FIDDLING WITH FIDEL: AN ANALYSIS OF THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT OF 1996

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"I do not believe in a policy of scold."[1]

Lord Palmerston

I. INTRODUCTION

On March 12, 1996, President William J. Clinton signed the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 into law.[2] This statute, dubbed the Helms-Burton Act after its two chief legislative sponsors,[3] was introduced in the United States (U.S.) House of Representatives as House Bill 927 on February 14, 1995.[4] The bill received little attention and languished in committee until February 24, 1996 when Cuban military aircraft shot down two unarmed U.S. civilian aircraft piloted by members of the anti-Castro exile group "Brothers to the Rescue" over international waters off the northern coast of Cuba.[5] This attack resulted in the deaths of three U.S. citizens and one permanent

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1. Lord Palmerston, *quoted in* David C. Acheson, *Bullying Our Allies,* WASH. POST, Sept. 13, 1996, at A28. Lord Palmerston served as Prime Minister of the United Kingdom from 1859 to 1865. Palmerston's remark was in response to a call for unilateral British action against the Ottoman Empire in retribution for alleged atrocities. As correctly noted by Acheson, Palmerston's remark exemplified his recognition of the limits of effectiveness of unilateral sanctions based upon national indignation rather than sound principles consistent with international law and diplomacy. *See id.*

2. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091 (1996) [hereinafter Helms-Burton Act].

3. The chief legislative sponsors of the Helms-Burton Act were United States Senator Jesse Helms (Republican, North Carolina) and United States Representative Dan Burton (Republican, Indiana).

4. H.R. REP. NO. 104-202, at 25 (1995).

5. The International Civil Aviation Organization concluded that the planes were outside Cuban airspace at the time of the shootdown. United Nations' special investigator Carl-Johan Groth concluded that the shootdown was a "violation of the right to life" of the crew members and may have been ordered by senior officers in the Cuban military. *See U.N. Probe Blames Cuba,* ASSOCIATED PRESS, Mar. 13, 1997.

resident.[6] In the atmosphere of outrage stirred by the incident, the bill was quickly passed by the Senate on March 5, 1996 and the House of Representatives on the following day.[7] In response to the national outcry for retaliatory action–and perhaps hoping to garner votes in electoral-vote rich Florida–President Clinton, who had previously opposed the bill, endorsed its provisions one week later.[8] The U.S. trade embargo against Cuba, once a matter of executive discretion, was now codified into law.[9]

At its core, the Helms-Burton Act has four purposes. Initially, the Act purports to "take proactive steps to encourage an early end to the Castro regime."[10] The means by which this purpose is accomplished is the strengthening of international sanctions against the Castro regime[11] and denying the regime the financial means by which to maintain its grip on power.[12] Secondly, the Act supports the initiation of the democratic process in Cuba by encouraging elections conducted under the supervision of internationally recognized observers [13] and providing assistance to successor governments, such as lifting of the long-standing embargo, assuming that such governments meet certain eligibility criteria.[14] Thirdly, the Act purports to serve the national security interests of the United States by shielding the nation from acts of Cuban terrorism, losses associated with theft of property and disruption associated with the mass migration of Cuban refugees to the United States[15] Finally, the Act allegedly protects U.S. nationals from confiscation of and trafficking in property confiscated by the Castro government.[16]

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6. Killed in the attack were U.S. citizens Carlos Costa, Mario de la Pena and Armando Alejandre, Jr. and permanent resident Pablo Morales. *See Pain Lingers After Fliers Killed,* ASSOCIATED PRESS, Feb. 24, 1997. *See also* H.R. CONF. REP. NO. 104-468, at 52 (1996).

7. H.R. REP. NO. 104-202, *supra* note 4, at 1.

8. *See* Charles Truchean, *Neighbors Slam U.S. on Cuba,* WASH. POST, June 14, 1996, at A38.

9. *See A Helms-Burton Waiver...,* WASH. POST, July 17, 1996, at A18.

10. H.R. REP. NO. 104-202, *supra* note 4, at 22.

11. *See* Helms-Burton Act, *supra* note 2, § 6022(2).

12. *See* H.R. REP. NO. 104-202, *supra* note 4, at 30.

13. *See* Helms-Burton Act, *supra* note 2, § 6022(4).

14. *See* H.R. REP. NO. 104-202, *supra* note 4, at 30.

15. *See id.*

16. *See* Helms-Burton Act, *supra* note 2, § 6022(6). The summary of the purposes set forth in the text are those of the U.S. Congress. In summarizing President Clinton's purpose in reversing his opposition to the Act, White House press secretary Michael McCurry stated that the President hoped the Act would "confine Cuban communism to the trash bin of history" and bring "pressure to bear on Fidel Castro and on that system that will bring about market economics and democracy in Cuba." John F. Harris & Paul Blustein, *Clinton Near Verdict on Cuba Sanctions,* WASH. POST, July 16, 1996, at A12.

The Act attempts to accomplish its purposes with four specific methods. Initially, Title I of the Act, encompassing Sections 6032 through 6046, strengthens the U.S. embargo against Cuba and calls for the concomitant strengthening of international sanctions.[17] Title II of the Act, encompassing Sections 6061 through 6067, provides a framework for American assistance to transition and democratically-elected governments in Cuba if such should ever arise.[18] These sections create and implement a plan for assistance to Cuban citizens in the event of the demise of the Castro government and its replacement by transition and democratically elected governments.[19] The third method by which the Act accomplishes its purposes is through the protection of property rights asserted by U.S. nationals.[20] Title III of the Act, encompassing Sections 6081 through 6085, creates civil liability in U.S. courts for persons alleged to be trafficking in confiscated property claimed by U.S. nationals.[21] Section 6085 grants the President the authority to suspend the effective date of Title III every six months if the President deems it necessary to serve national interests of the United States and to expedite Cuba's transition to democracy.[22] Finally, the Act provides for the exclusion from the United States of aliens who engaged in confiscation of property of U.S. nationals or who traffic in such property.[23] The exclusion penalty applies only to those persons who engage in such activities on or after March 12, 1996.[24]

International reaction to the adoption of the Helms-Burton Act was universal, immediate and unequivocally hostile. Canada, the largest trading partner of the United States, amended its Foreign Extraterritoriality Act to provide for fines or prison terms for company managers who comply with judgments entered pursuant to the Act.[25] The Canadian government has also examined the adoption of "clawback" legislation which would levy taxes on U.S. subsidiaries conducting business in Canada to compensate Canadian companies for losses incurred as a result of judgments entered pursuant to the Act and for restrictive immigration policies.[26] Mexico has considered similar legislation[27]

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17. See Helms-Burton Act, *supra* note 2, §§ 6031-6046.
18. *See id.* §§ 6061-6067.
19. *See id.* § 6062.
20. *See id.* §§ 6081-6085.
21. *See id.* § 6082.
22. *See id.* §§ 6085(b)(1), (2).
23. *See id.* § 6091.
24. *See id.* § 6091(a).
25. *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 5, 7 (1984) (Can.); *see also* Foreign Extraterritorial Measures Act of 1992, 130 CAN. GAZETTE. No. 2 (1996) (United States) Order 1992, Jan. 12, 1996, 24/1/96 CAN. GAZETTE Part II, Vol. 130, No. 2; Jon Stewart, *Helms, Burton, Clinton and Castro,* S.F. CHRON., July 14, 1996, at 6.
26. Stewart, *supra* note 25, at 8.

