4-1-1997

The Long Arm of U.S. Law: The Helms-Burton Act

Anthony M. Solis

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol19/iss3/6

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.
THE LONG ARM OF U.S. LAW: THE HELMS-BURTON ACT

I. INTRODUCTION

With the passage of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), extraterritorial legislation seems to be in vogue. Passed during the politically charged atmosphere of the 1996 U.S. presidential campaign, the Act uses two principal methods to counter the recent effort by Cuban President Fidel Castro to bolster Cuba’s faltering economy by luring foreign investors to the island. First, the Act allows U.S. nationals to sue foreign individuals or corporations for using property that U.S. nationals once owned, but that the Cuban government has since expropriated. Second, the Act bars U.S. entry to individuals who are using such expropriated property individually or through their companies.

The Helms-Burton Act purports to advance liberty and democracy in Cuba by hastening the end of the Castro regime. It thus appears to be little more than an extension of the decades-old U.S. embargo aimed at bringing down the Castro government. Although this aim is not new—the United States has been trying to topple the Cuban dictator for over thirty-five years—the means


5. See id. § 6091.

6. The United States has made several attempts to defeat Castro, including the
currently chosen depart from previous tactics. Historically, the United States has placed restrictions on the activities of U.S. citizens and companies in Cuba, including commercial restrictions on U.S. companies operating in Cuba.

The irony of this latest U.S. initiative is that it runs counter to two significant trends. First, as a result of the end of the Cold War between the United States and the Soviet Union, countries feel less compelled to follow the U.S. lead in many ventures from political to military. Second, the international trade system has become increasingly interdependent. The former suggests that the United States should act in a way that induces foreign countries to follow its lead in international affairs. The latter counsels against taking bold unilateral actions in foreign and trade policy matters at a time when nations are moving toward more interdependent trade arrangements and relying on bilateral and multilateral trade cooperation rather than unilateral mechanisms such as quotas and tariffs.

At first glance, the Helms-Burton Act is nothing more than a U.S. foreign policy limited to Cuba. Upon deeper inspection, however, the Act affects various countries, business interests, international trade agreements, and ultimately, international law itself. Indeed, countries around the world—many of which are

failed Bay of Pigs invasion in 1961, bungled assassination attempts, and even a plot to make Castro’s infamous beard fall out. See Loch K. Johnson, America’s Secret Power 67 (1989).


8. See generally Jeffrey E. Garten, Is America Abandoning Multilateral Trade?, Foreign Aff., Nov./Dec. 1995, at 50. Garten states that “expanded trade is now more critical to America’s future than at any other time in this century.” Id. at 51-52.


10. Many U.S. and international businesses are concerned about the Helms-Burton Act’s chilling effect on foreign investment and the potential effects of retaliatory efforts by countries adversely affected by the Act will have on the global trading system. See discussion infra Part V.

11. The Canadian and Mexican governments have charged that the Helms-Burton Act conflicts with the North American Free Trade Agreement (NAFTA). See discussion infra Part IV.B.1. The Canadian and Mexican governments, along with the European Union, have determined that the Act violates the General Agreement on Tariffs and Trade (GATT). See discussion infra Part IV.B.2.

U.S. allies—denounce the Helms-Burton Act as an extraterritorial extension of U.S. law and have vowed to fight its implementation.\(^{13}\) Some of these countries, including those which comprise the European Union, as well as Canada and Mexico, have enacted retaliatory or blocking legislation and have charged that the Act violates international trade agreements such as the North American Free Trade Agreement (NAFTA)\(^{14}\) and the General Agreement on Tariffs and Trade (GATT), which created the World Trade Organization (WTO).\(^{15}\)

This Comment argues that, although the United States uses international legal principles to support its efforts against Cuba, the Helms-Burton Act is less consistent with international law and more a codification of U.S. foreign policy. This distinction is important because the former operates within a delicate regime that depends largely on the volition of its followers, while the latter is a function of U.S. hegemony and the resources—political, economic, and military—that the United States can bring to bear to effectuate its policies. But, when U.S. power is brought to bear to enforce a law whose legality among the international community is as least suspect, if not firmly rejected, the legitimacy of both U.S. power and international law are threatened.

Part II of this Comment provides a background on the conflict between Cuba and the United States to place the Helms-Burton Act in proper context. Part III describes and analyzes the major

---

\(^{13}\) See Steven Lee Myers, Clinton Troubleshooter Discovers Big Trouble from Allies on Cuba, N.Y. TIMES, Oct. 23, 1996, at A1; see also John Goshko, 3 Allies Join Call Against Cuba Embargo, WASH. POST, Nov. 13, 1996, at A19. In 1996, the United Nations overwhelmingly passed a resolution calling for an end to the U.S. embargo against Cuba. See Goshko, supra. The United Nations has passed such a resolution in each of the past five years, but the most recent resolution specifically cited the Helms-Burton Act as violating the sovereignty of other states and the principles of free trade and navigation. See id.


\(^{15}\) Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) (The Final or “Uruguay” round of the General Agreement on Tariffs and Trade (GATT) is the agreement that produced the World Trade Organization (WTO)).
provisions of the Act and their effects, which include diplomatic protests and condemnations by various countries and commercial entities, blocking or retaliatory legislation primarily by the European Union, Canada, and Mexico, and charges that the Act violates NAFTA and GATT. Part IV looks at the broader, potential long-term consequences of extraterritorial legislation that has experienced a revival in the 104th Congress.

This Comment concludes that the Helms-Burton Act should be amended to exclude the provisions that operate extraterritorially in order to preserve: (1) the international trade agreements to which the United States is a party, (2) international law, (3) the integrity of U.S. foreign policy, and (4) the relationships with foreign nations that are predisposed to support U.S. policy. It is clearly in the best interests of the United States to amend the Act in order to maintain foreign policy consistent with, at the very least, the international legal principles that it recognizes and to show respect for the international agreements and bilateral relationships from which it greatly benefits. Accordingly, Part V provides alternatives that are less offensive, more effective, and more respectful toward other countries' sovereignty and international law.

II. BACKGROUND

A. The Initiation of the U.S. Embargo Against Cuba

In the early 1960s, after Fidel Castro wrested control of Cuba from President Fulgencio Batista, the Cuban government began to nationalize properties—many of which were owned by foreign nationals or persons who subsequently fled from Cuba to the United States.\textsuperscript{16} The restructuring of the Cuban economy led to the adoption of the Fundamental Law of the Republic,\textsuperscript{17} which provided the legal basis for Cuba's confiscatory decrees.\textsuperscript{18} In response


\textsuperscript{17} Ley Fundamental de la Republica, No. 5-123, GACETA OFICIAL, 7 Feb. 1959 (Cuba).

\textsuperscript{18} See MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS 71 (1976) (citing Ley Fundamental de la Republica, No. 5-123, GACETA OFICIAL, 7 Feb., 1959 (Cuba)).
to the confiscations, the U.S. Congress passed the 1961 Foreign Assistance Act, which authorized the President to impose an economic embargo against Cuba. The following year, Congress broadened the embargo through the Cuban Assets Control Regulations, which restricted Cuba’s assets in the United States and prohibited U.S. citizens or corporations from conducting any commercial transactions with Cuba. Further, Congress identified and validated property claims against Cuba. In 1964, Congress amended the 1949 International Claims Settlement Act to enable U.S. nationals to file claims against the Cuban government. To date, Cuba has compensated none of these claims.

