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The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum

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Cover Page Footnote

J.D., 1997, The Florida State University College of Law. The author wishes to thank her fiance, Mark L. Glenn, for his understanding, encouragement, and patience throughout three years of law school. This comment was selected as the recipient of the Richard B. Lillich Award for the best student piece submitted to the Journal of Transnational Law & Policy during the 1996-1997 academic year.

Comments

THE HELMS-BURTON ACT: INCONSISTENCY WITH INTERNATIONAL LAW AND IRRATIONALITY AT THEIR MAXIMUM

LUISETTE GIERBOLINI*

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I. INTRODUCTION

On March 12, 1996, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 ("Helms Burton"/"Act"), also known as the

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Helms-Burton Act for its two sponsors,¹ became law.² Although President Clinton had initially opposed the Act,³ the downing by the Cuban government of two American civilian aircraft operated by an anti-Castro exile group prompted the President to sign the law.⁴

International reaction to Helms-Burton has been overwhelmingly negative,⁵ with virtually all United States' ("U.S.") trading partners strongly condemning the U.S. They consider the Act contrary to international law, generally accepted principles of free trade and finance, the North America Free Trade Agreement ("NAFTA"),⁶ and the General Agreement on Tariffs and Trade ("GATT").⁷ They also fear the Act will set a precedent for the U.S. to enact similar legislation that could potentially interfere with international trade and investment in countries such as Iran, Libya, and Colombia, with which the U.S. historically has had rocky relations.⁸ Finally, these allies perceive Helms-Burton as being at odds with a long-standing U.S. belief in open markets as a mechanism to open politics.⁹

Consequently, Helms-Burton has resulted in a concerted effort among other countries to retaliate against the U.S. For example,

1. Republican Senator Jesse Helms and Representative Dan Burton.

2. Pub. L. No. 104-114, Mar. 12, 1996 (codified as amended at 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997)).

3. Secretary of State Warren Christopher sent a letter to Speaker Newt Gingrich in September of 1995 expressing his concerns about the Act and stating that he would recommend that President Bill Clinton veto the bill if passed by Congress. See Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 419 n.3 (1996).

4. On February 24, 1996, two civilian aircraft flown by the Cuban-American organization "Brothers to the Rescue" were downed over Cuban waters by the Cuban Air Force, apparently on orders of Fidel Castro. See *Clinton Delays Implementation of Bill on Cuba Lawsuits: U.S. Moves to Ban Canadian Executives*, FACTS ON FILE WORLD NEWS DIGEST, July 18, 1996, at A2; see also Lowenfeld, *supra* note 3, at 419 n.6.

5. For years, other nations have criticized U.S. policies toward Cuba. They believed that these policies sought to coerce third parties into modifying their sovereign decision to maintain trade relations with Cuba. See UNITED STATES ECONOMIC MEASURES AGAINST CUBA: PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES 15 (Michael Krinsky & David Golove eds., 1993) [hereinafter U.S. ECONOMIC MEASURES AGAINST CUBA].

6. North America Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1603, reprinted in 32 I.L.M. 296 [hereinafter NAFTA].

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

8. See Rolando Castañeda, *The Helms-Burton Act: "Lose-lose" Situation and Transition Trap*, CUBAN AFFAIRS, Summer/Fall 1996, at 7; see also Paul Rodgers, *Washington Takes on the Rest of the World: The Helms-Burton Act Could Be the First in a Series of Damaging Conflicts*, THE INDEPENDENT (LONDON), July 17, 1996, at 11. Helms-Burton creates a dangerous precedent which threatens companies trading in the former Soviet Union, Vietnam, and China, to name a few. These fears are not unfounded. Along the same lines as Helms-Burton, Congress is already considering a bill targeting firms trading with Libya and Iran. See *id.*

9. See Castañeda, *supra* note 8, at 10.

Mexico enacted laws to protect its investors.¹⁰ Canada, the largest U.S. trading partner,¹¹ ordered steep fines and jail terms for any Canadian who obeys U.S. directives on Cuba,¹² and Canadian travel groups have threatened a trade boycott of Florida.¹³ The juridical committee of the Organization of American States found the key provisions of the Act contrary to international law.¹⁴ The European Union filed a complaint against the U.S. at the World Trade Organization ("WTO")¹⁵ and recently enacted a law under which European companies affected by Helms-Burton may sue the European subsidiaries of any company which uses Helms-Burton against them.¹⁶ Further, at least one European nation is considering additional unilateral actions against the U.S.¹⁷ Finally, the United Nations

10. "Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional" [Law for the Protection of Commerce and Investment from Foreign Laws Which Violate International Law], D.O., 23 de octubre de 1996. The Mexican law prohibits any company, institution, or individual residing or acting in Mexico from complying with the extraterritorial application of any foreign law that is against trade or investment. The law deems a foreign law to have extraterritorial impact on Mexican commerce or investment if such foreign law:

[I]ntends to impose an economic blockade or restrict investment in a country to change the country's form of government; . . . allows individuals to assert claims for payment based on expropriations in such country; or . . . prevents the entry into the country that has issued the foreign law as a means of achieving the first two objectives.

Id. Mexican tribunals are to deny validity and execution of any judgment or legal act arising from such laws. Any company found complying with Helms-Burton can be subject to a heavy fine. *See id.* Although the law does not state that it countermeasures Helms-Burton, the Act meets every one of the conditions listed by the Mexican law.

Further, as part of the Mexican offensive against Helms-Burton, the Mexican state has been made a partner of corporations that have business ventures in Cuba. *See* Interview with Ramon Coto-Ojeda, Capital Partner and Chair of the Cuba Task Force at the law firm of McConnell-Valdes, San Juan, P.R., in San Juan, P.R. (Dec. 26, 1996). Strategically, that makes the Helms-Burton issue one of complete international proportions because a suit under Helms-Burton against a Mexican company doing business in Cuba would now be a suit directly against the Mexican nation. In that way, Helms-Burton's application would directly go against Mexico's sovereignty. *See id.*

11. *See Moneyline* (CNN television broadcast, Feb. 29, 1996).

12. *See id.*

13. *See* Tim Collie, *Policy Makes Waves Across Globe*, TAMPA TRIB., Oct. 26, 1996, at 9.

14. *See Resistance Grows to Helms-Burton Law: Eizenstat Rebuffed in Mexico*, LATIN AM. WKLY REP., Sep. 12, 1996, at 413 [hereinafter *Resistance Grows*]; *see also* OAS Committee Declares U.S. Helms-Burton Law Illegal, AGENCE FRANCE PRESSE, Aug. 27, 1996. This was the first time an agency of the Organization of American States ruled against the position of the U.S. against Cuba. *See id.* The ruling, although not binding on the U.S., is influential, given the prestige which the juridical committee enjoys. *See Resistance Grows, supra*, at 413.

15. *See* Lionel Barber, *Brussels Finesses Danish Threat to Cuba Law Riposte*, FIN. TIMES, Oct. 29, 1996, at 6.

16. *See* EU to Allow Countersuits to Foil U.S. Anti-Cuba Law, WALL ST. J., Oct., 29, 1996, at A18. Under the European law, any European company that is sued under the Act can recoup damages assessed in U.S. courts against those who sued them. *See id.*

17. *See, e.g.*, DOW JONES ASIAN EQUITIES REP., Oct. 29, 1996. The Director of the Oil and Gas department of the French Ministry of Energy said that Helms-Burton was contrary to European

("U.N.") General Assembly overwhelmingly endorsed a resolution calling for an end to the Cuban embargo.¹⁸ Only three countries voted against the resolution,¹⁹ showing Washington's isolation on the Helms-Burton issue.

Helms-Burton codifies the thirty-year-long U.S. embargo against Cuba.²⁰ Prior to the Act, the embargo against Cuba was a creature of executive orders promulgated by the U.S. president.²¹ As such, the president had the authority to annually review and/or modify the embargo.²² Helms-Burton eliminates the president's power to modify or eliminate the embargo, absent Congressional action.²³ Thus all prior restrictions imposed at the discretion of previous U.S. presidents are now codified and cannot be revoked without Congressional approval.²⁴

This comment takes the position that Helms-Burton violates customary international law and U.S. treaty obligations. Part II of the comment contains a brief background of the U.S. embargo on Cuba and the international community's reaction to U.S. policies. Part III analyzes particular provisions of the Act. The final part discusses the major reasons for finding Helms-Burton violative of international law. The comment concludes that Helms-Burton will become another failed attempt on the part of the U.S. to influence Cuba's and other countries' political and economic systems. Finally, this comment suggests that if the U.S. sincerely desires to be respected in the international community, the Act, in its current form, must be repealed.

law and that unilateral French action was being considered. *See id.* In retaliation for Helms-Burton, the United Kingdom has been considering restricting the entry of U.S. businesspeople to that country. *See* Caroline Brothers, *Britain May Retaliate for Helms-Burton Act: Legislator Says Law Could Threaten Investment*, THE WASH. POST, May 3, 1996, at A25.

18. *See* Stefan Halper, *Mixed Effects of Helms-Burton on Cuba*, WASH. TIMES, Dec. 2, 1996, at A15. The U.N. Resolution also called for all countries to refrain from promulgating and applying measures that affect the sovereignty of other countries. *See* Mark Tran, *Britain Defiant in Cuba Vote*, THE GUARDIAN (LONDON), Nov. 13, 1996, at 13.

19. These countries were the U.S., Israel, and Uzbekistan. *See* Sheryl McCarthy, *Our Noose Around Cuba Also Squeezes Us*, NEWSDAY, July 25, 1996, at A46. Twenty-four other countries abstained. *See* 6 U.S.-MEXICO FREE TRADE REPORT 21, Nov. 30, 1996, available in WESTLAW, 1996 WL 13938874.

20. *See* 22 U.S.C.A. § 6032(h) (West Supp. 1997).

21. *See* Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 327 (1995-1996).