and, in conjunction with Canada, complained that the Act violated the North American Free Trade Agreement (NAFTA) which guaranteed the free movement of business travelers between the United States, Canada, and Mexico.[28]

European Union officials claimed that the Act violates the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Specifically, the General Agreement on Trade in Services (GATS), a side agreement to GATT negotiated during the Uruguay Round, provides for the gradual implementation of free movement of persons employed in service industries throughout the GATS member states subject to certain restrictions such as public health and national security.[29] As a result, the European Union requested that the World Trade Organization (WTO) establish a dispute resolution panel to determine the consistency of the Act with the GATT.[30] The WTO agreed to establish such a panel in November 1996.[31]

Additionally, nearly all of Latin America's democracies filed protests against the Helms-Burton Act.[32] Specifically, in a joint statement issued at the conclusion of the sixth Ibero-American Summit in Chile in November 1996, the twenty-three participating heads of state, including representatives from throughout Latin America, Spain and Portugal, strongly rejected the Act and urged the United States to reconsider its enforcement.[33] The United Nations joined in this condemnation on November 12, 1996 when the General Assembly adopted a resolution calling upon the United States to end its economic embargo

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27. *See id.*

28. *See* North American Free Trade Agreement, Dec. 8, 1993, ch. 16, art. 1603(1), 32 I.L.M. 289, *available in* Westlaw, 1993 WL 574441 [hereinafter NAFTA]. *See also* David Crary, *World Trade Panel to Review Anti-Cuba Law,* S.F. CHRON., Nov. 21, 1996, at C2; *Canadians Ask U.S. to Pay for Tory Lands,* S.F. CHRON., Oct. 23, 1996, at A8. *See also Clinton Near Verdict on Cuba Sanctions, supra* note 17, at A12; Anne Swardson, *Canada Vows Sanctions Against U.S. for Enforcement of Anti-Cuba Trade Law,* WASH. POST, June 18, 1996, at A7.

29. *See* Annex on Movement of Natural Persons Supplying Services Under the Agreement, General Agreement on Trade in Services [hereinafter GATS] Annex 1B, Legal Instruments of the Uruguay Round vol. 1 (1994). *See also* GATS, *supra,* arts. XIV and XIV *bis* (1994).

30. *See Europeans Begin Attack on U.S. Law on Cuban Trade,* S.F. CHRON., Oct. 17, 1996, at A9.

31. *See WTO Panel to Study Helms-Burton Law,* WASH. POST, Nov. 21, 1996, at A33. *See also* Crary, *supra* note 28, at C2.

32. *See Envoy to U.N. Calls Cuba 'Embarrassment',* S.F. CHRON., Sept. 3, 1996, at A7. *See also Negotiator: Stronger Ties to Cuba,* ASSOCIATED PRESS, Sept. 3, 1997.

33. *See Latin America Rejects U.S. Law,* ASSOCIATED PRESS, Nov. 12, 1996. *See also U.S. Urged to Drop Cuban Law,* ASSOCIATED PRESS, Nov. 9, 1996; *Castro Gets Support, Advice,* ASSOCIATED PRESS, Nov. 11, 1996; *Latin Summit Blasts Embargo Against Cuba,* S.F. CHRON., Nov. 12, 1996, at A12.

against Cuba.[34] Even the Vatican entered the fray by issuing a statement questioning the legality of the Act.[35]

This article examines the provisions of the Helms-Burton Act and its consistency with the U.S. international and national interests. This article first examines in detail the history preceding the adoption of the Helms-Burton Act with specific concentration on the long-standing U.S. trade embargo against Cuba. It then examines the specific provisions of the Helms-Burton Act with emphasis on its two most controversial elements: the creation of the right to sue foreign persons who traffic in property confiscated by the Cuban government from U.S. nationals, and the exclusion of such foreign persons from the United States. Finally, this article analyzes the Helms-Burton Act in light of the U.S. international and national interests. This article concludes that the Helms-Burton Act is inconsistent with the promotion of the international and national interests of the United States.

II. THE HISTORICAL BACKGROUND OF THE HELMS-BURTON ACT

Although a complete history of the volatile relationship between the United States and Cuba is beyond the scope of this article, a brief review of the highlights of this relationship is in order to place the Helms-Burton Act in its proper context. Direct U.S. involvement in Cuban affairs commenced in 1898 after the sinking of the *U.S.S. Maine* in Havana Harbor as a result of an explosion

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34. G.A. Res. 51/17, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/17 (1996). The resolution specifically called upon member states "to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution in conformity with their obligations under the Charter of the United Nations and international law . . . [and] take the necessary steps to repeal or invalidate them." *See id.* The vote on the resolution in the General Assembly was 138 in favor, 3 opposed and 28 abstentions. Voting with the United States against the resolution were Israel and Uzbekistan. Countries that abstained included Japan, Saudi Arabia, South Korea, Jordan, Kuwait, Morocco, Estonia, Latvia and Lithuania. More importantly, the United Kingdom, Germany and the Netherlands - which had abstained in previous votes - cast their votes with the remainder of the European Union against the United States. *See also* G.A. Res. 50/10, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/10 (1995); G.A. Res. 49/9, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/9 (1994); G.A. Res. 48/16, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/16 (1993); G.A. Res. 47/19, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/19 (1992); *3 Allies Join Call Against Cuba Embargo,* WASH. POST, Nov. 13, 1996, at A19.

35. *See Vatican Criticizes U.S. Anti-Cuba Law,* S.F. CHRON., Oct. 19, 1996, at A12.

of unknown origin.[36] The *Maine* had been sent to Cuba to protect U.S. citizens from ongoing turmoil between Cuba's colonial master, Spain, and revolutionaries inspired by Jose Marti seeking independence.[37] After the sinking of the *Maine*, the United States intervened on the side of the Cuban revolutionaries. On December 10, 1898, Spain signed the Treaty of Paris which ended the Spanish-American War and relinquished control of Cuba to the United States.[38] The United States administered Cuba for three years before the proclamation of Cuban independence was issued on May 20, 1902.[39] Despite this proclamation, the United States retained the right to intervene in order to preserve Cuban independence pursuant to the Platt Amendment.[40]

Unfortunately, democratic institutions did not flourish in Cuba. General Gerardo Machado, elected to the presidency in 1924, refused to leave office after his term expired and forcibly extended his rule until 1933 when he was deposed by a popular uprising led by army sergeant Fulgencio Batista.[41] Following the uprising, Batista ruled Cuba through a series of presidents and was himself elected president in 1940.[42] Batista seized the presidency for himself permanently in a bloodless coup in March 1952.[43]

One year later, on July 26, 1953, Batista faced armed opposition led by Fidel Castro, an idealistic young army officer opposed to the corruption and excesses of the Batista regime. Although Castro's group failed to take control of the Cuban government, Castro laid the foundation for later success by founding the "26th of July Movement" while exiled in Mexico in 1955 and 1956.[44] Castro returned to Cuba in December 1956 and after three years of organizing support for his cause and actively opposing the existing government, succeeded in toppling the Batista regime on January 1, 1959.[45] Castro's resultant assumption of power was acclaimed both in Cuba and abroad.