B. Subsequent U.S. Policy and Its Effect on Presidential Politics

In the early 1960s, the United States gave Cuban nationals a refugee status unlike that offered to other foreign nationals. Until 1994, Cubans who reached the United States were given immediate asylum. This rule provided the impetus for hundreds of thousands of Cubans to flee to the United States, seeking refuge predominantly in southern Florida. The demographic change

---

22. See id. The Regulations also restrict cash remittances to Cuba. See id.
28. Between 1959 and 1980, approximately 800,000 Cubans settled in the United States, and since then, approximately 200,000 Cubans have arrived. See Legal and Practical Implications of Title III of the Helms-Burton Law Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations, 104th Cong., 62 (1996) (prepared statement of Robert L. Muse, Attorney) [hereinafter Muse Statement].
over the past thirty-five year period has greatly altered the dynamic of presidential politics. Florida now possesses the fourth largest number of votes in the electoral college, and thus it is a perennial battleground for candidates seeking the presidency. 29

The battle for the Cuban-American vote has evolved since the organization of this distinct and sizable constituency in the early 1980s with the formation of the Cuban-American National Foundation (CANF). The CANF is now a powerful lobby that includes a political action committee which doles out hundreds of thousands of dollars in campaign contributions. 30 The importance of the Cuban-American vote in U.S. presidential elections, combined with the disappearance of subsidies once provided by the Soviet Union, has made tightening the screws on the U.S. embargo against Cuba a rarity—a foreign policy that reaps domestic rewards.

The Cuban Democracy Act of 1992 (CDA) 31 is a case in point. In 1992, Congressman (now Senator) Robert Torricelli, a New Jersey Democrat, introduced the CDA, the precursor to the Helms-Burton Act. 32 The CDA aims to hasten the fall of the Castro regime in order to pave the way for a democratically-elected government that respects human rights and that the Cuban military does not dominate. 33 To further this goal, the CDA authorizes the President to impose sanctions on any country that provides assistance to Cuba. 34 Possible sanctions include ineligibility for

30. See Christopher Marquis & Josh Goldstein, Cuban Exile Lobby is the Most Cost-Effective, MIAMI HERALD, Jan. 24, 1997, at 1A; see also Carla Anne Robbins, Dateline Washington: Cuban-American Clout, FOREIGN POL., Fall 1992, at 162, 170-73.
32. See Robbins, supra note 30, at 166. Torricelli's interest in Cuba policy is a vested one. In recent years, New Jersey has developed a constituency of 85,000 Cuban-Americans, which became a key base of support for Torricelli's recent successful campaign for the U.S. Senate. See id. In addition, Torricelli is the second top recipient of funds from CANF leaders and their Free Cuba political action committee. See Marquis & Goldstein, supra note 30.
34. See id. § 6003(b)(1).
U.S. assistance under the Foreign Assistance Act of 1961 or ineligibility for forgiveness or reduction of debts owed to the United States.\textsuperscript{35} The CDA also prohibits vessels that enter a Cuban port from loading or unloading any freight in U.S. ports for 180 days following departure from the Cuban port.\textsuperscript{36} The most controversial of the CDA’s provisions prohibits foreign subsidiaries of U.S. companies from doing business with Cuba.\textsuperscript{37} This provision sparked concern among many U.S. allies because of its extraterritorial nature.\textsuperscript{38}

When first presented with legislation that included such a provision, President George Bush indicated that he could not sign it because it would apply U.S. law extraterritorially and “could force foreign subsidiaries of U.S. firms to choose between violating U.S. laws or host country laws.”\textsuperscript{39} Two years later, however, presidential candidate Bill Clinton announced that he liked the bill.\textsuperscript{40} Weighing the consequences of losing Florida’s support in the 1992 presidential contest, Bush signed the bill, with the extraterritorial provisions intact.\textsuperscript{41}

A similar calculus operated in President Clinton’s signing of the Helms-Burton Act. The bill reached the President’s desk shortly after Cuba shot down two small aircrafts operated by a Cuban exile group.\textsuperscript{42} Thus, the political ramifications that signing the bill would have on the upcoming presidential election strongly influenced Clinton’s decision to sign the bill.\textsuperscript{43} Nonetheless, the Clinton administration stressed explicit concerns with regard to the Helms-Burton Act’s effects on U.S. trading partners, interna-

\begin{itemize}
\item \textsuperscript{35} See id. § 6003(b)(1)(A)-(B).
\item \textsuperscript{36} See id. § 6005(b)(1).
\item \textsuperscript{37} See id. § 6005.
\item \textsuperscript{38} See Bush’s Signing of Cuba Embargo Law May Trigger GATT Complaint, EC Warns, Int’l Trade Daily (BNA) (Oct. 28, 1992).
\item \textsuperscript{39} Bush Uses Veto to Block Bill Banning Cuban Trade, CALGARY HERALD, Nov. 17, 1990, at A8.
\item \textsuperscript{40} See Robbins, supra note 30, at 167.
\item \textsuperscript{41} See id.
\item \textsuperscript{42} See Myers, supra note 13.
\item \textsuperscript{43} See id.; see also Erlanger, supra note 3 (noting that Clinton’s signing of the bill was a reflection of his eagerness to turn his position 180 degrees in the interest of reelection and Florida’s electoral votes).
\end{itemize}
tional trade agreements, and other international commitments.44 Undersecretary of State Peter Tarnoff testified before the Senate Foreign Relations Committee that the Helms-Burton Act potentially conflicts with NAFTA, GATT, the Treaties of Friendship, Commerce and Navigation, and arms control cooperation with and support for democracy in Russia.45 In addition, Tarnoff stressed the bill's possible conflict with U.S. obligations under the charters of the World Bank and the International Monetary Fund, and most importantly, with "principles of international law that have served U.S. business and the U.S. government well."46 Despite these reservations—and the fact that Congress passed a final bill that included all of the provisions with which the Clinton administration expressed concern—Clinton ultimately signed the bill.47

C. The Cuban Foreign Investment Strategy

The Helms-Burton Act was a direct response to a Cuban government policy recently created to respond to the precipitous decline in the Cuban economy that began in the early 1990s after the Soviet Union withdrew its substantial subsidies to Cuba.48 In order to bolster its economy, Cuba set out to attract foreign investment by easing the restrictions forbidding foreign ownership of Cuban land.49 The Castro government thus made a conscious decision to move from a strict socialist economic model to a hybrid socialist economic model that resembles the largely successful economic transitions in the People's Republic of China (PRC) and Vietnam.50 The Helms-Burton Act is clearly a response to Castro's policy because the Act specifically intends to chill foreign investors from providing Cuba with the cash that it desperately