22. *See* Lowenfeld, *supra* note 3, at 421.

23. *See* 22 U.S.C.A. § 6034 (West Supp.).

24. *See id.* §§ 6034-6064.

II. A BACKGROUND ON U.S.-CUBA RELATIONS SINCE 1959

Before Fidel Castro's ascent to power, Cuba was an American tourist's haven and a foreign investor's paradise.²⁵ There was virtually no government regulation, nor serious taxes on businesses.²⁶ Some sources assert that much of the U.S. investment in Cuba during those times came from gangsters who pumped millions of dollars into Havana's hotels and casinos to avoid confiscation under U.S. racketeering laws.²⁷ In 1959, Fidel Castro rose to power and began restructuring Cuba's government.²⁸ Shortly after Castro's ascent to power, Cuba established a relationship with the Soviet Union.²⁹ In reaction to this new friendship between Cuba and the Soviet Union, the U.S. reduced Cuba's sugar quota and eventually eliminated it altogether.³⁰

Several measures taken by the Cuban government further strained its relations with the U.S.³¹ In May 1960, Cuba demanded that the American oil companies in Cuba process Soviet oil.³² When the U.S. companies refused to comply, the Cuban government seized their refineries.³³ This action was followed by Cuban legislation authorizing the expropriation of all U.S.-owned property.³⁴

25. See Richard Falk, *Introduction to U.S. ECONOMIC MEASURES AGAINST CUBA*, *supra* note 5, at 8. Richard Falk explains that the Cuban community in Miami and U.S. companies that once owned property in Cuba are the supporters of a tough U.S. policy against Cuba. See *id.* Both of these groups remain committed to restoring Cuba to its pre-Castro status as a U.S. tourist's playground and investor's paradise. See *id.*

26. See *id.*

27. See, e.g., Rodgers, *supra* note 8, at 11.

28. See Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659 (1996). The process began with the 1959 seizure of agricultural ranches under the Agrarian Reform Law. See *id.*

29. See Shari-Ellen Bourque, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L.J. 191, 196 (1995). In 1960, Cuba and the Soviet Union entered into a trade agreement under which the Soviet Union agreed to purchase sugar and other products from Cuba, and to supply Cuba with crude oil and petroleum products. See *id.* Cuba also received low credit loans and technical advancements. See *id.*

30. See *id.*

31. See Jonathan R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 345 (1996). In October 1959, the Cuban government passed a new mineral law requiring the re-registration of mining claims. See *id.* By 1960, the dispute over mineral taxes had become a major issue between the two countries. See *id.*

32. See *id.* at 346.

33. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 108.

34. See *id.* at 109-10. Cuba's Law 851 of Nationalization of July 6, 1960 authorized these takings. See Travieso-Diaz, *supra* note 28, at 661. The Cuban government explained the nationalization as a response to the U.S. elimination of the sugar quota in 1960. See *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 865 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964). This law was followed by Law No. 890, which was passed in October 1960 and authorized mass expropriations of foreign property in Cuba. See Ignacio E. Sánchez, *Cuban Property Rights and the 1940 Constitution*, 3 J. TRANSNAT'L L. & POL'Y 135, 146 (1994).

Parallel to the nationalization of foreign property, most assets owned by Cuba nationals were also seized.³⁵

In response to Cuba's actions against U.S. companies, the U.S. instituted an economic embargo, banning exportation of U.S. goods into Cuba.³⁶ In 1961, Congress enacted the Foreign Assistance Act,³⁷ which authorized the president to impose an economic embargo against Cuba.³⁸ In 1962, President Kennedy extended the embargo to include all trade with Cuba.³⁹ In 1964, to determine and validate property claims against Cuba, Congress amended the International Claims Settlement Act of 1948 to enable U.S. citizens to file claims against Cuba.⁴⁰ Cuba has never compensated any of these claims. The amount of the claims has been estimated at \$1.8 billion.⁴¹ Of that amount, \$1.021 billion represent the claims of U.S. corporations.⁴²

After the break up of the Soviet Union and the fall of Communism in Eastern Europe, Cuba became vulnerable. Because the Soviets were its primary benefactors during the Cold War, Cuba now lacked steady financial support.⁴³ Accordingly, Castro implemented reforms aimed at improving Cuba's financial situation. He legalized a small amount of private businesses such as hairdressers, plumbers, restaurants, and repairmen.⁴⁴ Even before the demise of the Soviet Empire, Castro began to allow foreign investment in Cuba in the form of joint ventures.⁴⁵ Currently, Cuba permits foreign investors to own forty-nine percent of a joint venture, with the Cuban government owning the other fifty-one percent.⁴⁶ In the tourism area, Cuba allows foreign investors majority ownership of

35. See Travieso-Diaz, *supra* note 28, at 661.

36. See Bourque, *supra* note 29, at 196.

37. 22 U.S.C. § 2370 (1994).

38. This act states: "No assistance shall be furnished under this chapter to the present government of Cuba The President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba." *Id.* § 2370(a)(1).

39. See Proclamation 3447, 3 C.F.R. 157 (1959-1963 Comp.).

40. See Travieso-Diaz, *supra* note 28, at 662.

41. See *id.* at 662. The U.S. Foreign Claims Settlement Commission ("FCSC") certified 5,911 claims, eighty-five percent of which were asserted by 898 corporations. See *id.*

42. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 309.

43. See Bourque, *supra* note 29, at 192. The author cites sources which assert that the collapse of the Soviet Empire caused Cuba's economy to shrink by at least a third of its size and the value of its imports to decrease by seventy-five percent. See *id.*

44. See Kevin Fedarko, *Open for Business*, TIME, Feb. 20, 1995, at 51.

45. See Bourque, *supra*, note 29, at 200. Cuba has allowed foreign investment since 1982. See *id.*

46. See *id.*

the ventures.⁴⁷ As a result of Cuba's reforms, foreign investors began investing in Cuba and providing the country with aid.⁴⁸

In 1992, the Cuban Democracy Act,⁴⁹ also known as the Toricelli Bill, extended and strengthened the embargo on Cuba. The law imposed severe penalties on U.S. subsidiaries operating in third countries if these companies traded with Cuba.⁵⁰ More damaging, the law barred merchant ships trading with Cuba from docking in U.S. ports for six months after leaving Cuba.⁵¹ Not surprisingly, international reaction was negative.⁵² Maintaining that the Cuban Democracy Act was violative of international law, many of the U.S. closest allies, such as Canada and the United Kingdom, enacted laws prohibiting their companies from complying with this act.⁵³

Almost since its inception, Cuba has claimed that the U.S. embargo violates international law.⁵⁴ The U.S. has rebuffed Cuban claims asserting that the embargo is not a proper issue for discussion in an international forum.⁵⁵ Although the majority of the international community originally supported U.S. policies toward Cuba,⁵⁶ it eventually relaxed its treatment of Cuba.⁵⁷ Further, the

47. *See id.* at 201.

48. By the end of 1994, Cuba had signed 185 joint ventures with foreign investors. *See Bourque, supra* note 29, at 202. As of August 1996, 212 foreign companies had investments in Cuba. *See U.N. Says That More Than 50 Countries Trade with Cuba; Led by Spain, Canada, France, AFX NEWS*, Aug. 29, 1996. As of 1995, Canada was Cuba's largest trading partner, with Canadian tourists representing the largest proportion of tourists vacationing in Cuba. *See Bourque, supra*, note 29, at 203.

49. 22 U.S.C.A. §§ 6001-6010 (West Supp. 1997).

50. *See id.* § 6005(a)(1).

51. *See id.* § 6005(b)(1).

52. *See, e.g., G.A. Res. 47/19*, U.N. GAOR, 47th Sess., Agenda Item 39, at 1, U.N. Doc. A/Res/47/19 (1993), *revised by* U.N. Doc. A/Res/48/16 (1993). In this resolution, passed after the Toricelli Bill's enactment, the U.N. General Assembly called for an end to the U.S. embargo on Cuba. *See id.*

53. *See, e.g., Francisco J. Viñas, Establishing and Protecting United States Foreign Investment in a Post-Castro Cuba: By Waiting for Castro, Will U.S. Investors Miss the Boat?*, 5 J. TRANSNAT'L L. & POL'Y 227, 232 (1996).

54. Thus in 1991, Cuba requested the inclusion of the U.S. embargo on the agenda of the U.N. General Assembly's forty-sixth session. *See U.S. ECONOMIC MEASURES AGAINST CUBA, supra* note 5, at 13.

55. *See id.* at 20. The U.S. position has appeared to be that every country has a right to choose the governments with which it has commercial and political relations, the U.S. having chosen not to have relations with Cuba. *See id.*

56. In 1962, the Organization of American States voted to exclude Cuba from the Organization due to its establishment of a Marxist-Leninist government, that was "incompatible with the principles and objectives of the inter-American system." U.N. SCOR, 17th Sess., 5075th mtg., at 16, U.N. Doc. S/5075 (1962). The vote was fourteen in favor, with five abstentions and only one opposed. *See U.S. ECONOMIC MEASURES AGAINST CUBA, supra* note 5, at 112.

57. To illustrate, in the 1970s, the Organization of American States passed a resolution permitting each member country to determine its own trade relations with Cuba. *See U.S. ECONOMIC MEASURES AGAINST CUBA, supra* note 5, at 117.

U.N. has found that elements of the U.S. embargo were invasive of other countries' sovereignty⁵⁸ and has called for an end to the embargo.⁵⁹ Although a U.N. resolution is not legally binding upon the U.S., it carries a strong message encouraging the international community to defy the U.S.⁶⁰ Against this background, and as an attempt to prevent foreign investors from investing in and aiding Cuba, Helms-Burton was enacted.