However, soon after taking control, Castro moved to consolidate his power and establish an authoritarian system of government. In December 1961, Castro declared his Marxist-Leninist political orientation and moved to abolish

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36. U.S. DEPARTMENT OF STATE, CUBA: STATE DEPARTMENT NOTES 2 (Nov. 1, 1994) <http://www.washingtonpost.com/wpsrv/inatl/longterm/worldref/statedep/cuba.htm> [hereinafter CUBA: STATE DEPARTMENT NOTES].

37. *See id.*

38. Treaty of Peace Between the United States and Spain, Dec. 10, 1898, U.S.-Spain, S. TREATY DOC. NO. 62, PART 1 (1899).

39. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 2.

40. The Platt Amendment was repealed in 1934 as part of Franklin D. Roosevelt's "Good Neighbor" policy toward Latin America.

41. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 2.

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.* at 3.

representative democracy and opposition political activity.[46] Cuba became a totalitarian state dominated by Fidel Castro, President of the Council of State and the Council of Ministers, First Secretary of the Communist Party and Commander of the Armed Forces.[47] From January 1959 through December 1976, Castro ruled by decree. A constitution was adopted in 1976 that provides for a system of government in which the Communist Party is "the highest leading force of the society and state."[48] Currently, the Communist Party is the only legal political party.[49]

Executive and administrative power is vested in the council of ministers.[50] Castro serves as President of the Council of Ministers. Legislative authority rests with the National Assembly of People's Government.[51] When the assembly is not in session, it is represented by the Council of State headed by Castro.[52]

Cuba has no independent judiciary, and the courts are constitutionally subordinated to the assembly and Council of State.[53] Members of the Communist Party have monopolized most, if not all, high ranking judicial offices. Due process safeguards are tenuous, at best, and Cubans do not possess equal protection under the law. Freedom of expression, assembly, association, and travel are severely restricted.[54]

Relations between Cuba and the United States sharply deteriorated after Castro's ascent to power.[55] The cause of this decline was threefold. Initially, relations declined due to Castro's establishment of a repressive dictatorship and his abolition of the weak democratic tradition existing in Cuba at the time. This opposition to the Castro dictatorship culminated in the Bay of Pigs invasion by

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46. *See id.*

47. *See id.* at 4.

48. *See id. See generally* MARJORIE SUE ZATZ, PRODUCING LEGALITY: LAW AND SOCIALISM IN CUBA (John Bigham & Christine B. Harrington, eds., 1994). *See also* EMILIO MARILL, CONSTITUCION DE LA REPUBLICA DE CUBA (1989); FERNANDO ALVAREZ TABIO, COMENTARIOS A LA CONSTITUCION SOCIALISTA (1981).

49. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 4.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.* at 5.

54. *See id.* According to the State Department's 1996 report on human rights, Cuba "remains a totalitarian anachronism where . . . suppression of dissent worsened." *Glance at Human Rights Report,* ASSOCIATED PRESS, Jan. 30, 1997. The report concluded that human rights abuses increased in Cuba in 1996 with crackdowns against pro-democracy groups, increased deaths due to the excessive use of force by police, further restrictions on the distribution of foreign publications and increased use of internal exile to control the activities of journalists and human rights activists. *See U.S. Assails China, Others on Rights,* ASSOCIATED PRESS, Jan. 30, 1997.

55. The U.S. severed diplomatic relations with Cuba on January 3, 1961.

anti-Castro Cubans in April 1961.[56] Relations also suffered as a result of Castro's political, economic and military embrace of the Soviet Union. The political and economic aspects of this relationship led to Cuban reliance upon the Soviet Union for foreign policy initiatives[57] and Cuban dependence upon Soviet trade[58] and foreign aid.[59] The military aspect of this relationship resulted in an attempt by the Soviet Union to install nuclear-equipped missiles in Cuba and the resultant "missile crisis" in October 1962.[60]

Finally, relations deteriorated as a result of Cuba's uncompensated nationalization of American property valued at 1.8 billion dollars. Although Cuba also nationalized the holdings of other foreign companies, it has since ratified compensation agreements with several of the affected countries including Switzerland, France, the United Kingdom, Italy and Mexico.[61] U.S. nationals remain the largest group of uncompensated claimants arising from the Cuban nationalization program. A total of 5,911 U.S. nationals have filed compensation claims with the Foreign Claims Settlement Commission.[62] The twenty-six largest claimants account for more than 1.3 billion dollars of the 1.8 billion dollar total.[63]

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56. For a complete discussion of the Bay of Pigs operation, see generally MICHAEL BESCHLOSS, THE CRISIS YEARS: KENNEDY AND KHRUSHCHEV, 1960-1963 100-08 (1991). *See also* THOMAS PATERSON, KENNEDY'S QUEST FOR VICTORY: AMERICA'S FOREIGN POLICY 1961-1963 123-55 (1989); ROBERT E. QUIRK, FIDEL CASTRO 344-79 (1993).

57. Among the Cuban foreign policy initiatives overtly or tacitly approved and supported by the Soviet Union were Cuban sponsorship and support for leftist guerrilla insurgencies in Panama, the Dominican Republic, Haiti, Guatemala, Colombia, Venezuela, Peru, and Bolivia. The Cuban military also served as a Soviet surrogate in Mozambique and the Congo and in armed conflicts in Angola, Nicaragua and Ethiopia. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 12-13.

58. During the 1980s, more than seventy percent of Cuba's external trade was with the Soviet Union. For example, the Soviet Union imported eighty percent of all Cuban sugar and forty percent of all Cuban citrus products. Present Russian-Cuban trade is only a fraction of the past trade between the Soviet Union and Cuba. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 9.

59. Russia has terminated all trade subsidies previously granted by the former Soviet Union to Cuba. It is believed that Cuba owes in excess of twenty billion dollars to Russia. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 10.

60. For a complete discussion of the Cuban missile crisis, see generally ABRAM CHAYES, THE CUBAN MISSILE CRISIS (1974). *See also* GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971); QUIRK, *supra* note 56, at 344-79.

61. *See U.S. Revives Feud Over Cuban Properties,* S.F. CHRON., Aug. 24, 1996, at A10.

62. *See id.*

In response to Cuba's actions, the United States imposed a comprehensive economic embargo against Cuba on February 3, 1962. The embargo was imposed pursuant to Section 620(a) of the Foreign Assistance Act of 1961[64] and Section 5(b) of the Trading with the Enemy Act.[65] The embargo has

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63. According to the Cuban Foreign Ministry, the largest twenty-six largest U.S. claimants are:

> Cuban Electric Company - $268 million
> International Telephone and Telegraph - $131 million
> North American Sugar Industries, Inc., Cuban American Mercantile Corp., and West India Company - $109 million
> Moa Bay Mining Company - $88 million
> United Fruit Sugar Company - $85 million
> West Indies Sugar Company - $85 million
> American Sugar Company - $81 million
> Standard Oil Company - $72 million
> Baragua Industrial Corporation - $53 million
> Francisco Sugar Company - $53 million
> Texaco, Inc. - $50 million
> Manati Sugar Company - $49 million
> Nicaro Nickel Company - $33 million
> Coca-Cola Company - $28 million
> Lone Star Cement Company - $25 million
> New Tuinucu Sugar Company - $23 million
> Colgate-Palmolive Company - $14 million
> Braga Brothers, Inc. - $13 million
> Boise Cascade Corporation - $12 million
> American Brands, Inc. - $11 million
> Atlantic Richfield Company - $10 million
> Burrus Millis, Inc. - $10 million
> Pan American Life Insurance Company - $9.7 million
> United States Rubber Company - $9.5 million
> Havana Docks Corporation - $9 million
> Continental Can Company - $9 million

Id.