44. See Tarnoff Statement, supra note 12; see also Interview with Richard A. Nuccio, Special Advisor to the President and the Secretary of State for Cuba, in U.S.-CUBA POL'Y. REP., Sept. 20, 1995, at 1.
45. See Tarnoff Statement, supra note 12.
46. Id.
48. See You Can't Get There from Here, ECONOMIST, Apr. 6, 1996, at S3.
50. See id. at 332.
needs to make the type of transition that the PRC and Vietnam used to prevent the collapse of their economies.\[51\]

III. THE HELMS-BURTON ACT

The Helms-Burton Act is comprised of four titles.\[52\] The first two titles consist primarily of a restatement of the U.S. embargo against Cuba and the conditions and incentives for its termination.\[53\] The latter two titles are largely what is new with Cuba policy, with Title III as the primary focus of the extraterritoriality charges that have surrounded the Act.\[54\]

A. Provisions of the Helms-Burton Act

1. Titles I and II: “Strengthening International Sanctions Against the Castro Government” and “Assistance to a Free and Independent Cuba”

Title I of the Helms-Burton Act addresses the U.S. desire to strengthen its economic embargo against Cuba.\[55\] Title II sets out the requirements for lifting the economic sanctions and provides a list of inducements to a transition of government.\[56\] The Act directs the Secretary of State to instruct the diplomatic corps to communicate the reasons for the U.S. embargo and to urge foreign governments to cooperate with U.S. efforts to enforce the embargo.\[57\] Further, the Act underscores the legislation already in force to sanction Cuba,\[58\] reiterates U.S. opposition to Cuban


52. During the lengthy debate over the Helms-Burton Act, the four major sections of the bill came to be referred to as “titles,” which is the way each section was labeled before passage and codification in the United States Code. In common parlance, the sections that the United States Code refers to as “subchapters” continue to be referred to as “titles.”

54. See id. §§ 6081-6091.
55. See id. § 6032.
56. See id. § 6061.
57. See id. § 6032(b).
membership in international financial institutions (IFIs),\textsuperscript{59} and announces the reduction of financial support to IFIs that assist Cuba financially.\textsuperscript{60} The Act also expresses Congress' insistence that the United States oppose any change in the Cuban government's current suspension from participation in the Organization of American States (OAS).\textsuperscript{61}

In contrast to most other U.S. foreign policy legislation, the Helms-Burton Act sets out a remarkably detailed prescription as to how the United States expects to see Cuba develop. Many of its punitive characteristics, such as the economic sanctions, may end only when the President determines that Cuba has established a "democratically elected government" as defined in 22 U.S.C. § 6066.\textsuperscript{62} In determining whether Cuba has established such a gov-

\textsuperscript{59} See 22 U.S.C. § 6034(a).

\textsuperscript{60} See id. § 6034(b). Specifically, these IFIs include the International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the Inter-American Development Bank. See id. § 6034(b)(2)(c).

\textsuperscript{61} See id. § 6035. This provision reinforces Proclamation No. 3447, 27 Fed. Reg. 1085 (1962). The Proclamation reiterates the resolutions passed at the Eighth Meeting of the Consultation of Ministers of Foreign Affairs of the OAS, declaring that "the present Government of Cuba ... is incompatible with the principles and objectives of the inter-American system" and calling for OAS member states to "take those steps that they may consider appropriate for their individual and collective self-defense." Id. The United States interpreted these resolutions as authorizing under international law the imposition of the U.S. embargo and superseding the prohibition against economic sanctions contained in the OAS Charter. See Andreas F. Lowenfeld, Congress and Cuba: The Helms-Burton Act, 90 AM. J. INT'L L. 419, 420 n.8 (1996). Incidentally, at the OAS annual meeting in June 1996, the General Assembly unanimously, except for the United States, criticized the Helms-Burton Act as a violation of international law. See NAFTA Roundup: OAS Condemns Helms Burton, N. AM. FREE TRADE & INVESTMENT REP., June 15, 1996, available in 1996 WL 10175489.

\textsuperscript{62} See 22 U.S.C. §§ 6065-6066. The prerequisite to a democratically elected government, according to the Helms-Burton Act, is a "transition government." The Act defines a transition government in Cuba as a government that:

(1) has legalized all political activity;

(2) has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations;

(3) has dissolved the present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and
ernment, the President must consider some very specific factors. For example, the President must consider whether Cuban-born persons returning to Cuba have been allowed to regain their Cuban citizenship. 63

2. Title III: “Protection of Property Rights of United States Nationals”

Title III of the Helms-Burton Act contains the law’s most controversial provisions. One such provision is 22 U.S.C. § 6082, which creates a private right of action in U.S. district courts for any U.S. national who has a claim for property confiscated by Cuba since January 1, 1959. 64 These claims may be made against any person who “traffics” in or uses such confiscated property. 65 A

(4) has made public commitments to organizing free and fair elections for a new government . . .

(B) with the participation of multiple independent political parties that have full access to the media on an equal basis . . .

(5) has ceased any interference with Radio Martí or Television Martí broadcasts;

(6) makes public commitments to and is making demonstrable progress in—

(A) establishing an independent judiciary;

(B) respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights, to which Cuba is a signatory nation;

(C) allowing the establishment of independent trade unions . . . and allowing the establishment of independent social, economic, and political associations;

(7) does not include Fidel Castro or Raul Castro . . .

Id. § 6065(a).

63. See id. § 6065(b)(2)(B) (“In determining whether a transition government in Cuba is in power, the President shall take into account the extent to which that government has made public commitments to, and is making demonstrable progress in permitting the reinstatement of citizenship to Cuban-born persons returning to Cuba . . . .” (emphasis added)).

64. See id. § 6082(a). For the purposes of the Act, the term “United States national” means: “(A) any United States citizen; or (B) any other legal entity which is organized under the laws of the United States, or of any State, . . . and which has its principal place of business in the United States.” § 6023(15). Therefore, U.S. national includes individuals or entities who are now U.S. citizens, but were not at the time Cuba confiscated the property. The term “property” means any tangible and intangible property, including future interests, and includes everything from real estate to intellectual property. Id. § 6023(12)(A). The Helms-Burton Act excludes residential real property unless that property is “occupied by an official of the Cuban Government or the ruling political party in Cuba.” Id. § 6023(B)(ii).

65. See id. § 6082. A person “traffics” if that person knowingly and intentionally—

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of
claimant may also seek treble damages, which can amount to three times the property's fair market value.

Although the group of potential plaintiffs under the Act includes U.S. citizens who are exiles from Cuba, significant differences exist in the treatment of those U.S. nationals who have obtained certified claims before the Foreign Claims Settlement Commission (FCSC) and U.S. nationals who have not. The former group may bring their actions at any time after August 1, 1996, while the latter group, which consists largely of persons who were Cuban exiles at the time of the confiscation but are now U.S. nationals, must wait two years from the date of the Helms-Burton Act's enactment before filing actions in federal court. This provision does not, however, affect accrual of damages under the Act. While President Clinton did suspend the right to file suits under Title III, the suspension does not stay the accrual of damages.