III. HELMS-BURTON: A POLICY ANALYSIS

Title I of the Act⁶¹ strengthens the economic embargo against Cuba. It prohibits the indirect financing of Cuba,⁶² opposes Cuba's membership in international financial institutions,⁶³ and reduces U.S. payments to such institutions that provide loans or other assistance to Cuba.⁶⁴ It also makes the reinstatement of family remittances and travel to Cuba by U.S. nationals who have family in Cuba conditional on changes in Cuba's internal economy.⁶⁵

58. See Bourque, *supra* note 29, at 215 n.176. The author refers to U.N. Doc. A/46/193/Add. 7. In that document, the U.N. determined that some of the elements of the embargo were invasive of other states' sovereignty. See *id.* For example, the ban on the importation of goods produced by a third country and in a third country which contain any component grown, produced, or manufactured in Cuba. See *id.*

59. See G.A. Res. 47/19, U.N. GAOR, 47th Sess., Agenda Item 39, at 1, U.N. Doc. A/Res/47/19 (1993), revised by U.N. Doc. A/Res/48/16 (1993).

60. See Bourque, *supra* note 29, at 220.

61. 22 U.S.C.A. §§ 6031-6046 (West Supp. 1997).

62. See *id.* § 6033. This section declares, in pertinent part:

[N]o loan, credit or other financing may be extended knowingly by a United States national, a permanent resident alien, or a United States agency to any person for the purpose of financing transactions involving any confiscated property the claim to which is owned by a United States national as of March 12, 1996

Id.

63. See *id.* § 6034(a). This section instructs the U.S. executive director of each of the international financial institutions to oppose the admission of Cuba as a member of those institutions until the president determines that a democratically-elected government of Cuba is in power.

64. See *id.* § 6034(b). This section provides: "If any international financial institution approves a loan or other assistance to the Cuban Government over the opposition of the United States, then the Secretary of the Treasury shall withhold from payment to such institution an amount equal to the amount of the loan or other assistance"

65. See *id.* § 6042. U.S. citizens who have relatives in Cuba have in the past been allowed to send small amounts of money to their relatives in Cuba. Currently, the Cuban government allows small, privately-owned businesses. However, the owners cannot hire outside help. Section 6042 of the Act states that the U.S. will not consider the reinstatement of general licenses for family remittances to Cuba unless the Cuban government permits the newly-arising small businesses in Cuba to hire others to work in the business and to pay wages. Thus section 6042 is aimed at forcing Castro to shape and model small business organization in Cuba more like the U.S. capitalist business organization model.

Presumably, Title II⁶⁶ of the Act intends to achieve democracy in Cuba; however, the terms of effectuating this intent are hardly practicable. Title II sets out guidelines for U.S. assistance to a free and independent Cuba and permits the president to provide aid to Cuba after a transitional or a democratically elected government comes to power.⁶⁷ Title II would end the U.S. economic embargo on Cuba after the president has made a determination that a democratically elected government controls Cuba.⁶⁸ Accordingly, section 6066 contains an extensive list of requirements that a new Cuban government must meet to qualify as a "democratically elected government."⁶⁹ The legitimacy of any Cuban "democratically elected government" is primarily tied to the issue of expropriated U.S. property.⁷⁰

Although most of the requirements in the "laundry list" of section 6066 could be reasonably expected of a truly democratic government, some could not. For example, in order for the U.S. to recognize any new Cuban government, this government must first either make a public commitment and demonstrable progress to return to the U.S. those properties expropriated by the Cuban government or must provide full compensation for such properties.⁷¹ This requirement holds true regardless of whether the new Cuban government meets all other characteristics of a freely elected government. This U.S. position is unprecedented in its foreign policy toward any of the other former Soviet satellite-nations.⁷² Even worse, since the U.S. conditions are inconsistent with the goal of a democratically elected government, this position may actually delay the emergence of a U.S.-friendly democratic government in Cuba.⁷³

66. *Id.* §§ 6061-6067.

67. *See id.* § 6062(a).

68. *See id.* § 6064(a)-(c).

69. *Id.* §§ 6065-6066. For a Cuban government to be considered a "democratically elected government" it must: (i) have legalized all political activity; (ii) have released all political prisoners; (iii) have ceased interference with Radio Marti and Television Marti broadcasts; (iv) have resulted from free and fair elections conducted under international supervision; (v) show respect for basic civil liberties and human rights of its citizens; (vi) substantially be moving toward a market-oriented economy; (vii) have made progress in establishing an independent judiciary; (viii) have made progress in returning to U.S. citizens property taken by the Cuban government from such citizens on or after January 1, 1959, or providing full compensation for such property. *See id.*

70. *Id.* § 6066.

71. *See id.* §§ 6065(b)(2)(D), 6066(6).

72. *See generally* Lowenfeld, *supra* note 3, at 423.

73. *See id.* at 424. The Act is seen by many as a new version of the Platt Amendment, which in the 1920s and early 30s gave the U.S. the right to intervene in Cuban affairs to protect U.S. properties. *See* Castañeda, *supra* note 8, at 7.

Further, commentators suggest that Title II's approach to the issue of expropriated property is unrealistic.⁷⁴ Requiring a new, self-respecting Cuban government to commit to returning all expropriated properties to the U.S. or to provide "full compensation" for these properties in order to be recognized by the U.S. discourages the resolution of the property issue. The value of the claims against Cuba for expropriated property is estimated at over \$10 billion dollars.⁷⁵ Cuba's annual gross social product ("GSP") is calculated at \$13.19 billion dollars.⁷⁶ For Cuba to make a commitment to return all properties to their prior U.S. owners or to "fully compensate" them for their losses, would mean sentencing the country to financial and political devastation. For Cuba to honor such a commitment, it would have to turn over to the U.S. its entire annual GSP⁷⁷ and levy extremely high taxes upon Cuban citizens.⁷⁸ Such tension cannot facilitate a transition to an open market in Cuba as the U.S. desires.⁷⁹

Title III⁸⁰ was designed to protect U.S. property rights in Cuba. This title has sparked in the international community because it raises the issue of economic sanctions through the exercise of extra-territorial jurisdiction, explicitly rejects the Act of State doctrine, and allows U.S. courts to adjudicate claims arising from expropriations carried out more than thirty years ago.⁸¹ Under section 6082, any person who "traffics" in confiscated property which once belonged

74. See, e.g., Lowenfeld, *supra* note 3, at 425.

75. See Interview with Coto-Ojeda, *supra* note 10.

76. See 1996 THE ECONOMIST INTELLIGENCE UNIT: COUNTRY REPORT (4th Quarter) 6 [hereinafter INTELLIGENCE UNIT]. Due to Cuba's social and political structure, unlike the U.S., the country does not calculate economic product in terms of GNP. See interview with Coto-Ojeda, *supra* note 10. Instead, it uses the "gross social product" as the measure of its economy. See *id.*

77. Cubans are aware of these prospects. Cuban Parliament President Ricardo Alarcon has admitted that expropriation claims by U.S. and Cuban nationals, combined, could total approximately \$100 billion. See Travieso-Diaz, *supra* note 28, at 660 n.3. That figure represents fifty times Cuba's average receipt from exports in past years. See *id.* Alarcon expressed concerns that U.S. demands for full compensation would require Cuba to either return the properties to their former owners or to allocate the country's revenues for half a century to amortize the debt. See *id.*

78. See Castañeda, *supra* note 8, at 7.

79. Property issues in Eastern Europe have had a significant impact on its countries' economy. For example, after Germany's reunification, more than 2 million property claims were filed, and it is estimated that it will take ten years to process the claims. See Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 893 (1994). In Poland, 140,000 claims were filed, with an estimated value of \$12-15 billion. See *id.* The huge number of claims filed in these countries has been a considerable burden on their economies. See *id.* at 894.

80. 22 U.S.C.A. §§ 6081-6085 (West Supp. 1997).

81. See *id.*

to a "U.S. national" shall be liable to this national for damages.⁸² Further, the right to sue for damages may be exercised by individuals who were not U.S. nationals at the time of the confiscation but who subsequently became U.S. nationals.⁸³ It is noteworthy that in July of 1996, President Clinton, pursuant to authority vested in him by Congress, suspended for six months the right to sue under this title.⁸⁴

Section 6082 presents two particular problems. First, the definition of a "U.S. national" includes any individual who is now a U.S. citizen, whether or not such person was a U.S. national at the time of the confiscation of property by the Cuban government.⁸⁵ Second, the term "trafficking" is very broad. A person is deemed to traffic in confiscated property if that person "knowingly and intentionally" "engages in a commercial activity using or otherwise benefiting from confiscated property . . ."⁸⁶ A person also "traffics" in confiscated property if he or she profits from "trafficking" by another person.⁸⁷ The issue presented by this section of the Act is whether the U.S. is unnecessarily interfering with other nations' businesses which have no contacts with the U.S. other than for the fact that they somehow "benefit" from Cuban properties which once belonged to U.S. citizens.

Finally, Title IV gives the U.S. government the power to deny entry into the U.S. to aliens who traffic in property confiscated from U.S. nationals by the Cuban Government or who are corporate officers or majority shareholders of corporations which traffic in such property.⁸⁸ The spouses and minor children of such aliens can also be prevented from entering the U.S., regardless of their nationality or involvement in the alleged trafficking.⁸⁹ This title has already been used to deny entry into the U.S. to executives of at least two corporations doing business in Cuba.⁹⁰ Not only does Title IV

82. *Id.* § 6082.

83. *See id.* § 6023(15).

84. *See* Phil Willon, *President Delays Cuba Lawsuits*, TAMPA TRIB., July 17, 1996, at 1. The president can only waive application of this title in six-month intervals. *See* 22 U.S.C.A. § 6085(b) (West Supp. 1997).

85. *See id.* § 6023(15).

86. *Id.* § 6023(13)(A)(ii).

87. *See id.* § 6023(13)(A)(iii).

88. *See id.* § 6091(a).

89. *See id.* § 6091(a)(4).