64. Section 2370(a)(1) of the Foreign Assistance Act of 1961 provides as follows:

> No assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba.

Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(1) (1994).

been subsequently modified by the International Emergency Economic Powers Act,[66] the Export Administration Act of 1979[67] and the Cuban Democracy Act of

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65. Section 5(b)(1) of the Trading with the Enemy Act provides, in part, as follows:

> During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing , exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest. . . .

Trading with the Enemy Act, 50 U.S.C. app. § 5(b)(1) (1994).

66. Section 1702(a)(1)(A) and (B) of the International Emergency Powers Act provides as follows:

> At the times and to the extent specified in section 1701 of this title [unusual and extraordinary threats to the national security, foreign policy or economy of the United States], the President may . . .
>
> (A) investigate, regulate, or prohibit
>
> (i) any transactions in foreign exchange,
>
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities; and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

1992.[68] The embargo was implemented by the Cuban Assets Control Regulations issued on July 8, 1963 pursuant to authority granted by the Trading with the Enemy Act.[69] These regulations remain in effect today and affect all U.S. citizens, permanent residents, persons and organizations physically located in the United States and branches and subsidiaries of U.S. organizations located throughout the world.[70] The regulations are administered by the U.S. Treasury Department's Office of Foreign Assets Control.[71] Penalties for violating the regulations include imprisonment and corporate and individual fines.[72]

The embargo is comprehensive in its scope. Except for informational materials and certain humanitarian goods licensed for export by the U.S. Department of Commerce, no U.S. products, technology or services may be exported to Cuba either directly or through third countries.[73] This prohibition includes dealing or assisting in the sale of goods to or from Cuba, even if such dealing or assistance occurs offshore.[74] Goods or services of Cuban origin may not be imported into the United States either directly or through third countries.[75] Furthermore, the regulations prohibit buying from or selling to Cuban nationals wherever they may be located.[76] Finally, no vessel carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has any interest may enter a U.S. port.[77]

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by any person, or with respect to any property, subject to the jurisdiction of the United States.

International Emergency Economic Powers Act, 50 U.S.C. §§ 1702(a)(1)(A), (B) (1994).

67. *See generally* Export Administration Act of 1979, 50 U.S.C. app. § 2401 (1994).

68. *See generally* Cuban Democracy Act of 1992, 22 U.S.C. §§ 6004(b), (c)(1994). Section 6004(b) permits donations of food to nongovernmental organizations or individuals in Cuba without the need for a license from the U.S. Government. *See id.* Section 6004(c) permits the export of medicines and medical supplies to Cuba subject to specifically enumerated restrictions. *See id.*

69. *See* Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-.901 (1996).

70. *See id.* at §§ 515.302, 515.302, 515.303, 515.305-06.

71. *See generally* U.S. DEPARTMENT OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, CUBA: WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO 1 (1996).

72. Cuban Assets Control Regulations, *supra* note 69, at § 515.701(a)(1).

73. *See id.* §§ 515.201-07.

74. *See id.* §§ 515.201, 515.204, 515.206, 515.207, 515.410.

75. *See id.* The only exceptions are one hundred dollars worth of Cuban merchandise which may be brought into the U.S. as accompanied baggage by authorized travelers arriving from Cuba and publications, artwork or other informational materials. *See id.*

76. *See id.*

77. *See id.* § 515.207.

The embargo also places a freeze on Cuban assets, both governmental and private, located in the United States and on financial dealings with Cuba.[78] All property belonging to Cuba and Cuban nationals in the possession of U.S. nationals is blocked.[79] Any property in which Cuba has an interest which enters the United States is automatically blocked by operation of law.[80] No payments, transfers, withdrawals or other dealings may take place with regard to blocked property unless such transactions are authorized by the Treasury Department.[81] Remittances may not be sent to Cuba without a license issued by the Office of Foreign Assets Control except for payments of up to one thousand dollars for fees and travel to enable relatives to emigrate from Cuba to the United States.[82]

Finally, travel by U.S. nationals to Cuba is severely restricted. Three classes of travelers are permitted to spend money for Cuban travel without having to obtain special permission from the Treasury Department.[83] These travelers include official government travelers,[84] journalists[85] and persons visiting close relatives in circumstances of extreme humanitarian need.[86] Two other classes of travelers require specific licenses issued by the Office of Foreign Assets Control prior to travel to Cuba.[87] These classes include humanitarian travelers[88] and persons traveling in connection with specific purposes.[89]

The Cuban economy is under the direction of the council of state.[90] The council of state controls prices and production and sets import and export goals

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78. *See id.* §§ 515.201-.206.

79. *See id.*

80. *See id.*

81. *See id.* § 515.201.

82. *See id.* § 515.583.

83. *See id.* § 515.560.

84. *See id.* Official government travelers are defined as United States and foreign government officials, including representatives of international organizations of which the United States is a member, who are traveling on official business. *See id.*

85. *See id.* Journalists are defined as persons regularly employed in the field of journalism by a news reporting organization. *See id.*

86. *See id.*

87. *See id.*

88. *See id.* Humanitarian travelers are defined as those persons traveling to Cuba more than once in a twelve month period to visit close relatives in cases involving extreme hardship, persons traveling to Cuba to accompany licensed humanitarian donations and persons traveling in connection with activities of recognized human rights organizations investigating specific human rights violations.

89. *See id.* Travel related to specific purposes includes travel in connection with professional research and similar activities, for clearly defined educational or religious activities or for purposes relating to the provision of informational materials including telecommunications services. *See id.* §§ 515.332, 515.416, 515.418-19.

90. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 7.

after consulting with the Banco Nacional de Cuba.[91] The government also owns and operates over seventy percent of Cuban farmland[92] and all industrial enterprises.[93] Cuban agricultural exports include sugar, tobacco, coffee and citrus products.[94] Cuba's industrial enterprises emphasize food processing, petroleum products, metallurgy, textiles and biotechnology.[95] Industrial production has been hampered in recent years by a lack of spare parts and foreign investment capital.[96] Most basic public services are provided free of charge or for a minimal fee.[97] However, many of these public services are in serious decline, especially education, medical care, communications and transportation.[98]

The U.S. economic embargo has had a severe effect upon the Cuban economy, especially when combined with the termination of subsidies from Russia and the sharp decline in export trade resulting from the collapse of the Soviet Union in 1991.[99] Since the late eighteenth century, the Cuban economy has prospered or suffered with the sugar industry.[100] Cuba has never been able to diversify from a single crop economy, and sugar presently accounts for over fifty

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91. *See id.*

92. *See id.* at 8. Privately owned farms account for ten percent of all farmland in Cuba. *See id.*

93. *See id.* at 8. Despite this conclusion by the United States Department of State, it should be noted approximately 200,000 Cubans are currently licensed by the Cuban Government as self-employed workers. *See Cuba Won't Expand Businesses,* Associated Press, Apr. 1, 1997.

94. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 8.

95. *See id.*

96. *See id. See also Cubans Blame Slowdown on Helms-Burton Act,* WASH. POST, Jan. 25, 1997, at A16.

97. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 7.