3. Title IV: "Exclusion of Certain Aliens"

Title IV is nearly as controversial as Title III. This provision seeks to exclude from the United States persons involved in trafficking confiscated U.S. property in Cuba. It casts a wide net because it includes anyone who knowingly and intentionally "causes, directs, participates in, or profits from, trafficking . . . by another person, or otherwise engages in trafficking . . . through another person." Further, foreign persons who "traffic" can be denied visas to enter the United States. This includes the spouse, minor

confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property.

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from trafficking . . . without the authorization of any United States national who holds a claim to the property.

Id. § 6023(13)(A).


67. Prior to the Helms-Burton Act, only persons who were U.S. nationals at the time of the confiscation by the Cuban government could file claims. See Cuban Claims Act, 22 U.S.C. § 1643 (1996). The Cuban Claims Act limited the FCSC's jurisdiction to claims of persons who were U.S. nationals at the time of their property loss. See id. § 1643a.

68. See id. § 6091(a).

69. Id. § 6091(b)(2)(A)(iii).
child, or agent of an excludable person.\footnote{70}

**B. The Helms-Burton Act and Principles of International Law**

1. The "Substantial Effect" and "Reasonableness" Doctrines

The drafters of the Helms-Burton Act were clearly aware that the Act would be criticized for its extraterritorial nature.\footnote{71} In anticipation of such criticism, they turned to international law for justification.\footnote{72} According to congressional findings, international law allows a nation to provide for some extraterritoriality: "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."\footnote{73} The findings reflect section 402 of the *Restatement (Third) of Foreign Relations Law of the United States* (Restatement), which indicates that some extraterritoriality is permissible: "[A] state has jurisdiction to prescribe law with respect to ... conduct outside its territory that has or is intended to have substantial effect within its territory."\footnote{74} Section 403 of the Restatement, however, adds an important limitation: "Even when one of the bases for jurisdiction under [section] 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."\footnote{75} Therefore, the key inquiries are: (1) whether the Helms-Burton Act satisfies the substantial effect doctrine; and (2) whether the U.S. court's exercise of jurisdiction over foreign corporations "trafficking" in U.S. property is unreasonable pursuant to the limitation set out in Restatement section 403.

The first inquiry is the target of the legislation. The Cuban government, not the persons over whom jurisdiction is exercised, caused the "effect" that the Act targets—the effect being the eco-

\begin{footnotes}
\footnote{70}{See id. § 6091(a)(4).}
\footnote{71}{See id. § 6081(9).}
\footnote{72}{See id.}
\footnote{73}{Id. § 402(1)(c) (1986) (emphasis added).}
\footnote{74}{Id. § 403(1) (emphasis added).}
\end{footnotes}
nomic repercussions of the original nationalization of U.S. property. The exercise of jurisdiction over persons found to be “trafficking” in U.S. property punishes foreign corporations investing in Cuba while legally not touching the Cuban government. Therefore, the Helms-Burton Act can only affect the Cuban government indirectly by deterring foreign investment in Cuba.

The second inquiry is whether the exercise of jurisdiction under Title III is “reasonable” within the meaning of Restatement section 403. Because the Helms-Burton Act cannot legally affect the Cuban government, it is highly questionable whether exercising jurisdiction over foreign corporations trafficking in U.S. property is “reasonable.”

Perhaps the best way to construct a definition in this regard is to determine how “reasonable” the United States would view similar legislation from another country. In fact, a pair of Canadian legislators, Peter Godfrey and Peter Milliken, introduced their answer to the Helms-Burton Act in the Canadian House of Commons. The Godfrey-Milliken Bill would allow descendants of British loyalists who fled during the American Revolution to seek compensation from the U.S. government for lost property. U.S. State Department Spokesman Nicholas Burns remarked “Should the [Godfrey-Milliken] bill become law, I’m sure we’ll give it the same warm welcome that Canada gave Helms-Burton.” Incidentally, the American founding fathers promised to pay restitution for confiscated property, but never have.

2. The “Act of State” Doctrine

The drafters of the Helms-Burton Act also anticipated the “act of state” doctrine as a possible obstacle and proscribed its application when adjudicating claims brought pursuant to the

76. See Lowenfeld, supra note 61, at 431.
77. See Muse Statement, supra note 28.
79. See U.S. Responds in Kind to Canadian Bill Mocking Helms-Burton, supra note 78.
80. Id.
81. See 60 Minutes: 1776 and All That, supra note 78.
The act of state doctrine generally precludes U.S. courts from inquiring into the validity of public acts that a recognized sovereign power has committed within its own territory. Although neither international law nor the U.S. Constitution mandate the act of state doctrine, the U.S. Supreme Court invoked it in 1964 to prevent the U.S. judiciary from inquiring into the validity of a Cuban government expropriation decree. In response, Congress enacted the Second Hickenlooper Amendment, which bars the invocation of the doctrine in cases involving foreign expropriation of property where such expropriations were alleged to have occurred in violation of international law.

The U.S. Supreme Court case of Banco Nacional de Cuba v. Sabbatino suggests that circumvention of the act of state doctrine may be constitutional. Nevertheless, Justice John Marshall Harlan, writing for eight of the nine Supreme Court Justices, expressed the "strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the inter-

82. See 22 U.S.C. § 6082(a)(6) (1996) ("No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under paragraph (1)."").

83. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 (1986); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897))).

84. See Sabbatino, 376 U.S. at 421-22 ("No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments . . . .").

85. See id. at 423. In Sabbatino, the Court remarked: "If international law does not prescribe the use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law." Id. at 422.

86. See id. at 425. The Court analogized the act of state doctrine to the Erie doctrine, underscoring federal courts' function and lack of competence to interpret state law, and by analogy, likening that to international law. See id. at 421-22.


88. See id.

89. 376 U.S. 398 (1964).

90. See id. at 423.
national sphere."  
Insistence that the federal courts circumvent the act of state doctrine—ignoring the court's limited function in international relations and the judiciary's limited competence to pass judgment on a foreign sovereign's laws—is misappropriation of the judiciary to perform what is essentially a legislative and executive function. Executing a foreign policy via the U.S. courts is both an abuse of the judicial process and an unwise precedent, especially if Congress expands such a practice into other areas of international affairs.

3. The Nationality of Claims Principle

Another area in which the Helms-Burton Act is at odds with existing international legal principles is the change in the definition of who may bring claims before U.S. courts. Over thirty years ago, the FCSC found: "The principle of international law that eligibility for compensation requires [U.S.] nationality at the time of loss is so widely understood and universally accepted that citation of authority is scarcely necessary." 

The Helms-Burton Act changed this principle by eliminating the requirement that claimants be U.S. nationals at the time of the seizure of their property. As a result, the number of potential suits jumped from thousands under the old definition to hundreds of thousands under the new definition. The inclusion of claimants who were Cuban nationals at the time of the confiscation of their property, coupled with the expansive definition of "traffic," translates into a veritable deluge of potential suits under the Helms-Burton Act. The number of potential claimants is, however, simply being used for its deterrent effect on foreign invest-

91. Id.
92. This practice could include further legislation in the same or similar areas, such as the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541.
95. See Muse Statement, supra note 28.
ment in Cuba.96

Clearly, by breaking with the established practice of requiring that claimants be U.S. nationals at the time their property was confiscated, the United States has done two things. First, it evidently hopes that by greatly increasing the number of potential claimants, foreign investors will think long and hard before investing in Cuba. Second, it has essentially invited more Cubans to seek U.S. citizenship in order employ the power of U.S. courts to recover damages for their expropriated property. Neither case justifies the perversion of established international legal principles.