90. *See* Molly Moore, *Tighter Cuban Embargo Snares Mexican Despite U.S. Ties: Georgetown Grad, Businessman Assails Helms-Burton Act*, INT'L HERALD TRIB., Sep. 10, 1996, at A14. As a result of Title IV, U.S. visas of executives of Grupo Domos, a Mexican telecommunications company, and of Canada's Sherritt International, were revoked. *See id.* The Department of

punish people who are completely unrelated to investments in Cuba, but it also raises a question of equal protection. Many of these spouses or dependents are U.S. citizens themselves, who are denied entrance into their own country for no wrongdoing of their own. Like every other U.S. citizen, they have a right to enter their homeland.

IV. IS HELMS-BURTON CONSISTENT WITH INTERNATIONAL LAW?

Basically, international objection to Helms-Burton revolves around the fact that the Act provides the U.S. with various means to punish citizens of third countries who do business with Cuba from outside the U.S.

A. *The Principle of Nonintervention*

A fundamental legal document in international relations is the U.N. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.⁹¹ This declaration stresses the equality of states regardless of their size, wealth or power.⁹² To illustrate, the declaration's second paragraph reads: "No state may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure advantages of any kind."⁹³

Thus the principle of nonintervention involves the right of every sovereign state to conduct its affairs without outside interference.⁹⁴ Sovereign nations must be free to choose their political, economic, and social systems.⁹⁵ No matter how one looks at Helms-Burton, it runs afoul of the principle of nonintervention. By putting third-party nations at risk of being sued in the U.S., the Act clearly seeks to coerce these nations into modifying or ending trade relations with Cuba. The Act seeks to accelerate Castro's demise and to establish a democratic government in Cuba. Accordingly, the intentions and

State did so despite the fact that the children of Grupo Domos' Chief Executive Officer are U.S. citizens. *See id.*

91. G.A. Res. 2131, U.N. GAOR, 20th Sess., 1408th plen. mtg., Supp. No. 14, U.N. Doc. A/6014 (1965). The resolution was adopted with the vote of both the U.S. and Cuba on December 21, 1965. *See id.*

92. *See id.*

93. *Id.*

94. *See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 146-47 (June 27).

95. *See id.*

effects of Helms-Burton are completely interventionary and, therefore, violate the well-settled principle of nonintervention.

B. Extraterritoriality: Controlling Conduct Abroad

The principle of territoriality proclaims that a state should restrict its rule-making to persons and goods within its territory.⁹⁶ Therefore, as a general rule, a state cannot exercise its powers in the territory of another state.⁹⁷ Nevertheless, by threatening non-U.S. nationals with lawsuits, damages, and/or banning their entry into the U.S., Helms-Burton seeks to impose on such nationals the restrictions of U.S. law. The Act exposes foreign companies conducting business completely *outside the U.S.* to litigation *in the U.S.* International law generally does not allow this type of extraterritoriality.

The U.S. has justified Helms-Burton's extraterritorial scope by asserting that international law allows a state to enact laws concerning conduct which takes place completely outside its territory when such conduct has a significant effect within the state's territory.⁹⁸ Such a statement refers to the "effect doctrine" expressed in the Restatement (Third) of Foreign Relations.⁹⁹ However, when a

96. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 204; see also Bourque, *supra* note 29, at 211-13. The principle of territoriality is firmly embedded in international law. For example, Article 18 of the Charter of the Organization of American States reads:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

ORGANIZATION OF AMERICAN STATES CHARTER art. 18, reprinted in 33 I.L.M. 981, 991 (1994) [hereinafter OAS CHARTER]. The Charter is binding upon the U.S. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 236.

97. For example, the Organization of American States, of which the U.S. is a member, clearly prohibits a member state from extending its laws extraterritorially for the purpose of influencing and controlling another state's internal affairs. The OAS Charter states: "Each State has the right to develop its cultural, political, and economic life freely and naturally." OAS CHARTER, *supra* note 96, art. 16. By attempting to indirectly change Cuba's nonmarket economy, the U.S. is in direct violation of Articles 16 and 18 of the OAS Charter.

98. See 22 U.S.C.A. § 6081(9) (West Supp. 1997). This section of Helms-Burton reads: "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory."

99. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) [hereinafter RESTATEMENT OF THE FOREIGN RELATIONS]. That section states, in pertinent part:

Subject to § 403, a state has jurisdiction to prescribe law with respect to (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory

U.S. regulation affects other nations, the Restatement takes the position that the U.S. may exercise extraterritorial jurisdiction only when the effect or intended effect of another state's actions is substantial and when the exercise of jurisdiction is reasonable under the analysis of section 403 of the Restatement.¹⁰⁰ Helms-Burton fails those requirements.

1. Reasonableness

The principle of reasonableness calls for limiting the exercise of a state's jurisdiction so as to minimize conflict with the jurisdiction of other states. Section 403 of the Restatement enumerates factors to consider in evaluating whether a State's exercise of jurisdiction is "unreasonable."¹⁰¹

Section 403's factors suggest that Helms-Burton's provisions unreasonably exercise jurisdiction over foreign persons and corporations. The alleged trafficking takes place entirely outside U.S. territory. The alleged trafficking is conducted by non-U.S. citizens. Further, the Act's provisions shake the very foundation of the principle of territoriality since the international community has not accepted the notion that U.S. citizens should be allowed to sue the kinds of "traffickers" to which the Act refers.¹⁰² Finally, the Act

Id. (emphasis added).

100. *Id.* § 402 cmt. d.

101. Section 403 of the Restatement lists the following factors to be considered in evaluating the reasonableness of a country's exercise of jurisdiction outside its territory:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

Id. § 403.

102. See Ratchik, *supra* note 31, at 363 n.119 (citing MARK P. SULLIVAN, CONGRESSIONAL RESEARCH SERVICE, CUBA-U.S. RELATIONS: SHOULD THE U.S. INCREASE SANCTIONS AGAINST CUBA? 10 (1995)); see also *id.* at 349 n.48 (referring to Letter from Wendy R. Sherman, Assistant

ignores Cuba's interest in providing its own definition of property and will obviously conflict with regulations by other nations.¹⁰³

2. Deference to Other Nations' Interests

Even if one were to conclude that Helms-Burton is not an unreasonable exercise of U.S. jurisdiction, other states may have as much right as the U.S. to regulate the trading activities addressed by the Act. When that is the case, each state has an obligation to evaluate its own, as well as other states', interest in exercising jurisdiction over the issue.¹⁰⁴ To assist states with such a balancing test, the Restatement provides a nonexhaustive list of factors that states should consider.¹⁰⁵ In a nutshell, a state should defer to the other state's interest if "that other state's interest in regulating the activity at issue is clearly greater."¹⁰⁶ Application of such principle to Helms-Burton suggests that the U.S. must defer to other nations' interests in independently choosing their foreign investment sites.

With the collapse of the Soviet Union, the U.S. interest in Cuba has shifted to Cuba's internal political life, its violation of human rights, and its denial of political democracy.¹⁰⁷ Like the rest of the embargo, Helms-Burton is aimed at changing Cuba's internal political character.¹⁰⁸ It seeks to deter foreign investment in Cuba so as to bring the demise of Castro and the emergence of a Cuban political system more to the liking of the U.S.¹⁰⁹ This is not a legitimate reason to regulate third countries' trade activity which takes place completely outside U.S. soil. Moreover, even if the U.S. had a legitimate interest in changing Cuba's form of government, past U.S.

Secretary of Legislative Affairs, to Benjamin A. Gilman, Chairman, House Committee on International Relations (Apr. 28, 1995), reprinted in *CUBA POLICY OR CUBA FOLLY?: FACTS ABOUT THE HELMS-BURTON LEGISLATION TO TIGHTEN THE EMBARGO AGAINST CUBA* (1995).

103. See *id.* at 362.

104. See *RESTATEMENT OF THE FOREIGN RELATIONS*, *supra* note 99, § 403(3).

105. *Id.* § 403 cmt. b.

106. *Id.* § 403(3).

107. See 22 U.S.C.A. § 6022 (West Supp. 1997). Section 6022 of Helms-Burton declares that one of the purposes of the Act is "to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries . . . in the Western hemisphere." The Act also emphasizes Cuba's violation of human rights as evidenced by the lack of free speech, free elections, political persecution, and executions, and the U.N. expressions about Cuba's violations on human rights. See *id.* § 6021(4), (11), (15), (20), (24).

108. See Briefing by Sandy Berger and Peter Tarnoff, July 18, 1996, available in *WESTLAW*, 1996 WL 10348826. In that briefing, Mr. Berger acknowledged that the fundamental purpose of Helms-Burton was to promote a transition to democracy in Cuba. *Id.*

109. See, e.g., *U.S. ECONOMIC MEASURES AGAINST CUBA*, *supra* note 5, at 40. This book quotes President George Bush's comments that the U.S. intended to isolate Cuba until Cuba abandons its internal political institutions and replace them with institutions more to the liking of the U.S. *Id.*

foreign policy indicates that it must defer to other countries' economic and financial interests in trading with Cuba.

3. *Helms-Burton as a Secondary Boycott*

Because the U.S. has always rejected secondary boycotts, Helms-Burton comes as a surprise to other nations. In a secondary boycott, state A declares that if state C or its nationals trades with state B, C may not trade with or invest in state A.¹¹⁰ In other words, C and its nationals are required to choose between doing business with state A and doing business with state B.¹¹¹ U.S. history reflects that if another country were to take measures similar to Helms-Burton, the U.S. would not recognize them.

To illustrate, in the late 1980s, the Arab states imposed a secondary boycott on Israel.¹¹² The U.S. reacted with fury, directing penalties for U.S. citizens who participated in or cooperated with this boycott.¹¹³ That was followed by a law authorizing the president to prohibit any "United States person" from complying with international boycotts.¹¹⁴ The U.S. could not accept that its companies were turned into instruments of the foreign policy of other nations.¹¹⁵ Based on past U.S. policy with regards to secondary boycotts, the U.S. should have never enacted Helms-Burton.