98. *See id.*

99. The U.S. embargo has had effects upon Cuba beyond interference with its economic prosperity. For example, the embargo has had a devastating impact on the health of the Cuban populace. In a study released in March, 1997, the American Association for World Health concluded that the embargo has had the unintended effect of causing unnecessary suffering for the Cuban people. According to the study, Cuban patients are often denied essential drugs, and doctors are forced to work without adequate equipment as a result of the embargo. *See Health Study Faults Cuba Embargo,* ASSOCIATED PRESS, March 4, 1997. *See also Study: Embargo Tough on Cubans,* ASSOCIATED PRESS, March 3, 1997; *U.S. Embargo Hurting Cuba's Health,* S.F. CHRON., March 3, 1997, at A16.

100. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 7. Cuba produced 4.8 million tons of sugar in 1996. *See Cuba Sugar Production May Rise,* ASSOCIATED PRESS, Jan. 1, 1997. This represents a 33% increase over previous years in the early 1990s. However, this figure is far below production figures for the 1980s when production reached 7.7 million tons annually. *See Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16. Additionally, 1997 production has been estimated at less than the 1996 figure. *See Castro Says Sugar Crop Falls Short,* ASSOCIATED PRESS, May 2, 1997.

percent of export earnings.[101] Eighty percent of Cuban sugar was exported to the Soviet Union, but such exports dropped precipitously with the collapse of the Soviet Union.[102] At the same time, Cuban industry, especially the electronics, pharmaceuticals and biotechnology sectors, suffered steep declines due to a lack of spare parts and components.[103] Foreign investment capital became scarce due to worsening economic conditions, Cuba's excessive foreign debt and the lack of clear titles to expropriated property.[104] The only economic success has been the tourism industry which has increased by twenty percent per year and contributes over five hundred million dollars in net revenue to the Cuban economy annually.[105]

As a result, the Cuban economy suffered a deep depression commencing in the late 1980s. Both unemployment and underemployment grew rapidly,[106] and rationing was introduced for such commodities and services as food, fuel, and electricity.[107] Imports declined by seventy-five percent,[108] and economic production declined an estimated thirty-five to forty percent.[109] Cuba's trade deficit ballooned and now currently stands in excess of one and one half billion dollars annually.[110] Cuba became unable to service its seven billion dollar debt to Western creditors in July 1986[111] and has failed to resolve its twenty billion dollar debt to Russia.[112] In a desperate attempt to stimulate the economy, the Castro regime introduced tentative free market reforms which included authorization of the free use of the American dollar in commercial transactions, the slashing of subsidies to Cuban industries and the legalization of markets not run by the

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101. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 8. The much-heralded Cuban tobacco industry produces seventy million cigars per year and generates Cuba more than one hundred million dollars in gross export earnings annually. *See 100 Americans Invited to Cuba for Cigar Party,* WASH. POST, Feb. 18, 1997, at A3.

102. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 9.

103. *See id.* at 8.

104. *See id.* at 10.

105. *See id.* Cuba attracted over one million tourists in 1996. Gross revenues from tourism in 1996 were in excess of one billion dollars. *See Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16.

106. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 11.

107. *See id.* at 7.

108. *See id.* at 11.

109. *See id. See also Cuba Sugar Production May Rise, supra* note 100.

110. Cuba incurred a 1.7 billion dollar trade deficit in 1996. *See Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16.

111. *See id.* The Cuban Ministry of Economics and Planning recently estimated this debt to be in excess of eleven billion dollars.

112. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 10.

state.[113] As a result, the economy has shown some signs of recovery from its recent decline.[114]

Despite setbacks such as the Mariel Boatlift in 1980 and the expulsion of Cuban operatives from Grenada in 1983, U.S.-Cuba relations improved slightly in the 1970s and 1980s.[115] In 1975, the Organization of American States lifted comprehensive sanctions and deferred to individual member states the option of reestablishing diplomatic and trade relations with Cuba.[116] The United States did not oppose this resolution.[117] In 1977, the United States and Cuba established interest sections in their respective capitals under the protection of the Swiss embassy.[118] In 1984, the United States and Cuba negotiated an agreement to normalize immigration between the two countries and return persons who arrived during the Mariel Boatlift who were ineligible for residence in the United States.[119] Furthermore, the United States began to permit the shipment of humanitarian donations to nongovernmental organizations in Cuba in October 1992 pursuant to the Cuban Democracy Act,[120] and, to date, over fifty million dollars worth of humanitarian goods have been licensed for export to Cuba.[121] Recent efforts to improve relations have also focused on improving telecommunications service between the countries and further normalizing immigration procedures.[122]

Into this hopeful atmosphere of burgeoning cooperation entered the Helms-Burton Act. As set forth above, the Act was introduced as House Bill 927 on February 14, 1995.[123] The Act was actively opposed by the Clinton Administration until the February 24, 1996 shootdown of two unarmed U.S.

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113. *See Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16. There is also a thriving gray market in Cuba. One economist described the current Cuban economy as "schizophrenic" and at a stage "where almost everything is permitted, but most things are not legal." *See id.*

114. *See id.*

115. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 13-5.

116. *See* OAS GENERAL SECRETARIAT, MEETINGS OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS, COLLECTION OF FINAL ACTS (THE ELEVENTH THROUGH THE TWENTIETH) VOL. 2 (1989). *See also* O. CARLOS STOETZER, THE ORGANIZATION OF AMERICAN STATES 201 (1993).

117. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 13.

118. *See id.*

119. *See id.* at 14.

120. *See supra* note 68 and accompanying text.

121. *See id.*

122. For example, in May 1995, the U.S. and Cuba reached an agreement whereby the U.S. agreed to repatriate Cubans caught while attempting to flee the island in return for Cuban promises not to punish such persons as a consequence of their attempt to emigrate illegally. *See U.S. Won't Fight Cuba Prosecutions,* ASSOCIATED PRESS, Feb. 13, 1997.

123. *See* H.R. REP. NO. 104-202, *supra* note 4, at 25.

civilian aircraft over international waters by Cuban military aircraft resulting in the death of four Cuban-Americans.[124] In the aftermath of the shootdown, the bill quickly proceeded through the U.S. Congress which rejected efforts to delete controversial provisions creating civil liability for persons alleged to be trafficking in confiscated property claimed by U.S. nationals[125] and excluding aliens who have confiscated property claimed by U.S. nationals or who traffic in such property.[126] The bill was approved by the Senate on March 5, 1996 and by the House of Representatives the following day.[127] President Clinton signed the Helms-Burton Act into law on March 12, 1996.[128]

As previously noted, international reaction to the adoption of the Helms-Burton Act was universal, immediate and hostile.[129] Most of the opposition centered around the provisions allowing U.S. nationals to instigate litigation and receive damage awards from persons alleged to be trafficking in confiscated property and excluding aliens who have engaged in such activities. Response to the Act included the issuance of condemnations, the enactment of retaliatory legislation and the initiation of dispute resolution procedures pursuant to the GATT and the NAFTA.[130]

The reaction of private industry to the Act was more divided. Some private enterprises took notice of the Act's provisions and moved to bring their policies into compliance. For example, Cemex, the largest cement maker in Latin America, withdrew from Cuba in order to protect the operations of its foreign subsidiaries.[131] The Mexican glass company Vitro SA withdrew from a joint venture agreement to produce bottles in Cuba.[132] The Dutch bank insurer ING Group NV refused to renew a thirty million dollar finance agreement with the Cuban sugar industry as such a renewal, in its opinion, violated the Act.[133] ING Group was joined in this action by the Spanish firm Banco Bilbao Vizcaya, which also refused to renew a thirty million dollar financing agreement relating to the

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124. *See U.S. Expects Furor Over Trade Sanctions at Summit,* WASH. POST, June 27, 1996, at A20. *See also* Swardson, *supra* note 28, at A7.