4. The "Requirements" Problem

One of the most troubling aspects of the Helms-Burton Act is the specificity with which it defines a "transition government" and a "democratically elected government."97 The strictures upon the President to make a factual finding are so tight that it appears only the complete subjugation of the Cuban government will satisfy the requirements of the Helms-Burton Act. Indeed, this might explain some of the foreign discontent with the Act; the United States looks more like a bully asserting its great power prerogatives than a serious arbiter of democracy in the Western Hemisphere.

On a domestic level, the stringent requirements placed upon the President rob the administration of the flexibility required to effectively maneuver within the delicate realm of international diplomacy. Acutely specific foreign policies often breed hostility between the executive and legislative branches because the administration will invariably resent being so completely removed from the foreign policy process. Furthermore, such inflexible policies lessen the opportunity for an administration to bring its own creativity to bear on given policy. With regard to the Helms-Burton Act, President Clinton has chosen to indefinitely suspend the Title III provision that allows aggrieved parties to file lawsuits.98 By signing the bill into law, however, Clinton has allowed Congress to limit his opportunities to work with U.S. allies to bring democracy to Cuba. Traditionally, Presidents have bristled at the idea of

96. See id.
97. See supra notes 62-63 and accompanying text.
Congress restricting the executive branch in such a way.99

IV. The Parade of Horribles: The European Union, Canada, and Mexico v. The Helms-Burton Act

A. Diplomatic Protests, Condemnations, and Blocking or Retaliatory Legislation

1. The European Union100

The Helms-Burton Act clearly seeks to effect a regime change in Cuba.101 Although many countries have no quarrel with that aim,102 some countries object to the means chosen to further it.103 The European Union (EU) has found that the Helms-Burton Act is extraterritorial and, therefore, violates international law.104 Jacques Santer, Chairman of the European Commission, recently

99. See Bush Uses Veto to Block Bill Banning Cuban Trade, supra note 39. In 1990, for example, President Bush refused to sign a bill that included a ban on trade with Cuba by foreign subsidiaries of U.S. companies because he felt it was impermissibly extraterritorial and would interfere with his ability to carry out foreign policy. See id.

100. The European Union consists of 15 nations: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. See THE WORLD ALMANAC AND BOOK OF FACTS 1996 at 842 (Robert Famighetti ed., 1995).


103. See id.; see also US, EU at Friendly Odds over Helms-Burton, WASH. TRADE DAILY, Sept. 20, 1996, at 2. A European diplomat indicated that the European Union “is growing more discontented with the Castro regime, but was adamant that slapping on sanctions is not the correct course to pursue.” Id.; see also Andrew Hill, EU to Delay Retaliating on American Anti-Cuba Laws, TORONTO STAR, Sept. 9, 1996, at B2 (“‘We repeat our absolute opposition to legislation with extra-territorial effects and our determination to protect the European Union’” (quoting Irish Foreign Minister Dick Spring)).

104. See EU Draft Regulation on Helms-Burton, reprinted in INSIDE U.S. TRADE, Aug. 2, 1996, at 23; see also European Union: Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act, Mar. 5, 1996, 35 I.L.M. 397. The EU “has consistently expressed its opposition, as a matter of law and policy, to extraterritorial applications of U.S. jurisdiction which would also restrict EU trade in goods and services with Cuba . . . .” Id. at 398.
stated the EU's position in no uncertain terms: "We do not believe it is justifiable or effective for one country to impose its tactics on others and to threaten to aid its friends by targeting its adversaries."105

The Helms-Burton Act so offended the Europeans that EU ministers assembled quickly after the Act's signing to express their opposition to it.106 The EU ministers expressed their displeasure not only with the extraterritorial provisions of the Act, but also with the effects that such unilateral measures would have on the international trade system, particularly the World Trade Organization (WTO).107 Individually, the constituent nations of the EU expressed various levels of opposition to the Helms-Burton Act—from disappointment108 to outright condemnation.109 As an entity, however, the EU's message is clear: it in no way intends to comply with the Act.110

The EU's assault on the Helms-Burton Act is two-pronged. One approach is to file charges with the WTO and to rely on the WTO's settlement mechanisms.111 At the same time, however, the EU is also taking unilateral measures. On October 29, 1996, the EU unanimously approved retaliatory legislation that would allow Europeans to bring suit to recover damages assessed in U.S. courts pursuant to the Helms-Burton Act.112

The three major effects of the EU legislation can be described

---


107. See id.


109. See, e.g., Hill, supra note 103.


as non-recognition, noncompliance, and countersuit. First, the EU legislation states that no member state shall recognize any foreign judgment that violates international law, namely a judgment that results from an extraterritorial law. Second, the law forbids any person from complying with extraterritorial laws either actively or by deliberate omission. Third, the legislation entitles any person against whom a foreign country enters a judgment to seek recovery of that sum from the original plaintiff in the courts of the European Community.

The EU legislation has the potential of putting European companies presently doing business in Cuba in a difficult position. On the one hand, continuing to "traffic" in confiscated property places European companies at risk of triggering lawsuits and expulsions under the Helms-Burton Act. On the other hand, obeying or complying with any of the Helms-Burton Act's provisions puts these companies at risk of suffering EU fines.

At some stage, each company will have to weigh the consequences of each action and choose which course imposes the lighter penalty: doing or not doing business in Cuba. Further, depending on how vigorously the EU intends to enforce its countermeasures, there seems to be a wide array of interpretations as to what constitutes "compliance." Carried to an extreme, compliance may include a decision not to invest in Cuba where there was a developed or announced plan to do so, regardless of whether the company bases its decision on its own, independent factors or on a calculus that weighs the potential punishment under the Helms-Burton Act.

While the potential consequences of the EU measure might lead to the belief that the EU is merely fighting fire with fire—to

116. Spain's biggest investor in Cuba, Sol Melia hotel group, has said that it would cancel plans to build hotels in Orlando and Miami in favor of continuing operations in Cuba, but such a move does not necessarily immunize it from the reach of the Helms-Burton Act. See Canadian Company Penalized Under Helms-Burton, CARIBBEAN UPDATE, Aug. 1, 1996, at 1. Italian telecommunications company Societa Finanziaria Telefonica per Azioni (STET) is also subject to the Helms-Burton Act because it uses properties that formerly belonged to U.S. company ITT Corp. See id.
the detriment of the international free trade system that it hopes to
preserve—the alternative could prove worse. If the Europeans
obey the Helms-Burton Act, a dangerous precedent could be set.
The United States might be encouraged to use further extensions
of U.S. law to influence foreign policy in other areas of the world.
Indeed, the United States has already shown such willingness with
President Clinton’s recent signing of legislation to punish foreign
companies that invest in the Iranian and Libyan oil sectors.117

The Europeans would be committing utter folly if they ne-
glected to oppose the Helms-Burton Act. Unless Congress ceases
to enact the type of extraterritorial legislation that it has recently
passed, the EU would find a great deal more of its foreign and
trade policies being written in Washington rather than in Europe.

