activation, who wins? One group of winners is Cuba's "former one percenters," a small class consisting of

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for Damages at 2, Mata et al. v. Trivago GmbH, No. 1:19-cv-22529 (S.D. Fla. June 18, 2019).

231. LeoGrande, *supra* note 221.

232. Complaint at 3, Havana Docks Corp. v. Carnival Corp., No. 1:19-CV-21724 (S.D. Fla. May 2, 2019). The property that is the subject of the claim was confiscated and nationalized by the Cuban government on Oct 24, 1960. *Id.*

233. *Id.* In response, Carnival maintains that the plaintiff has failed to plead "trafficking" under Helms-Burton because it has not plausibly shown that Carnival's "use of the property was not incident to lawful travel" to Cuba and its use of the Havana Docks was "necessary to the conduct of such travel." Carnival Corp.'s Motion to Dismiss the Complaint & Incorporated Memorandum of Law at 3, 11, Havana Docks Corp. v. Carnival Corp., No. 1:19-CV-21724 (S.D. Fla. May 30, 2019). Moreover, Carnival disputes whether plaintiff even owns a real claim over the 'trafficked' property. *Id.*

234. Nora Gámez Torres, *ExxonMobil Sues Cuba's Oil Companies for Their Use of Properties Seized under Castro*, MIAMI HERALD (May 5, 2019), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article230009709.html [https://perma.cc/8F4D-56E2] (archived Oct. 27, 2019) (discussing recent lawsuits filed against Cuban companies CIMEX and CUPET).

235. U.S. Dep't of State, *Settlement of Outstanding United States Claims to Confiscated Property in Cuba, Report to Congress Under Section 207 of the Cuban Liberty and Democratic Solidarity Act of 1996* (Sept. 1996); *Cuba: U.S. Policy in the 115th Congress*, CONG. RESEARCH SERV. R44822 72–73 (Jan. 15, 2019), https://crsreports.congress.gov/product/pdf/R/R44822 [https://perma.cc/5US9-3NMP] (archived Oct. 27, 2019).

236. LeoGrande, *supra* note 221.

Cuba's exiled wealthy elite that owned a majority of the land and business in Cuba prior to the 1959 Cuban Revolution.[237] These wealthy Cubans fled the country after Castro's communist regime nationalized their businesses and confiscated their bank accounts and property. As a result of Title III's activation, they can now sue Cuban, American, and foreign entities that profit in any way from the use of that land. On the other end of the spectrum are the majority of Cuban Americans who stand to gain nothing from the administration's new sanctions against Cuba. Because Title III exempts private residences from compensation, there is no statutory remedy for US citizens who seek restitution for the loss of their house confiscated after January 1, 1959. As William LeoGrande points out, "[t]he exiled owners of thousands of small Cuban mom-and-pop shops nationalized in 1968 [also] won't see compensation . . . because the law exempts Cuban small businesses that were confiscated."[238] Thus for now, it appears that the administration's action will likely serve to further divide Cuba's exiled communities.

Does Title III's new flood of litigation resolve the question of a potential regulatory taking in Cuba? Although the law on its face would not appear to apply to alleged takings of property investments made by US nationals between 2014 and 2019, if a US company or citizen could prove that one of its properties has been expropriated by a Cuban or foreign entity—and that this action took place after President Trump's decision to reinstate the embargo—it is possible there may be a basis for legal action under Title III. Notwithstanding the Trump administration's decision to activate the clause, Title III does not explicitly prevent the possibility of takings relief for such claimants; rather, it merely requires that such claimants prove that their property in Cuba has been expropriated or otherwise taken some time after January 1, 1959. With conclusive evidence proving this, it is plausible that claimants could try to seek relief in US courts under Title III from those who are "trafficking" in their confiscated property in Cuba.[239] Now that the US government has lifted the twenty-three year suspension of Title III, lawsuits like the ones involving Carnival and Marriott will continue to roll into US courts across the nation—a warning sign that may scare off foreign investors from entering the Cuban market as well as alarm current investors who are profiting from confiscated land in Cuba. As such, a Fifth Amendment taking alleged by Marriott or another similarly situated US plaintiff may not be completely out of the question.

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237. *Id.*

238. *Id.*

239. *See id.* (suggesting that up to 200,000 lawsuits could be filed in federal court under Article II because any company doing business with Cuba could be sued for using property that was nationalized by the Cuban government since 1956).

V. CONCLUSION

The US government's decision to reinstate the economic embargo against Cuba in 2017 may have significant legal consequences for US claimants who hold property rights in Cuba as well as for the US government. Under the Fifth Amendment of the U.S. Constitution, if a government has expropriated one's property, a taking may be justified whereby a claimant may seek his constitutional right to just compensation.[240] In addition to direct takings of US property overseas, the Fifth Amendment's scope has been extended to include "indirect" takings of property by foreign governments, suggesting that a court may hold the United States liable for a foreign taking simply by encouraging foreign governments to adopt domestic policies or programs that result in the seizure of a US claimant's property.[241] However, if a court concludes that a US claimant has not satisfied the two-pronged test necessary to demonstrate a foreign taking,[242] there remain several alternatives available to US claimants seeking compensation for property losses in Cuba, the most prominent of which is to pursue legal action under Title III of the Helms-Burton Act.[243] If takings claims are alleged and upheld as a result of this regulatory decision, the United States will undoubtedly face future takings challenges stemming from its trade policies or those of other sovereigns. Moreover, any litigation resulting from this shift in policy would undoubtedly require the United States to consider the impact and costs of future takings challenges when deciding whether to adopt certain policy positions or enforce key regulatory actions.

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240. United States v. Jones, 109 U.S. 513, 518 (1883).
241. Langenegger v. United States, 756 F.2d 1565, 1571–72 (Fed. Cir. 1985).
242. *See id.* at 1572–73.
243. Ashby, *supra* note 202, at 423.

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