125. *See* Helms-Burton Act, *supra* note 2, § 6082.

126. *See id.* § 6091. The House of Representatives Committee on International Relations rejected an amendment offered by Representative Lee Hamilton (Democrat, Indiana) to delete these sections by votes of 23 to 6 and 27 to 9 on reconsideration. *See* H.R. REP. NO. 104-202, *supra* note 4 at 27-28.

127. *See* H.R. REP. NO. 104-202, *supra* note 4, at 1.

128. *Id.*

129. *See supra* notes 25-35 and accompanying text.

130. *See id.*

131. *See U.S. Revives Feud Over Cuban Properties, supra* note 61, at A10.

132. *See id.*

133. *Dutch Bank Cuts Off Money to Cuban Firm,* DENV. POST, July 5, 1996, at 21A.

Cuban sugar industry.[134] According to the State Department, nine other foreign companies also withdrew from Cuba or refrained from doing business there as a result of the Act.[135] Other companies, such as the Spanish companies Tabacalera SA and Sol-Melia, have attempted to demonstrate that their operations in Cuba do not utilize property or finance enterprises subject to claims by U.S. nationals.[136]

Conversely, other private enterprises chose to ignore the Act and risk the imposition of sanctions. Chief among these companies was Sherritt International Corporation, a Canadian company which operates nickel and cobalt mines in eastern Cuba on property the United States contends was owned by Freeport-MacMoRan Company of New Orleans, Louisiana.[137] Rather than part with its lucrative Cuban operation, Sherritt placed its U.S. operations up for sale and raised five hundred million dollars through the sale of debentures to finance further expansion of its Cuban operations.[138] As a result, Sherritt's chairman Ian Delaney and other top executives have been barred from entry into the United States.[139] Other companies choosing to ignore the Act's prohibitions include the Mexican consortium Grupo Domos and the Italian telecommunications company STET which maintain substantial investments in the Cuban telephone system.[140]

Faced with international furor and confusion, as well as domestic opposition,[141] President Clinton exercised his authority pursuant to Section 6085

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134. *Foreign Banks Pull Plug on Cuban Sugar Harvest,* DENV. POST, Dec. 2, 1996, at 4A.

135. *See Official: Cuba Sanctions Working,* ASSOCIATED PRESS, Feb. 10, 1997.

136. *See id.* Tabacalera SA provides financing for Cuban tobacco farming and processing. Sol-Melia operates six hotels in Cuba including the Varadero beach hotel adjacent to an estate formerly owned by the DuPont family. *See id.*

137. *Canadian Firm Eyes Cuba Role,* ASSOCIATED PRESS, Nov. 12, 1996. Sherritt also owns interests in agriculture, oil exploration, tourism and communications operations in Cuba. *See id.*

138. *See id.*

139. *See id. See also 4 Executives Banned from U.S.,* ASSOCIATED PRESS, March 15, 1997; *Canadians Execs Barred from U.S.,* ASSOCIATED PRESS, March 14, 1997; *Clinton May Delay Enforcing Part of Cuban Sanction Law,* WASH. POST, July 12, 1996, at A32.

140. *See U.S. Revives Feud Over Cuban Properties, supra* note 61, at A10. STET was recently threatened with the imposition of sanctions by the United States for its activities in Cuba including transacting business with Cuban companies that utilize assets that may have been expropriated from American nationals. *See Albright Received as 'Iron Lady',* WASH. POST, Feb. 17, 1997, at A29. Grupo Domos executives have been barred from entry into the U.S. pursuant to Title IV of the Act. *See Canadian Execs Barred from U.S., supra* note 139.

141. The National Association of Manufacturers, the U.S. Chamber of Commerce and the National Foreign Trade Council opposed the Helms-Burton Act on the bases that it would jeopardize American economic interests abroad, invite retaliation, and fail to

of the Act on July 16, 1996 by suspending implementation of Title III of the Act relating to the instigation of litigation against persons trafficking in confiscated property for six months.[142] In suspending implementation of this section of the Act, President Clinton stated that the administration would use the delay to persuade U.S. allies to join in the effort to promote democracy in Cuba.[143] Further, the President stated that the suspension would continue to present Cuba with a united front opposed to its form of government rather than provide a division of opposition which Castro could exploit to his benefit.[144] Although generally met with relief by U.S. allies,[145] President Clinton's actions were met with strong partisan reactions from Republicans who had previously voiced support for the Act.[146]

President Clinton's initial suspension of Title III of the Act was scheduled to expire on February 1, 1997. However, on January 3, 1997, President Clinton suspended Title III for an additional six months.[147] In ordering this suspension, President Clinton again cited continuing efforts to unify opposition to the Castro regime at the international level.[148] In this regard, President Clinton specifically cited a resolution adopted unanimously by the Council of Ministers of the European Union on December 2, 1996 which warned Cuba that future trade relations depended upon improvements in human rights and political freedom.[149]

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accomplish its stated purposes. *See Business Groups Urge Clinton to Disallow Suits Over Seized Property in Cuba,* WASH. POST, July 6, 1996, at A24.

142. *Clinton Delays Effect of Cuba Lawsuit Act,* WASH. POST, July 17, 1996, at A1.

143. *See id.*

144. *See id.*

145. *See id.* The European Union issued a statement welcoming the suspension but still objecting to the possibility of future implementation as a "sword of Damocles" hanging over its future relations with Cuba and the United States. *See id.*

146. *See id.* Republican presidential candidate Robert J. Dole criticized President Clinton's actions as "trying to have it both ways." *See id.* Dole stated that President Clinton was inconsistent in ordering the suspension as "[Clinton] claims he is allowing a penalty to go into effect–civil liability for trafficking in expropriated property–but he will not allow American citizens to use American courts to seek justice." *See id.* House Speaker Newt Gingrich stated that the President's action would "be applauded by the Castro regime." *See id.* Blunter still, U.S. Representative Lincoln Diaz-Balart (Republican, Florida) characterized President Clinton's decision as revealing "[c]haracter of Jell-O. Backbone of Jell-O." *See id.*

147. *See* Thomas W. Lippman, *Clinton Suspends Provision of Law that Targets Cuba,* WASH. POST, Jan. 4, 1997, at A1. *See also Clinton Delays Cuba Sanctions,* ASSOCIATED PRESS, Jan. 3, 1997.

148. *Clinton Delays Cuba Sanctions, supra* note 147.