2. Canada

Canada, like the EU, has taken a two-pronged approach to
fighting the Helms-Burton Act. The first is to join the EU in its
fight to convene a settlement panel under the auspices of the
WTO.118 The second, like the EU, is to act unilaterally to protect
its interests. The Canadian House of Commons passed blocking
legislation, which Prime Minister Jean Chrétien’s government
sponsored, that seeks to bar enforcement in Canada of judgments
rendered in U.S. courts based on the Helms-Burton Act.119

The Canadians have been among the most vehement of the
Helms-Burton Act’s detractors.120 After several condemnations of
U.S. policy, the Canadian government introduced legislation to

See also Toby Roth, New Iranian-Libyan Sanctions Will Only Hurt U.S., WALL ST. J.,


119. See Bill C-54, An Act to Amend the Foreign Extraterritorial Measures Act, 35th
Parl. (1996) (Can.). The original Foreign Extraterritorial Measures Act (FEMA) appears
at R.S.C., ch. F-29 (1985) (Can.).

120. See Government of Canada, News Release, Government Introduces Legislation to
Counter U.S. Helms-Burton Act, News Release of the (Sept. 16, 1996). Canada’s Interna-
tional Trade Minister, Art Eggleston, remarked: “Hels-Burton is an unwarranted move
to extend the arm of U.S. law into trade between countries. The FEMA changes are a
deterrent against U.S. companies seeking to penalize Canadian firms doing legitimate
business in Cuba.” Id.
amend the 1984 Foreign Extraterritorial Measures Act (FEMA)\textsuperscript{121} to include retaliatory provisions against the Helms-Burton Act.\textsuperscript{122} Similar to the EU legislation, the FEMA amendments authorize the Canadian government to issue "blocking" orders to prevent the enforcement in Canada of judgments based on foreign laws deemed objectionable—in this case, extraterritorial.\textsuperscript{123} Unlike the EU legislation, however, the FEMA amendments explicitly target the Helms-Burton Act.\textsuperscript{124} In addition, the legislation includes a "clawback" provision to provide a Canadian forum for Canadian companies to recover damages paid pursuant to Title III suits from the original plaintiff.\textsuperscript{125} The Canadian law also provides for an award of court costs for the suits in both countries.\textsuperscript{126} The Canadian judgment applies against the U.S. plaintiff's assets in Canada.\textsuperscript{127}

The FEMA amendments also seek to deter Canadians from complying with the Helms-Burton Act by increasing the penalties for compliance from C$10,000 under the original FEMA to C$1.5 million under the amended FEMA.\textsuperscript{128} By comparison, the penalties under the U.S. law can only reach U.S. $1 million.\textsuperscript{129}

The FEMA amendments have a great potential for putting Canadian companies in a precarious position. Undoubtedly, like European firms, Canadian companies will have to weigh a decision to conduct business in Cuba against the legal and economic consequences that such a decision might produce. One Canadian company already chose to ignore the deterrent intent of the Helms-Burton Act even before the passage of the FEMA amendments. Sherritt International Corporation, (Sherritt) a Canadian nickel mining company with $200 million invested in Cuba, sent a clear

\begin{itemize}
  \item \textsuperscript{121} Foréign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (Can.).
  \item \textsuperscript{122} See Bill C-54, An Act to Amend the Foreign Extraterritorial Measures Act, 35th Parl. (1996) (Can.).
  \item \textsuperscript{123} See id. § 4.
  \item \textsuperscript{124} See id. § 7. The law expressly indicates: "Any judgment given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 shall not be recognized or enforceable in any manner in Canada." Id.
  \item \textsuperscript{125} See id. § 9.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id.
  \item \textsuperscript{128} See id. § 7.
  \item \textsuperscript{129} See Cuban Assets Control Regulations, 31 C.F.R pt. 515 (1994).
\end{itemize}
signal that it intends to ignore the Helms-Burton Act.\textsuperscript{130} Although it previously held meetings in Toronto and London, it recently convened a meeting of its board of directors in Havana, Cuba.\textsuperscript{131} While the Helms-Burton Act does not per se bar doing business in Cuba, Sherritt seized the opportunity to send a message that it clearly intends to continue its relationship with Cuba and to use property expropriated by the Cuban government.

Sherritt's executives have already been targets of the Helms-Burton Act's exclusionary policy. In July 1996, the U.S. State Department sent a letter to Sherritt's top executives indicating that Sherritt was violating the Act and, therefore, the executives and their families were barred from the United States.\textsuperscript{132} The real test of the Helms-Burton Act, however, namely liability under the Title III lawsuit provision, has yet to materialize because President Clinton recently suspended that provision until June of 1997.\textsuperscript{133}

3. Mexico

Like the EU and Canada, Mexico has also chosen both unilateral and multilateral measures to counter the Helms-Burton Act. It has chosen to join Canada in an effort to convene a NAFTA dispute resolution panel, charging that the Helms-Burton Act violates NAFTA.\textsuperscript{134} In addition, Mexico has taken its own initiative; on October 23, 1996, Mexican President Ernesto Zedillo signed the Law for the Protection of Trade and Investment from Foreign Regulations Which Infringe Upon International Law.\textsuperscript{135} The Mexican law, which is less strident than either the EU or Canadian


\textsuperscript{131} See Fletcher \textit{supra} note 130.

\textsuperscript{132} See \textit{Canadian Company Penalized Under Helms-Burton, supra} note 116.

\textsuperscript{133} See Rossella Brevetti & Peter Menyasz, \textit{Clinton Delays Lawsuits Under Title III of Helms-Burton, Int'l Trade Rep.} (BNA) 1158 (July 17, 1996); see also \textit{Clinton Extends Suspension of Right to Sue Under Helms-Burton}, Daily Rep. for Executives (BNA) A-12 (Jan. 6, 1997).


measures, encourages Mexican individuals or companies that may be affected by “extraterritorial effects of foreign laws” to inform the Department of Foreign Affairs and the Department of Trade and Industrial Development.\textsuperscript{136} The law also prohibits Mexican individuals or companies from providing information to foreign courts or other authorities acting to enforce such extraterritorial laws.\textsuperscript{137} Further, the law directs Mexican courts to refuse to recognize U.S. decisions or judgments rendered pursuant to the Helms-Burton Act and has a countersuit provision.\textsuperscript{138} Violation of the Mexican law can result in fines ranging from $3,000 to $300,000.\textsuperscript{139}

The first major Mexican company caught in the crossfire between the U.S. and Mexican legislation was Grupo Domos, a Mexican telecommunications company that had invested $706 million in Cuba.\textsuperscript{140} The U.S. State Department sent letters to Grupo Domos executives indicating that Grupo Domos was in violation of the Helms-Burton Act because it was “trafficking” in U.S. property, and thus, that the executives and their families were barred from entering the United States.\textsuperscript{141}

\textit{B. Charges of International Trade Agreement Violations}

In addition to their unilateral efforts, the EU, Canada, and Mexico have complained that the Helms-Burton Act violates the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT), which created the World Trade Organization (WTO).