In sum, Helms-Burton fails to defer to other nations' interests and is inconsistent with U.S. foreign and trade policies. The exercise of extraterritorial jurisdiction under Helms-Burton is unreasonable, and, therefore, the Act violates the principle of territoriality.

C. *Helms-Burton as a Coercive Means of Bringing Democracy to Cuba*

The U.S. has partially excused its behavior toward Cuba as a reaction to Cuba's violation of human rights.¹¹⁶ However, it maintains close trade and diplomatic relations with China, one of the last

110. See Lowenfeld, *supra* note 3, at 429.

111. See *id.*

112. See *id.* at 430.

113. See *id.* For example, in a well-publicized case, a U.S. company that had been targeted by the Arab countries for doing business in Israel caved in to Arab pressure, selling its Israel plant. See *id.* When the U.S. government found out, it undertook a major investigation which concluded with civil and criminal fines of more than \$6 million against the company. See *id.*

114. 50 U.S.C. app. § 2402(5) (1994). The Anti-Boycott Amendments to the Export Administration Act make it illegal to participate in a boycott against a country with whom the U.S. has friendly relations. See Matthew H. Wenig, *Exporting U.S. Products, Services and Technologies: An Overview of the Regulations and Considerations Regarding Compliance Programs*, 23 DENV. J. INT'L L. & POL'Y 569 (1995).

115. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 207.

116. See *id.* at 312.

communist strongholds in the world, which has been widely criticized for human rights violations far worse than those of Cuba. China's human rights abuses, worse than Cuba's, have been documented.¹¹⁷ Nonetheless, the U.S. has close trade ties with China and does not intervene with other countries' business relations with that country. Ironically, the U.S. has declared that it trades with China because trade will help liberalize China's regime and will bring about human rights improvements in China.¹¹⁸ Nonetheless, the U.S. refuses to apply the same philosophy to its relations with Cuba and envisages Cuba's future almost as a U.S. protectorate.¹¹⁹

In the past, groups of scholars have discussed the use of coercive economic measures as a tool for foreign policy.¹²⁰ To determine whether a state's economic measure is coercive, the intent of the state enacting the economic measures should be examined.¹²¹ Accordingly, it is impermissible for a state to use coercive economic measures to influence changes in the noneconomic policies of another state.¹²² This includes the intent to influence a targeted state in its choice of government, in its choice of political and civil rights granted to the targeted state's citizens, and in the targeted state's foreign policies toward third countries. As clearly evidenced by the House Report on the Act, the purpose of Helms-Burton is to "discourage persons and companies from engaging in commercial transactions in Cuba and, in doing so, to deny the Cuban regime the

117. To illustrate, torture is widespread and systematic in China's system. See, e.g., Daniel C. Turack, *The Clinton Administration's Response to China's Human Rights Record: At the Half-Way Point*, 3 TULSA J. COMP. & INT'L L. 1 (1995).

118. See, e.g., President Bill Clinton, Press Conference (May 26, 1994), in RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, JR., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM ORIENTED COURSEBOOK* 330-31 (3d ed. 1995). In that press conference, President Clinton acknowledged that China had not achieved significant progress in the realm of human rights. Yet, the President granted it Most Favored Nation trading status as means to "lay the basis for long term sustainable progress in human rights." *Id.* The President explained that trade with China would bring about changes in the country's human rights policy. In his own words:

[W]e do more to advance the cause of human rights if . . . our nations are engaged in a growing web of political and economic cooperation and contacts. I am persuaded that the best path for advancing freedom in China is for the U.S. to intensify and broaden its engagement with that nation.

Id.

119. See Castañeda, *supra* note 8, at 11.

120. See, e.g., U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 246. The authors printed a 1989 discussion of a U.N. group of legal experts who evaluated and sought to eliminate coercion against developing countries in the international arena. Although their focus of discussion was Nicaragua, the same principles discussed by these experts could apply to U.S. coercion with regards to Cuba.

121. See *id.* at 250.

122. See *id.*

capital generated by such ventures."¹²³ Thus the main objective is to drive foreign investment out of Cuba. Because the intent behind Helms-Burton's provisions is invalid, its interventionary and coercive provisions violate international law.

Further, Helms-Burton's goal is to bring democracy to Cuba. For that purpose, the Act uses economically coercive measures. However, there seems to be no support for the imposition of sanctions to promote democracy in a unilateral way. The International Court of Justice ("I.C.J.") has declared that the principle of nonintervention applies irrespective of whether the U.S. actions are an attempt to promote democratic changes.¹²⁴ The U.S. has in the past been unable to explain to the international community how international law supports such a goal. Instead, the U.S. has claimed that its measures and goals with regard to Cuba are not appropriate topics of discussion in an international forum, such as the U.N. Although there is some indication of international acceptance of the use of *multilateral* economic sanctions to promote democracy in states where an existing democracy has been overthrown, such as in the case of Haiti¹²⁵ and Panama,¹²⁶ Cuba's situation is distinguishable.¹²⁷

In the past, other countries against which the U.S. has taken coercive economic action have filed complaints with the U.N. For example, in the 1980s, the U.S. supported the Nicaraguan *contras*, whose goal was to overthrow the Nicaraguan pro-communist government. The U.S. economic measures against Nicaragua included the blocking of loans from international financial organizations, a measure similar to one found in Helms-Burton. Other

123. Lowenfeld, *supra* note 3, at 427 (citing to the House Comm. on International Relations, Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995, H. R. Rep. No. 104-202, pt. 1, at 39, 104th Cong., 1st Sess. (1995)).

124. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 106-09, 130-35 (June 27).

125. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 294. In 1991, a military coup overthrew the democratically elected government of Haiti. The Organization of American States condemned the coup and urged member states to impose a trade embargo on Haiti. See Ministers of Foreign Affairs, MRE/RES.291. OEA/Ser.F/V.1 (Oct. 8, 1991).

126. In 1988, the U.S. imposed economic measures on Panama in response to General Noriega's refusal to recognize a democratically elected new government in that country. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 274. Noriega has prevented the elected government from taking office; U.S. eventually invaded Panama and arrested Noriega. See *id.*

127. Cuba has never had a democratic government. Before Castro's rise to power, Cuba was governed by Fulgencio Batista, a dictator. His government was not described as democratic, with at least one author expressing that Batista's reign included "midnight arrests to silence his opponents." ROBERT E. QUIRK, *FIDEL CASTRO: THE FULL STORY OF HIS RISE TO POWER, HIS REGIME, HIS ALLIES, AND HIS ADVERSARIES* 47 (1993).

measures approximated the present U.S. embargo on Cuba. Nicaragua went to the I.C.J. and contended that U.S. economic measures against Nicaragua and the U.S. support of *contras* were against international law because they violated the prohibition against nonintervention in the internal affairs of other states.¹²⁸ The I.C.J. found that by aiding military and paramilitary activities against Nicaragua, the U.S. was in breach of obligations under international law.¹²⁹ However, the court did not evaluate Nicaragua's claim concerning economic intervention and coercion on the part of the U.S. Some authors suggest that because of the conclusive manner in which the I.C.J. resolved the economic coercion issue, it is difficult to predict how the court would treat a similar claim brought by either Cuba or any other country affected by Helms-Burton.¹³⁰ Evaluating Nicaragua's claim, the I.C.J. focused on customary international law, but there may be other venues to reach a conclusion that U.S. coercion, as enacted in Helms-Burton, violates international law.

D. Helms-Burton as Response to Cuba's Nationalization of U.S. Properties

The U.S. has implied that the Act's extraterritorial measures can be justified under international law as countermeasures to Cuba's unlawful nationalization of U.S. property in Cuba.¹³¹ The U.S. believes that Cuba's nationalization of U.S. property was unlawful because the Cuban government did not provide full compensation and because the nationalization was performed in a discriminatory fashion.¹³² Thus the argument follows, it should not come as a surprise to foreigners to face liability for trafficking in property which was "stolen" from its rightful owner.¹³³ This argument has two weaknesses. First, in thirty years of embargo, the U.S. never relied on the issue of nationalization to justify its policy toward Cuba. Second, the argument presumes that the property was

128. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 18-20 (June 27).

129. See *id.* at 146-49.

130. See, e.g., U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 248.

131. See 22 U.S.C.A. § 6081(6)(B) (West Supp. 1997).

132. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 309. The editors explain that U.S. courts held that the expropriations were discriminatory because Cuba only expropriated U.S. property and because the expropriations were in retaliation to the elimination of Cuba's sugar quota. See *id.* at 310.

133. See, e.g., James Rosen, *Helms' Anti-Castro Law Strikes Unexpected Target*, THE NEWS & OBSERVER, Dec. 9, 1996, at A1 (quoting Senator Helms); see also Brice M. Claggett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996).

"stolen" because Cuba would not agree to pay full compensation to foreigners for the expropriations.

1. *The Nationalization as Reason for Helms-Burton*

When the U.S. originally instituted the embargo against Cuba, it did not rely on the nationalization of property as a reason.¹³⁴ Subsequently, when the U.S. had to defend the embargo against international pressure, it failed to rely on the nationalization issue again. Until Helms-Burton was enacted, the U.S. explanation for its policies at international forums relied on Cuba's alliance with the Soviet Union and Cuba's support for subversion in the world.¹³⁵ Even in 1992, when the U.S. enacted the Cuban Democracy Act, it failed to mention the nationalization of U.S. property in Cuba.¹³⁶ Suddenly, when U.S. policy toward Cuba can no longer be justified based on the Cold War, Helms-Burton declares the nationalization issue to be a reason for strengthening the embargo. In sum, the nationalization issue is a pretext for continuing an already failed American economic and political policy of animosity toward Cuba.