149. Common Position 96/332 of 2 December 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Cuba, 1996 O.J. (L 322) 1. The resolution specifically provided that "[i]t is not European Union policy to try to bring

Although the Clinton Administration recognized that such statements would not cause "democracy . . . to break out immediately under Fidel Castro,"[150] such resolutions were welcomed by the United States as serving to increase international awareness of human rights abuses in Cuba[151] and the need for the promotion of democratic reform.[152] Furthermore, President Clinton stated that he would continue to suspend Title III every six months "so long as America's friends and allies continue their stepped-up efforts to promote a transition to democracy in Cuba."[153] President Clinton continued this policy on July 16, 1997 when he suspended implementation of Title III for an additional six months. [154]

International reaction to President Clinton's suspensions has been decidedly mixed. Hugo Paemen, the European Union's ambassador to Washington, called the suspensions "steps in the right direction,"[155] but stated that they do not guard against potential future application.[156] Paemen also noted that, despite the President's action, Title IV of the Act barring executives of companies that traffic in confiscated Cuban property from entering the United States remains in effect and continues to penalize Europeans engaged in lawful business activities in Cuba.[157] Mexico's Foreign Ministry also welcomed the waivers but characterized them as merely "an effort to respond to the unanimous opinion of the international community."[158] The Foreign Ministry further stated that the Act remains "contrary to international rights and the fundamental principle of nonintervention in the internal matters of other nations."[159] Canada remained hostile and characterized the waivers as "disappointing."[160] International Trade Minister Art Eggleton restated Canada's long-standing objection to the Helms-Burton Act as "unacceptable behavior by the United States in foisting its foreign

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about change by coercive measures with the effect of increasing the economic hardship of the Cuban people. . . . [However], full cooperation with Cuba will depend upon improvements in human rights and political freedom." *See id.* The resolution also called upon Castro to release political prisoners and reform the Cuban penal code. *See also EU Tells Cuba to Improve Its Human Rights Record,* S.F. CHRON., Dec. 3, 1996, at A13. *See also EU Gives Clinton an Opportunity,* S.F. CHRON., Dec. 4, 1996, at C2.

150. Lippman, *supra* note 147, at A1.

151. *See EU Gives Clinton an Opportunity, supra* note 149, at C2.

152. *See* Lippman, *supra* note 147, at A1.

153. *See id.*

154. *See Cuba Sanction Waived Again,* WASH. POST, July 17, 1997, at A23. *See also Helms-Burton Lawsuits Blocked by Clinton,* S.F. CHRON., July 17, 1997, at A9.

155. *Lippman, supra* note 147, at A1.

156. *See id.*

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.*

policy onto Canada and other countries, threatening Canadian business, threatening anyone who wants to do legal business with Cuba."[161]

Domestic reaction to the suspensions was also mixed. Predictably, conservative Republican legislators and anti-Castro constituencies expressed disappointment and outrage. One of the Act's namesakes, Senator Jesse Helms of North Carolina, acknowledged the European Union's resolution calling for improvement in Cuba's human rights record but stated that such a resolution was "no justification for giving our allies a permanent carte blanche to traffic in stolen American property as a reward for doing what they should have been doing all along."[162] Furthermore, Helms condemned the suspensions as unjustly rewarding Canada and Mexico although such states had failed to modify their policies toward Cuba. [163] More outspoken members of Congress accused the President of circumventing the intent of Congress by failing to demonstrate that the suspensions were necessary to the national interests of the United States and would expedite a transition to democracy in Cuba.[164] However, the predominant national reaction was one of praise for serving to bring more attention to human rights violations in Cuba and placing greater multilateral pressure upon Castro to liberalize his regime.[165] The Administration's most recent suspension will expire on February 1, 1998.

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161. *Id.*

162. *Id.*

163. *See id.*

164. *See* Ileana Ros-Lehtinen, *Exploiting Enslaved Cubans,* WASH. POST, Jan. 14, 1997, at A14. Representative Ros-Lehtinen is a Republican from Florida. Section 6085(b)(2) of the Act grants the President authority to suspend Title III for periods not to exceed six months in the event "that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." Helms-Burton Act, *supra* note 2, § 6085(b)(2). Representative Ros-Lehtinen characterized the suspension as:

> [the loss of] a magnificent opportunity to tighten the noose on Fidel Castro. Instead, far from putting democracy and human rights for Cuba on the forefront of U.S.-Cuba policy, the president surrendered to the foreign economic interests that are exploiting American property stolen by the Castro dictatorship and exploiting the enslaved people of Cuba.

Ros-Lehtinen, *supra,* at A14.

165. *See Deft Move on Cuba,* WASH. POST, Jan. 5, 1997, at C6. *See also* Thomas Oliphant, *Seeds of Change Planted on Cuba Policy,* S.F. CHRON., Jan. 9, 1997, at A23; *Concerted Action Against Castro,* S.F. EXAMINER, Jan. 5, 1997, at B12.

III. THE PROVISIONS OF THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT OF 1996

The Helms-Burton Act consists of four separate titles designed to accomplish the purposes set forth in Section I of this article.[166] Initially, Title I, consisting of Sections 6032 through 6046, strengthens the U.S. embargo against Cuba and calls for the concomitant strengthening of international sanctions against the Castro regime. From the domestic standpoint, Title I requires full enforcement of the Cuban Assets Control Regulations with strict Congressional oversight of such enforcement.[167] Title I also prohibits U.S. nationals from knowingly extending a "loan, credit or other financing" for transactions involving any property owned by a U.S. national that was confiscated by the Cuban government.[168] Additionally, Title I restates existing law prohibiting the reexport of Cuban sugar to the United States by requiring verifications and assurances that sugar and sugar products entering the United States are not of Cuban origin or reexported by a third country from Cuba.[169] Title I declares that all restrictions contained within the Act or otherwise arising from the economic embargo of Cuba are consistent with the U.S. obligations pursuant to the NAFTA.[170]

From an international point of view, Title I urges the President to continue his efforts to encourage foreign countries to restrict trade and credit relations with Cuba.[171] This effort is to include application to the United Nations Security Council for a mandatory international embargo directed against Cuba.[172] Title I also instructs the President to withhold U.S. assistance from countries that undermine the embargo by providing aid to or engaging in concessional trade with Cuba.[173] Furthermore, the Act requires the President to reduce U.S. assistance to any country in an amount equal to assistance provided by such country or any entity in that country to the Cuban nuclear facility located at

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166. *See supra* notes 17-24 and accompanying text.

167. *See* Helms-Burton Act, *supra* note 2, § 6032(c).

168. *See id.* § 6033(a).

169. *See id.* §§ 6040(a), (c), (d). Section 902(c) of the Food Security Act of 1985 requires the President to refuse to allocate any of the U.S. sugar import quota to a country that is a net importer of sugar unless officials of that country verify that the country does not import for reexport to the United States any sugar produced in Cuba. *See* Food Security Act of 1985, Pub. L. No. 99-198, § 902(c), 99 Stat. 1443, 1354, 1443-44 (1985) (codified as amended at 7 U.S.C. § 1446).

170. *See* Helms-Burton Act, *supra* note 2, § 6040(b).

171. *See id.* § 6032(b).

172. *See id.* § 6031(2). This section further declares the Castro government to be a threat to international peace and security thereby warranting Security Council action pursuant to Chapter VII of the United Nations Charter. *See id.* § 6031(1).

173. *See id.* § 6032(b).

Juragua.[174] Foreign assistance, financing and trade with Cuba is to be monitored through the provision of a detailed annual report from the executive branch to Congress.[175] Title I also seeks to further isolate Cuba by opposing termination of the suspension of Cuba from participation in the Organization of American States[176] and international financial institutions such as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank) and the Inter-American Development Bank.[177]

Title II, consisting of Sections 6061 through 6067, provides a framework for American assistance to transition and democratically-elected governments which may come to power in Cuba in the future. Title II, which states that it is U.S. policy to support Cuban self-determination,[178] instructs the President to develop a plan for providing economic assistance to Cuba.[179] The types of assistance which may be extended to transition and democratically-elected

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174. *See id.* § 6041(b). Begun in 1983 with the assistance of the former Soviet Union, construction on the Juragua nuclear power plant near Cienfuegos, Cuba was suspended in 1992 as Cuba could no longer afford the cost of Russian technical assistance. In November 1992, Russia and Cuba signed an agreement to complete construction of the plant if a financier could be found for the nuclear safety and control equipment. Among the many concerns raised by the international community, including the United States, regarding this project is Cuba's status as a nonsignatory to either the Nuclear Non-Proliferation Treaty or the Treaty of Tlatelolco, the Latin America regional non-proliferation regime. *See* Cuba State Department Notes, *supra* note 36, at 9.