\textbf{1. NAFTA}

The NAFTA accords, which were signed into law in 1994,
promote the principles of free trade among the United States, Canada, and Mexico. Canada and Mexico contend that the Helms-Burton Act violates NAFTA in both practice and principle.¹⁴²

Specifically, section 6091 of the Helms-Burton Act, which provides for the exclusion of persons found to be trafficking in U.S. property, appears to violate chapter 1603 of NAFTA, which grants U.S. entry to foreign businessmen who are otherwise qualified.¹⁴³ The exclusion of Canadian and Mexican businessmen solely on the basis of their investment in Cuba has angered both countries’ governments to the point that the two have requested a dispute settlement panel under NAFTA to resolve their disagreements with the U.S. law.¹⁴⁴

On a more general level, however, the Helms-Burton Act appears to interfere with the principles of free trade embodied in NAFTA. Both Canada and Mexico complain that the Helms-Burton Act effectively interferes with the very trade liberalization measures that NAFTA was designed to promote.¹⁴⁵ The Clinton administration, as might be expected, argues that the Helms-Burton Act is “fully consistent” with U.S. international obligations.¹⁴⁶

In August 1996, the Clinton administration hinted, however, that if pressed on the issue, it would defend the Helms-Burton Act

¹⁴³. See id.
¹⁴⁵. For a specific discussion of Canada’s complaints, see Peter Menysz, Canada Plans Legislation to Counter Helms-Burton Law, Int’l Trade Rep. (BNA) 1008 (June 19, 1996).
under NAFTA’s “national security” exemption. Recently, the Clinton Administration has publicly indicated that it might formally invoke the exemption. Chapter 2102 of NAFTA governs the extent to which a government may take action that would otherwise be inconsistent with NAFTA in order to protect its “essential national security interests.” Like international law itself, interpretations of “national security” imperatives are highly subjective and rely almost exclusively on the good faith and good judgment of the nations that invoke them. In terms of NAFTA, the formal invocation of national security to defend the Helms-Burton Act could set a precedent that would encourage other countries to defend their trade barriers as “vital to national security.” While a slippery slope scenario need not be drawn, stretching the national security exemption to allow the effectuation of one nation’s foreign policy—without a clear national security threat—could eviscerate the very principles of free trade that NAFTA was drafted to uphold.

2. GATT/WTO

While Canada and Mexico have pursued settlement procedures under NAFTA, they have also joined the EU in pressing for the formation of an investigative panel under the WTO’s Dispute Settlement Body (DSB). On November 20, 1996, after an earlier rejection of such an action, the United States accepted the formation of a panel that would investigate the effects of the Helms-Burton Act. Later, on February 20, 1997, after the panel was appointed, the United States said that the newly-created panel lacked competence to proceed because the issue did not concern a trade dispute, but rather a U.S. national security matter. The consequences of such an investigation could be wide-ranging in-

147. See id.
149. NAFTA, supra note 14, ch. 2102 (emphasis added).
152. See id.
deed for both the United States and the international trade system.

First, if the WTO panel finds that the Helms-Burton Act violates the WTO, the United States would find itself in a difficult position. It could be forced either to repeal the portions of the Act that conflict with the WTO or maintain the Act and defend it as consistent with its international obligations.

The United States, however, has chosen a third option: recasting the dispute as a matter of U.S. national security instead of a trade issue.154 If the United States eventually chooses to formally invoke "national security" to defend the Helms-Burton Act, the consequences for the future of the WTO could be dire. Invoking a national security exemption to defend a policy with such tenuous national security implications might cast into doubt the U.S. commitment to international free trade or encourage others to do the same and risk the unraveling of the agreement.

Such a consequence would not only bode ill for the fledgling trade organization—which is the product of almost fifty years of GATT negotiations155—but also could have wide-ranging consequences for the United States and its ability to maintain international support for multilateral agreements in others fields. Nuclear non-proliferation, combating international terrorism, and international peacekeeping efforts are but a few such ventures in which U.S. leadership is vital to success.

U.S. repudiation of a WTO settlement panel decision would also affect U.S. domestic policy. To allow a lack of commitment by the United States to decimate the WTO—after such a long struggle for the WTO by the United States in general and the Clinton administration in particular—would work at cross-purposes with the Clinton administration’s other stated goals. First, Clinton fought hard for both the WTO and NAFTA and has been tough on opening up the Japanese, Chinese, and other markets to U.S. goods.156 In addition, he has indicated that he wants to enlarge NAFTA to include at least Chile and to expand free trade along

154. See id.

155. For a review of these negotiations, see A Brief History of GATT (visited Nov. 19, 1996) <http://www.unicc.org/wto2_2_0_wpf.html#Uruguay>.

the Pacific Rim.\textsuperscript{157}

Maintaining the Helms-Burton Act threatens another prong in the U.S. trade policy, namely the stated goal of strengthening international financial institutions (IFIs). In a speech to the Bretton Woods Committee, U.S. Treasury Secretary Robert Rubin identified IFIs as "absolutely vital [to] promoting growth and reform in the developing world."\textsuperscript{158} The Act's call for the diminution of funds to IFIs that assist Cuba risks the U.S. commitment to multilateral institutions and ultimately risks the institutions themselves, particularly those that rely on U.S. leadership and financial support.

V. EXTRATERRITORIAL LAW AND THE INTERNATIONAL ORDER

The controversy surrounding the Helms-Burton Act has included vociferous protest from U.S. and international business interests decrying the Act as extraterritorial,\textsuperscript{159} a danger to the international legal order,\textsuperscript{160} and tantamount to a secondary boycott\textsuperscript{161}—a practice that the United States itself has denounced.\textsuperscript{162} The Mobil Oil Corporation took out a full-page advertisement in The Economist to urge the U.S. government to rethink its use of what Mobil called a secondary boycott to "tighten [the U.S.] economic grip."\textsuperscript{163} In addition, the Trans-Atlantic Business Dialogue, a coalition of U.S. and European business leaders, recently convened in Chicago and urged the repeal of the extraterritorial provisions of recent U.S. sanctions legislation, including

\textsuperscript{157} See id.

\textsuperscript{158} Rubins Calls for Strengthening International Financial Institutions, \textbf{WHITE HOUSE BULL.}, Nov. 15, 1996, at 5.


\textsuperscript{161} See id. A secondary boycott is a tactic whereby country A says that if X, a national of country C, trades with country B, X may not trade with country A. See Lowenfeld, supra note 61, at 429. Essentially, X is given the choice of trading with country A, the boycotting country, or with country B, the target country, although under the law of country C where X is established, trade with both countries A and C is permitted. See id.

\textsuperscript{162} See Lowenfeld, supra note 61, at 430. The United States denounced the Arab boycott of Israel. See id.