2. *"Stolen" Property and "Full Compensation"*

The U.S. has also rationalized Helms-Burton's enactment by asserting that Cuba's nationalization of U.S. property has failed to provide "prompt, adequate and effective compensation" as required by international law.¹³⁷ In the past, Cuba has responded to this argument that the questions as to whether compensation has to be provided and as to the amount of compensation are matters which international law leaves up to a state's sovereign discretion.¹³⁸

Although international law requires that expropriation of foreign property be compensated,¹³⁹ the Restatement of Foreign Affairs suggests that the U.S. needs to demonstrate that the nationalization violated international law with respect to compensation.¹⁴⁰ The U.S. will find proving this point difficult because the compensation standard for foreign property expropriation is unclear.¹⁴¹

134. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 309.

135. See *id.*

136. See *id.*

137. *Id.* at 310.

138. See *id.* at 311.

139. See Consuegra-Barquín, *supra* note 79, at 879.

140. RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 99, § 905 (1987); see also U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 311.

141. See Consuegra-Barquín, *supra* note 79, at 879; see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("There are few if any issues in international law today on

At least two views exist with regard to compensation.¹⁴² One view requires expropriating countries to pay full compensation for the property taken.¹⁴³ The other view asserts that the expropriating country should determine, according to its own laws, the type and amount of compensation.¹⁴⁴ Real property issues, such as expropriation and adequate compensation, the argument follows, fall within the category of actions over which nations have complete sovereignty, and the U.S. cannot decide whether another sovereign state's expropriation is proper or adequate.¹⁴⁵

In 1962, the U.N. General Assembly passed Resolution 1803 which provided in part: "In such cases [of nationalization or expropriation] the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."¹⁴⁶

In the 1970s, at least two separate U.N. resolutions espoused the belief that measures of nationalization adopted by a nation were the expression of their sovereign power and that each state should determine the amount and procedures for compensation.¹⁴⁷ In a nutshell, these resolutions proclaimed that "prompt, adequate and full" compensation was no longer the standard of compensation for expropriation. Instead, the determination of the standard was in discretion of the expropriating state. Although U.N. resolutions lack binding effect, they serve as a source of international customary law.¹⁴⁸ Further, some U.S. courts have held that the applicable standard is whether the compensation is "appropriate compensation."¹⁴⁹ Nevertheless, commentators assert that the majority of the international community adhered to the principle of "full compensation."¹⁵⁰

which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.")

142. For an in-depth discussion of these views, see Consuegra-Barquín, *supra* note 79.

143. *See id.*

144. *See id.* at 877.

145. *See* Interview with Coto-Ojeda, *supra* note 10.

146. G.A. Res. 1803, 17 U.N. GAOR Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

147. *See* U.N. TDBOR, 12 Sess., Supp. No. 1, at 1, U.N. Doc. TD/B/423 (1972); G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 52, U.N. Doc. A/9631 (1974).

148. *See* Consuegra-Barquín, *supra* note 79, at 882.

149. *See* U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 311; *see also* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 887 (2d Cir. 1981).

150. *See, e.g.,* Consuegra-Barquín, *supra* note 79, at 880 (citing BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 838 (1991)). These commentators assert the fact that a large number of constitutions in the world declare the compensation standard for expropriation to be "just" or "full" compensation indicates this to be the majority view. *See id.*

There is no clearly established international standard for compensation, and U.N. principles of compensation significantly differ from what nations are actually paying for expropriation. Although the trend regarding compensation in the international community may be shifting toward full compensation, the issue is hardly settled. Accordingly, the U.S. cannot justify all of Helms-Burton's provisions based on Cuba's alleged failure to fully compensate it for the expropriations.

Further, even if the U.S. could show that international law requires Cuba to pay full compensation for the expropriated properties, Helms-Burton would still violate international principles. For Helms-Burton to be legal, the U.S. would need to show that the Act complies with the requirements of proportionality and necessity.¹⁵¹ "Proportionality" requires that Helms-Burton not be disproportionate to the violation and the injury suffered by those affected by Cuba's acts.¹⁵² "Necessity" means that the U.S. has to avoid countermeasures as long as genuine negotiations or settlements are available and offer some promise of resolving the matter.¹⁵³ The Act clearly fails to meet both requirements. The law is not "proportional" because of the U.S. insistence on receiving full compensation, *as defined by the U.S.*, when it is fully aware that accepting such demand would destroy any and all Cuban chances of economic recovery. The Act is also "unnecessary" under international law standards because Cuba has demonstrated its willingness to resolve the issue of expropriated properties in a reasonable manner.¹⁵⁴

In sum, because the U.S. never before relied on the issue of expropriation to justify its economic policies against Cuba and because there is no well-settled international standard of compensation for expropriation of foreign property, U.S. reliance on these arguments to support Helms-Burton is insufficient to overcome its extra-territorial and interventionary nature.

151. See RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 99, § 905; U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 311.

152. See U.S. ECONOMIC MEASURES AGAINST CUBA, *supra* note 5, at 312.

153. See *id.*

154. In the past, Cuba settled expropriation claims against it by countries such as Spain, France, Switzerland, and Canada. See Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 221 (1995). "In general, these claims were settled for "a fraction of the assessed value of the expropriated assets." *Id.*

E. Espousing the Claims of Cuban Nationals as a Violation of International Law

As discussed earlier in this comment,¹⁵⁵ Title III of Helms-Burton allows U.S. nationals to sue foreign corporations who traffic in confiscated property. The Act does not distinguish between claims by persons who were U.S. nationals at the time of the expropriations and claims by persons who were not U.S. nationals at the time of expropriation but who became U.S. nationals *after* the expropriations had occurred. This approach extends remedy to Cuban owners who were not U.S. nationals at the time of the expropriation and violates international law.

It is a well-established principle that a state can expropriate the property of its own nationals.¹⁵⁶ International law does not provide a remedy to domestic claimants for the expropriation of their assets by their own state.¹⁵⁷ Therefore, international law requires that the resolution of expropriation claims of those who were Cuban nationals at the time of the confiscations be handled in accordance with Cuban law.¹⁵⁸ In other words, whether Cuban nationals should be compensated for expropriated property is an issue to be resolved pursuant to Cuban domestic law.¹⁵⁹ Helms-Burton violates the well-established international law principle that a nation can only espouse the claims of those who were its nationals when the claims arose because it allows Cuban-Americans who were Cuban nationals at the time of the expropriations to sue under the Act.¹⁶⁰

Traditionally, U.S. citizens and nationals pursue claims against foreign governments for confiscation of their property through the Foreign Claims Settlement Commission ("FCSC").¹⁶¹ Prior to section 6082's enactment, Congress had never authorized the FCSC to hear claims of persons who were not U.S. nationals at the time their property was confiscated by a foreign government.¹⁶² U.S. officials

155. See *supra* text accompanying notes 82-84.

156. See Consuegra-Barquín, *supra* note 79, at 887; see also *Jafari v. Islamic Rep. of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982).

157. See Travieso-Díaz, *supra* note 154, at 223.

158. See *id.* at 223; Ratchik, *supra* note 31, at 358. "This rule is a formulation of the principle that an injury to a national is an injury to his state . . ." *Id.*

159. See *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 865 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

160. See Ratchik, *supra* note 31, at 361; see also FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE U.S.: DECISIONS AND ANNOTATIONS 18 (1968).

161. See Ratchik, *supra* note 31, at 360.

162. See *id.* The FCSC has twice validated claims of foreign-born nationals. However, in these cases, Congress only validated the FCSC claims of persons who were not U.S. nationals at the time of a confiscation: in 1958, to Italian-Americans, and in 1981, to Czech-Americans. See

were aware of the dangerous precedent that Helms-Burton could set as they warned Congress that the law deviated from well-established U.S. policy.¹⁶³

Some authors have suggested that the U.S. Constitution mandates that Helms-Burton allow Cubans who became U.S. nationals after 1958 to file claims to receive compensation under Helms-Burton.¹⁶⁴ Their argument is that forbidding U.S. citizens of Cuban ancestry from pursuing their property claims against foreign traffickers while permitting other U.S. citizens to do so would violate the equal protection guarantees of the U.S. Constitution.¹⁶⁵ This argument is flawed. Research did not show any precedent for the U.S. to espouse the property claims of people who became U.S. citizens after a foreign government expropriated their property.¹⁶⁶ The U.S. has not espoused the claims of Poles, Germans, Russians, or other foreign-born people whose properties were confiscated in their home countries and who later became U.S. nationals. Allowing Cuban Americans who were not U.S. nationals at the time of the confiscation to recover their properties under the Act seems to violate the equal protection right of other foreign-born U.S. citizens.

id. at 360 n.107. The FCSC validated their claims only after persons who were U.S. nationals at the time of confiscations were compensated for their loss. *See id.* Nevertheless, the U.S. in 1981 clarified its intention to only remedy the claims of those who were U.S. citizens at the time of the confiscations and maintained that the initiative taken with respect to the Czech-Americans did not establish any precedent for future claims. *See id.*

163. *See* Travieso-Diaz, *supra* note 154, at 224. The author discusses a letter written to Congress by the Department of States stating:

Under well-established principles of international law, to which the U.S. adheres, the U.S. cannot espouse claims against foreign governments for injuries inflicted upon persons who were not U.S. citizens at the time of the injury Deviation from the established legal principles cited above would create a precedent with implication beyond this immediate case. It could open a broad range of new and marginal claims for the U.S. government to pursue, without support under international law. At the same time, it would erode our ability to espouse legitimate claims of U.S. citizens

Id.

164. *See, e.g.,* Ratchik, *supra* note 31, at 361.