\textsuperscript{163} Secondary Boycotts: Squeeze Plays That Hurt Everyone, supra note 160.
the Helms-Burton Act. Furthermore, the National Foreign Trade Council, a U.S. organization representing 500 of the largest U.S. multinational corporations, met in September 1996 to discuss the best approach to reversing or diluting the recent spate of unilateral sanctions legislation.

Many in the U.S. business community feel unfairly excluded from the Cuban market while European and other countries’ companies take advantage of the U.S. exclusion from Cuba. As a general matter, U.S. businesses dislike unilateral sanctions measures because such measures put U.S. businesses at a disadvantage vis-à-vis foreign companies. U.S. and international businesses seem to be wary of the embargo against Cuba, indeed of unilateral sanctions legislation in general, for two additional reasons: (1) In an integrated global economy, unilateral sanctions measures have proven ineffective; and (2) They work to destabilize the global trade system, particularly when combined with extraterritorial means.

A recent study of sanctions legislation over several decades found that such measures are ineffective unless there is a broad base of support for the sanctions. Indeed, sanctions were most effective when they were multilateral, such as the international effort against apartheid in South Africa. If such a finding is true, most free-trade supporters may not be simply motivated by greed in opposing unilateral sanctions, but may be concerned with exclusion from a market to further a strategy that has questionable merit.

164. See EC Official Welcomes Business Declaration on Extraterritorial Laws, supra note 159.
167. See Uchitelle, supra note 165.
168. See id. (citing, INSTITUTE FOR INT’L ECON., ECONOMIC SANCTIONS RE-CONSIDERED (1990)).
169. See id.
170. Many business entities, including multinational corporations, non-governmental organizations, and trade associations, argue that the infusion of market capitalism achieves better results than unilateral sanctions. See Lucio A. Noto, Where We Are
The systemic effects that unilateral sanctions—and particularly sanctions that employ extraterritorial means—have on international trade, cause concern among many in the international business arena. The National Association of Manufacturers, for example, has expressed concern that the Helms-Burton Act and the Iran-Libya Oil Sanctions Act may endanger future U.S. sales to countries that currently do business with either Cuba, Iran, or Libya. Although these Acts may have a negative effect on U.S. exports, and in turn the U.S. economy, there is a much broader concern. Donald Fites, chairman of Caterpillar, Inc., a heavy machinery company, finds that “the real pressure is on the U.S. companies that not only must cede American jobs to foreign firms, but also risk being branded in other markets as unreliable suppliers.”

The United States has great influence in the world and is ill-served by being hypocritical with respect to international law. Precisely because the United States often does not benefit from unilateral sanctions and other forms of “force,” it is in the U.S. interest to adhere to international legal principles that foreign countries can respect and follow without feeling prey to U.S. hegemony. In addition, it is a risky venture to jeopardize the disruption of long-established international legal principles and business customs in the furtherance of a policy that has proven its worthlessness.

VI. ALTERNATIVES

At the heart of the Helms-Burton Act controversy is the underlying debate as to whether to increase pressure on the Castro regime or to flood Cuba with market capitalism to provoke the types of changes that marked the transitions to democracy in Eastern Europe. There is over thirty-five years of evidence to support the contention that increasing pressure not only is ineffective, but

171. See Secondary Boycotts: Squeeze Plays That Hurt Everyone, supra note 160; see also Uchitelle, supra note 165.
172. See Uchitelle, supra note 165.
173. Id.
also damages U.S. relationships with other nations and puts U.S. businesses at a disadvantage with regard to Cuba. Therefore, the best alternative is to repeal the Helms-Burton Act altogether and formulate a Cuba policy around U.S. principles that reflect sound international legal concepts. The re-election of Jesse Helms, who retains the Chair of the Senate Foreign Relations Committee, ensures that such a repeal is unlikely. Nevertheless, if Congress wishes to maintain its policy, it would be wise to make adjustments to the existing law.

Congress might reformulate what constitutes the transition to a democratically elected government in Cuba. To replace the current litany of specific requirements with more general principles would both respect Cuba’s sovereignty and would indicate to U.S. allies that the United States would accept a democratization process in Cuba that is not entirely an American one. This change might garner support from other Latin American nations because the United States would appear less prone to asserting its great power prerogatives in the Caribbean basin and more willing to work on a constructive solution to democratize Cuba—the only non-democratic nation in the Western Hemisphere.

Wisconsin Congressman Toby Roth advanced a series of amendments that would make the Act more flexible. Before final passage of the Act, Roth proposed amendments that would offer a series of aid commitments tied to the determination of a transition government. These commitments included: (1) negotiation of either the return of the U.S. Naval Base at Guantanamo Bay to Cuba or renegotiation of the present agreement; (2) development assistance; (3) financial guarantees under the Export-Import Bank of the United States and support under the Overseas Private Investment Corporation for investments in Cuba; (4) relief of Cuba’s external debt; (5) military adjustment assistance; (6) renegotiation of Most Favored Nation trade status; and (7) negotiation of Cuba’s inclusion in NAFTA. Such initiatives would provide Cuba—and Castro—with real incentives for change, instead of leaving Cuba with a full ballot box and an empty bread box. Indeed, democratic reforms are hardly enticing without concurrent reforms

175. See id.
to improve Cuba's ailing economy.

In addition, Congress would have to change the Helms-Burton Act to respect current U.S. obligations under NAFTA. Specifically, the United States would have to repeal the exclusion of persons under Title IV. The continued exclusion of foreign businessmen undermines the U.S. commitment to increased hemispheric free trade, which the United States has worked so laboriously to promote.

The most difficult change concerns the Title III provision conferring a right of action on persons who were not U.S. nationals at the time of their property loss. Because the provision offends most principles of jurisdiction and effectively acts as a secondary boycott, its efficacy, either as an international legal principle or a U.S. foreign policy, cannot be sustained. Admittedly, the changes required to make the Helms-Burton Act conform with international legal principles would effectively emasculate the law. At the very least, however, the potential claimants should be limited to persons or companies who were U.S. nationals at the time of their property confiscation. In this way, the United States would only be protecting the rights of its own nationals, instead of becoming a forum for foreign claimants.

VII. CONCLUSION

The Helms-Burton Act is bad law. Although it purports to advance liberty and democracy in the Western Hemisphere, it is little more than a foreign policy adorned with the legal equivalent to the emperor's clothing. This type of policy is unwise because in the international arena, like the political arena in general, what may be defensible on technical legal grounds does not always translate into good policy. Worse, vehemently defending as legal under international law a policy that is facially incongruous with established international legal principles exposes the type of hypocrisy that can easily undermine the confidence in the international legal order upon which many countries and business interests rely.

Indeed, it is a dangerous precedent for the United States to codify a U.S. foreign policy and insist that it be followed by third-party countries that are not the target of the policy and whose own policies diverge from the U.S. policy, especially when the implica-
tions for those third-party countries are so dire. Such a policy can only breed resentment toward the United States—not only with regard to the policy in question, but also in other areas of policy.

Anthony M. Solis*