165. *See id.*

166. For example, in the past, the FCSC denied the claims of Yugoslav citizens who allegedly had an outstanding property claim against the Yugoslav government. *See id.* at 360 n.108. The FCSC explained that the U.S. government would not espouse claims which had not been impressed with U.S. nationality *from the date the claim arose*. *See id.* at 361 n.108. Essentially, the author suggests that U.S. nationals must be in continuous possession of the property related to a claim from the date of loss to the filing of the claim for the claim to be valid. *See id.* (referring to *In re Krukowski*, Foreign Claims Settlement Comm'n, Claim No. PO-9532 (Dec. No. PO-927) (Sep. 2, 1964) (denying the claim of a Polish national); *In re Forester*, Foreign Claims Settlement Comm'n, Claim No. CZ-2696 (Nov. 13, 1959) (denying a claim where the claimant was not a U.S. citizen at the time of the confiscation); *In re Papacostas*, Foreign Claims Settlement Comm'n, Claim No. IT 10251 (July 17, 1957) (denying the claim of a Greek national who inherited the property of a U.S. national)).

In sum, although those benefiting from the Cuban confiscations may have a moral obligation to compensate Cuban nationals for the expropriated properties, such obligation falls short of being a legal obligation. More importantly, because under international law compensation for property expropriated by one's own state is a matter of that state's domestic law, Title III of Helms-Burton violates international law.

F. Helms-Burton and GATT

The GATT is a legally binding treaty, to which the U.S. is a party. Article I of GATT requires member nations to treat "like products" from other countries with equal preference when these products come into a GATT member nation.¹⁶⁷ This is called the "Most Favored Nation" treatment ("MFN"). Helms-Burton violates GATT's Article I in at least two ways. First, by treating third country products which contain sugar purchased from Cuba differently from products containing sugar purchased from other countries, Helms-Burton fails to grant equal preference for like products.

Second, as Helms-Burton bans the entry into the U.S. of products "made or derived in whole or in part from any article which is the growth, produce, or manufacture of Cuba,"¹⁶⁸ regardless of the product's transformation, it violates the U.S. MFN obligations. According to GATT, whether the U.S. must afford MFN treatment to sugar products of countries which originally purchased sugar from Cuba will depend on the origin of such products.¹⁶⁹ There are two approaches to defining the origin of goods: (i) the "substantial transformation" approach and (ii) the "value-added" approach.¹⁷⁰ Helms-Burton's prohibition on Cuban sugar disregards this distinction and prohibits importation of sugar products from any country that purchased sugar from Cuba, regardless of the origin of the product attempting to enter the U.S. from another GATT country. In this way, the Act threatens to disrupt significant trade between the U.S. and other GATT countries.¹⁷¹

167. GATT, *supra* note 7, art I.

168. 22 U.S.C.A. § 6040(a) (West Supp. 1997).

169. See Ratchik, *supra* note 31, at 354.

170. See *id.*

171. See *id.* For example, Helms-Burton threatens more than \$370 billion in Canadian food product exports. See David Adams, *Pressure Is on to Strengthen Cuba Sanctions*, ST. PETERSBURG TIMES, May 28, 1995, at 1A. As a result, Helms-Burton can cause a costly trade war between the U.S. and countries trading with both the U.S. and Cuba.

Finally, Title I of the Act also violates Article XI of GATT. This article prohibits a contracting party from instituting restrictions, other than taxes, duties or other charges, on the importation by a contracting party of any product of the territory of another contracting party.¹⁷² Helms-Burton's complete ban on Cuban sugar runs afoul of GATT's Article XI.

The U.S. may assert, however, that Helms-Burton's enactment is permitted under GATT Article XXI, which relieves a party from its GATT obligations to the extent necessary for the protection of its essential security interests.¹⁷³ Although Article XXI permits the imposition of otherwise banned economic measures if the contracting party considers them necessary for the protection of its security interests in times of war, the U.S. cannot assert an exception under Article XXI. First, the U.S. no longer claims that Cuba threatens its national security.¹⁷⁴ Rather than concerns over American national security, the U.S. rationale for implementing Helms-Burton is its desire to bring democracy and a free market economy to Cuba. Second, although GATT allows member states to avoid their GATT obligations to protect the public,¹⁷⁵ a member cannot apply these exceptions in an arbitrary and discriminatory manner in order to restrict international trade.¹⁷⁶

The European Union has requested a GATT/WTO panel to evaluate Helms-Burton's provisions, and the panel's decision will be announced soon.¹⁷⁷ It is not difficult to predict the outcome. The WTO dispute resolution body is a brand new panel. It has established procedural mechanisms to resolve substantive issues, such as

172. Article XI of GATT provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on any other contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale of any product destined for the territory of any other contracting party.

GATT, *supra* note 7, art. XI.

173. Article XXI of GATT provides: "Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests."

174. Further, the WTO is empowered to decide issues such as the application of the "national security" exception of GATT. See Maritza F. Bolaños, *International Trade and Business in Light of the Cuban Liberty and Democracy Solidarity Act of 1996*, INT'L TRADE & BUS., Oct. 1996, at 6.

175. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 42-43 (1989) (reviewing the exceptions a contracting party may invoke to avoid its GATT obligations).

176. See GATT, *supra* note 7, art. XX(a).

177. See *EU Given WTO Panel to Examine U.S. Anti-Cuba Law*, EUR. REP. Nov. 23, 1996, available in WESTLAW, 1996 WL 11075127.

those presented by Helms-Burton. For example, the WTO determines what types of situations qualify under the organization's "national security" exception to permit a member state's interference with free trade.¹⁷⁸ The European Union's challenge to Helms-Burton will be the first time the WTO rules on the national security exception and, consequently, will have important implications for the credibility of the organization. If the WTO finds in favor of the U.S., the WTO's credibility will be undermined because other countries could use the case as precedent for future international trade violations.¹⁷⁹ However, if the WTO finds against the U.S., it is likely that the U.S. will refuse to comply with the ruling,¹⁸⁰ and, again, the WTO's credibility would be jeopardized. Nevertheless, despite probable U.S. indifference to its ruling, the WTO panel is most likely to find that Helms-Burton's provisions violate GATT. This finding will send a strong message to member nations to defy the Act. At that point, the U.S. will have to determine whether it is willing to completely alienate virtually all its allies. At a minimum, the panel's findings may contribute to an indefinite suspension of Title III of the Helms-Burton.

G. *Helms-Burton and NAFTA*

The U.S. is a member of NAFTA; however, Helms-Burton's provisions may violate NAFTA in at least two ways. First, the Act ignores NAFTA's rules of origin, which are similar to GATT's rules discussed earlier in this comment. Also, Helms-Burton violates U.S. commitments under NAFTA to facilitate entry into the U.S. for Mexican and Canadian entrepreneurs.

1. *NAFTA's Rules of Origin*

One of NAFTA's goals is to promote free trade between Mexico, Canada, and the U.S. For that purpose, chapter 4 of the treaty sets out four ways in which goods from any one of the three states can enter the market of another member state without having to pay external tariffs. These are so-called "rules of origin."¹⁸¹

178. The WTO's national security exception applies in three situations only: in relation to fissionable materials; traffic in armaments; and action "taken in time of war or other emergency in international relations." *Id.* The U.S. would try to classify under this last exception. *See id.*

179. *See* INTELLIGENCE UNIT, *supra* note 76, at 7.

180. Assistant U.S. Trade Representative Jay Siegler opined that the U.S. did not consider the WTO an appropriate forum to resolve Helms-Burton's issues. *See* *USIA Foreign Press Center Briefing About Upcoming WTO*, FED. NEWS SERV., Dec. 3, 1996, available in WESTLAW, 1996 WL 5796074.

181. *See* NAFTA, *supra* note 6, art. 401(b).

According to NAFTA, if a good is produced in a NAFTA state, but one or more of the materials used to make the good come from a state which is not a NAFTA member, the good may still qualify as a NAFTA good if the nonoriginating materials used in the production of the good undergo a substantial transformation.¹⁸² Helms-Burton's ban on Canadian or Mexican goods which contain *any* Cuban component violates chapter 4 of NAFTA because it ignores NAFTA's rules of origin. It ignores whether the Cuban components of the NAFTA product underwent a substantial transformation as part of the process to make the NAFTA product.

2. Helms-Burton Violates Chapter 19 of NAFTA

Title IV of Helms-Burton allows the U.S. to exclude from entry into the country aliens who traffic in confiscated property.¹⁸³ By excluding from the U.S. aliens who directly or indirectly benefit from such a confiscation, this provision dissuades foreign investors from investing into Cuba. This title is not in accord with NAFTA's chapter 19,¹⁸⁴ which obligates the U.S. to facilitate entry into the U.S. to Mexican and Canadian citizens.¹⁸⁵ Although NAFTA allows the U.S. to deny entry to aliens for specified reasons, "trafficking" or "benefiting from confiscated land" are not among those reasons.¹⁸⁶

182. *See id.* This is essentially the same concept as GATT's rules of origin.

183. 22 U.S.C.A. § 6091 (West Supp. 1997). This section, in pertinent part, reads:

The Secretary of State shall deny a visa to . . . any alien who the Secretary of State determines is a person who, after March 12, 1996—

- (1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a U.S. national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a U.S. national;
- (2) traffics in confiscated property, a claim to which is owned by a U.S. national;
- (3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a U.S. national; or
- (4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).

Id.

184. Both Mexico and Canada have claimed that Helms-Burton violates NAFTA. *See Anti-Cuba Law Still an Affront*, MONTREAL GAZETTE, Jan. 7, 1997, at B2, available in WESTLAW, 1997 WL 4604435; *see also Implications and Reactions from Mexico*, 4 LATIN AM. L. & BUS. REP. 9, Sep. 30, 1996, available in WESTLAW, 1996 WL 8856612.

185. NAFTA, *supra* note 6, art. 1603. Article 1603(1) specifically provides that, "[e]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter . . ." Under NAFTA, the U.S. agreed to provide temporary entry to four classes of business people: business visitors; traders and investors; intra-company transferees; and certain professionals. NAFTA, *supra* note 6, Administrative Action Statement, ch/16(A)(2).

186. Article 1603 of NAFTA reads:

Helms-Burton prevents some otherwise eligible Mexican and Canadian citizens from entering the U.S. and, therefore, violates NAFTA. Furthermore, restricting the entry of business people from Canada or Mexico merely because they conduct business with Cuba is inconsistent with NAFTA's objectives of eliminating trade barriers and increasing investment opportunities in member countries.

Helms-Burton's drafters apparently anticipated Mexico's and Canada's claims that the Act violates NAFTA. Section 6040(b) of the Act declares that NAFTA does not purport to modify or alter U.S. sanctions against Cuba. However, one must question whether Helms-Burton itself modifies or alters sanctions against Cuba.¹⁸⁷ As a matter of international trade, Helms-Burton's declarations that it trumps NAFTA are incredibly self-serving. The U.S. voluntarily chose to become a NAFTA partner and has reaped the benefits of the treaty. At the same time, it intends to unilaterally weaken the treaty's application when U.S. actions are inconsistent with its obligations under NAFTA. By supporting free trade only if it suits its needs, the U.S. wants to "have its cake and eat it, too."

H. Helms-Burton and the Act of State Doctrine

The Act of State doctrine is a judicially created doctrine¹⁸⁸ which historically has precluded the U.S. from questioning the validity of acts of foreign nations.¹⁸⁹ The doctrine instructed national courts to recognize the acts of a foreign nation committed within that nation's own territory.¹⁹⁰ The Act of State doctrine usually precludes federal district courts from hearing property/expropriation claims. However, by permitting these claims under Helms-Burton, Congress has in essence enjoined the courts from using the doctrine. Helms-Burton precludes federal courts from using this doctrine to avoid

A Party may refuse to issue an immigration document authorizing employment to a business person where the temporary entry of that person might affect adversely: (a) the settlement of any labor dispute that is in progress at the place or intended place of employment; or (b) the employment of any person who is involved in such dispute.

Id. art. 1603(2).

187. See Lucio, *supra* note 21, at 341 n. 74.

188. See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 974 (S.D.N.Y. 1965) (explaining that the doctrine was developed by the judiciary to avoid disrespect for foreign states and as a result of the judiciary's respect for the Constitution's entrustment of foreign policy to the legislative and executive branches). Neither international law nor the U.S. Constitution requires the exercise of the doctrine. See Ratchick, *supra* note 31, at 365.

189. See *id.*

190. See RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 99, § 443 (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

making a determination of the merits of an action brought under Title III of the Act.¹⁹¹

I. Helms-Burton and the Charter of International Financial Institution

Section 6034 of Helms-Burton declares that if any financial institution approves a loan or other assistance to Cuba over the objection of the U.S., the Secretary of the Treasury will withhold from such institution payment of a corresponding amount.¹⁹² The Act requires the U.S. directors of international financial institutions such as the World Bank and the International Monetary Fund to use their vote to oppose the admission of Cuba as a member of such institutions. Such behavior and requirement is contrary to the charter of these international institutions.¹⁹³

V. CONCLUSIONS

The effect of Helms-Burton on foreign investment in Cuba remains unclear. In December of 1996, two large foreign banks declined to finance Cuba's sugar harvest, forcing Castro's government to scramble for seed and fertilizer money at higher interest rates.¹⁹⁴ It was also reported that several companies which sell goods derived from Cuban sugar have either curtailed or stopped doing business with Cuba.¹⁹⁵ The U.S. would like to think that these are but a few examples of Helms-Burton's effectiveness.¹⁹⁶ However, it appears that the Act is not hurting Cuba as much as the U.S. desires.

Rather than an impediment to its economy, Helms-Burton appears to be a mere inconvenience for Cuba. Despite cancellations by a few investors and lenders, Cuba has no shortage of people interested in lending it money.¹⁹⁷ Neither has Helms-Burton seriously hurt foreign investment. For example, after the law's enactment, an Anglo-Dutch group signed a deal to help build a five-star hotel in

191. See Ratchik, *supra* note 31, at 366.

192. 22 U.S.C.A. § 6034(b) (West Supp. 1997).

193. See Lowendfeld, *supra* note 3, at 423; see also Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, arts. II, III, 60 Stat. 1440, 2 U.N.T.S. 134.

194. See *Cuba Is Feeling Grip of Helms-Burton; U.S. Says Officials Said Two Foreign Banks Have Stopped Financing Cuban Sugar and That Other Companies Are Pulling Back*, THE ORLANDO SENTINEL, Dec. 2, 1996, at A4.

195. See *id.*

196. See *id.*

197. See *id.* The article explains that following the cancellation of loans by the two foreign banks, Cuba immediately received substitute financing from other European investors. *Id.* Cuba has no problem receiving substitute financing due to the high rate of return that these banks can charge on loans given to Cuba. See *id.*

Varadero.¹⁹⁸ In July, a Canadian entrepreneur signed a \$400-million deal to construct eleven hotels in Cuba.¹⁹⁹ Another Canadian group has agreed to a similar contract to build and manage several Cuban hotels.²⁰⁰ Similarly, a Spanish group whose hotels are believed to occupy at least part of land once owned by a wealthy U.S. family is expanding its operations in Cuba.²⁰¹ Some firms have even opined that the embargo and Helms-Burton create excellent opportunities for foreign investors in Cuba because the investors are protected from U.S. competition.²⁰² Further, although some large corporations may withdraw from Cuba because of concerns over lawsuits, smaller, ambitious corporations which do not fear being hauled to court in the U.S. will take their place in Cuba's economy. Any way one looks at the situation, foreign investment in Cuba will not stop, and because of the incentives offered by Castro, the amount of investments is not likely to decrease.⁴

Further, Helms-Burton may backfire. The law may have provided Castro's regime with support from Cubans on the island who otherwise may have risen against the regime. Because of Helms-Burton, Cubans in the island now perceive Castro as the defender of the homeland from an attack by a powerful and mean neighbor.²⁰³ To these Cubans, Helms-Burton confirms Castro's rhetoric of the U.S. as an imperialist, evil neighbor. The Act further reminds island Cubans that the Cuban-American community in Miami has different interests and poses a threat to their island.²⁰⁴

198. See Pascal Fletcher, *Cuba Seeks to Board Tourist Bandwagon*, FIN. TIMES, Nov. 1, 1996, at 4. This year, Cuba's tourism has experienced an increase of thirty-eight percent over the last year. See *id.*

199. See *id.* at 5.

200. See *id.*

201. See *id.*

202. See, e.g., *French See U.S. Embargo of Cuba as Opportunity*, TORONTO STAR, Dec. 2, 1996, at C3. The article detailed a trip to Cuba by French businesspeople. At the end of the visit, some fifteen members of the group had arranged to return to Cuba with business proposals or projects. See *id.*; see also Stephen Fidler, *The Long Arm of American Law: U.S. Legislation Aimed at Punishing Fidel Castro Has Angered Washington's Trading Partners and Left Mr. Clinton with a Dilemma*, FIN. TIMES, July 8, 1996, at 17.

203. See, e.g., Consuegra-Barquín, *supra* note 79, at 894-95. In the past, Castro has played the Cuban-American community against those who remained in Cuba, making statements such as the following: "[I]n Miami, they are already parceling out our country, and dreaming of getting everything back, but that won't happen as long as there remains one single man or woman with a sense of dignity." *Id.* at 895 n.96.

204. See M.A. Font, *Commentary: Assessing the Helms-Burton Law*, CUBAN AFFAIRS, Summer/Fall 1996, at 9. The Act may also create a break between Cubans who live in Cuba and the powerful exile Cuban-American community in Miami, as Cubans on the island perceive Cuban Americans' prospective property claims as attempts against the rights of Cubans who remained in the island. The Act, as one author suggests, "puts the rights of pre-revolutionary property owners . . . above the rights of Cuban nationals currently residing on the island."

Helms-Burton's terms are unrealistic. They have been drafted by Washington bureaucrats and lobbyists who failed to consider the reality of international relations and who disregarded the importance of consistent U.S. trade policies. They also failed to consider the realities of Cuba's economy since the Act does not keep the aggregate cost of its provisions within the financial means of a new, democratic Cuba.

Helms-Burton was enacted in conspicuous violation of international law. The Act contradicts an internationally recognized principle of nonintervention and the Act of State doctrine and is not in accord with NAFTA, GATT, and the Charter of International Financial Institution. The exercise of extraterritorial jurisdiction under the Act is unreasonable and illegitimate. The U.S. government has argued that the Act is justified by Cuba's expropriation policies and by a "meritorious" task of compensating U.S. owners for their "stolen" property. However, this argument is inconsistent with the U.S. foreign policies, does not withstand the reality of customary international law, and, favoring Cuban Americans over other U.S. citizens of foreign descent, raises equal protection claims. Further, espousing property claims of all Cuban nationals violates international law, which does not provide a remedy to domestic claimants for the loss of property expropriated by their own government.

The U.S. has asserted that the enactment of Helms-Burton is justified by concerns over violation of human rights in Cuba. However, such concerns are hypocritical and capricious, considering that the U.S. has ignored much worse human rights violations inflicted by much more antidemocratic regimes, such as China and certain Latin American states.²⁰⁵

Further, the Act's goal to bring democracy to Cuba ignores the fact that democracy cannot be imposed from the outside. Finally, Helms-Burton seeks to prevent other nations from handling and developing their economic systems, and its terms are disrespectful of other states' sovereignty. As such, the Act must at least be modified and, at best, repealed. If Helms-Burton is not found to be a violation of international law, nothing will stop Congress from passing similar laws in the future. Other countries could follow U.S.

Castañeda, *supra* note 8, at 7. Islanders consider that they would be turned into second-class citizens as a result of the process of restitution or compensation contemplated by the Act. *See id.* at 8. The Act may also strengthen Castro's regime because it has heightened the tension with the U.S. which has so well-served Castro for over thirty years.

205. For example, in 1980s, the U.S. has actively supported government of El Salvador, which had a shameful record of human rights violations.

steps. This would disturb international trade in a way it has never been affected.