175. *See* Helms-Burton Act, *supra* note 2, § 6038.

176. *See id.* § 6035. Cuba's membership in the Organization of American States was suspended in 1961.

177. *See id.* § 6034(c). The International Development Association, the International Finance Corporation, and the Multilateral Investment Guaranty Agency are also included in this prohibition. *See id.* Title I also seeks to promote democratic reform and human rights in Cuba by providing assistance to independent nongovernmental organizations supporting democracy-building in Cuba and directing the President to urge the Organization of American States to create a fund to support the deployment of human rights and election observers in Cuba. *See id.* §§ 6039(a), (b). Communication with the Cuban people is sought to be enhanced by provisions of Title I directing the conversion of Television Marti to ultra-high frequency to broaden its reception in Cuba and permitting the establishment of U.S. news bureaus in Cuba. *See id.* §§ 6037(a), 6044.

178. *See id.* § 6061.

179. *See id.* § 6062. In a report dated January 28, 1997 and entitled "Support for a Democratic Transition in Cuba", the Clinton Administration estimated that the first six years of post-Castro transition in Cuba would cost between four and eight billion dollars with the predominant share coming from the United States and the rest from international financial institutions, multilateral organizations and other countries. *See* Nick Madigan, *U.S. Pledges Support for Post-Castro Cuba,* WASH. POST, Jan. 28, 1997, at A10. *See also Post-Castro U.S. Aid Promised,* ASSOCIATED PRESS, Jan. 28, 1997; *U.S. May Aid Post-Castro Cuba,* ASSOCIATED PRESS, Jan. 28, 1997; *U.S. May Subsidize Post-Castro Cuba,* DENV. POST, Jan. 28, 1997, at 15A.

governments in Cuba are described in Section 6062.[180] In addition, the President is instructed to seek the assistance of other countries, international financial institutions, and multilateral organizations in aiding transition and democratically-elected governments in Cuba.[181] The President is authorized to suspend the economic embargo in the event a transition government comes to power in Cuba and such suspension would contribute to a stable foundation for a democratically-elected government.[182] The President may terminate the embargo in the event a democratically-elected government comes to power in Cuba.[183] The requirements for a government to be deemed "transition" or "democratically-elected" for purposes of the Act are set forth in elaborate detail in Sections 6066 and 6067.[184]

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180. *See* Helms-Burton Act, *supra* note 2, § 6062. In the case of a transition government, assistance is limited to food, medicine, medical supplies and equipment, assistance necessary to meet emergency energy needs, assistance in preparing the Cuban military for adjustment to an appropriate role in a democracy, and remittances by individuals to their relatives of cash or goods. In the case of a democratically-elected government, assistance may include: development assistance and economic support funds as provided in the Foreign Assistance Act of 1961; assistance as provided in the Agricultural Trade Development and Assistance Act of 1954; financing and other forms of assistance provided by the Export-Import Bank; Overseas Private Investment Corporation and Trade and Development Agency; Peace Corps programs; and assistance in preparing the Cuban military for an appropriate role in a democracy. The Act also empowers the President to consider Cuba's participation in the Caribbean Basin Economic Recovery Act and the extension of most-favored nation treatment to Cuba. *See id.*

181. *See id.*

182. *See id.* § 6065(a).

183. *See id.* § 6065(c).

184. Section 6065 defines a transition government in Cuba as a government which is demonstrably in transition from communist dictatorship to representative democracy and possessing the following characteristics:

> Recognition of the right to independent political activity;
> Release of all political prisoners;
> Termination of disruption of Television and Radio Marti;
> Exclusion of Fidel and Raul Castro from the government;
> Assurance that the government will allow the efficient distribution of assistance to the Cuban people;
> Granting of permission for the deployment of human rights monitors throughout Cuba;
> Commitment to the establishment of an independent judiciary;
> Dissolution of the Department of State Security in the Cuban Ministry of the Interior;
> Pledging respect for internationally recognized human rights;
> Organization of free, fair and open elections within one year;
> Respect for private property;

In any event, normalization of economic and diplomatic relations between the United States and Cuba is made specifically contingent upon satisfactory resolution of property claims of U.S. nationals by the Cuban government.[185]

Title III, encompassing Sections 6081 through 6085, is clearly the most controversial portion of the Helms-Burton Act. This title creates a cause of action for U.S. nationals whose confiscated Cuban property is being exploited without authorization. Along with Title IV, this portion of the Act is intended to "create a 'chilling effect' that will deny the current Cuban regime venture capital, discourage third-country nationals from seeking to profit from illegally confiscated property, and help preserve such property until such time as the rightful owners can successfully assert their claim."[186] The "unique but proportionate remedy"[187] designed to accomplish these purposes is to subject persons exploiting confiscated property in Cuba to liability for damages in civil actions commenced in American courts by affected U.S. nationals.

> Taking appropriate steps to return to U.S. nationals property confiscated by the Cuban government;
> Granting of permits to privately owned telecommunications and media companies; and
> Allowing the establishment of independent trade unions and social, political and economic associations.

Id. § 6065.

Section 6066 defines a democratically-elected government in Cuba as a government that results from free and fair elections conducted under the supervision of internationally recognized observers and possessing the following characteristics:

> Granting of time to opposition parties to organize and campaign;
> Permitting full access to the media for all candidates;
> Demonstrating respect for basic civil liberties and human rights of the Cuban people;
> Progress toward the establishment of an independent judiciary;
> Progress toward the establishment of a market-oriented economic system;
> Constitutional provisions guaranteeing regular free and fair elections; and
> Demonstrable progress in returning to U.S. nationals property taken by the Cuban government or providing full compensation.

Id. §6066.

185. *See id.* § 6067(d).
186. H.R. REP. No. 104-202, *supra* note 4, at 25.
187. *See id.* at 39.

Section 6082(a)(1) provides that any person[188] who, after three months of the date Title III becomes effective, traffics in property confiscated by the Cuban government from a U.S. national on or after January 1, 1959 shall be liable in damages to said national.[189] Property is defined to include tangible and intangible property whether real, personal or mixed and any present, future or contingent right or interest therein including leasehold interests.[190] Such property is deemed confiscated for purposes of the Act if its ownership or control was seized by the Cuban government on or after January 1, 1959 without being returned, adequate and effective compensation having been paid, or without any claim to it having been settled pursuant to an internationally recognized agreement or procedure.[191] Property may also be deemed confiscated if the Cuban government has repudiated, defaulted, or failed to pay any debt of a expropriated enterprise, a debt which is a charge on expropriated property, or a debt incurred in satisfaction of an expropriated property claim.[192] A person traffics in such property if he knowingly and intentionally[193] disposes, receives, invests in, uses, or profits from such property without the authorization of the U.S. national who holds a claim to the property.[194] U.S. nationals who are eligible to file claims

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188. A person is defined as "any person or entity including any agency or instrumentality of a foreign state." *See* Helms-Burton Act, *supra* note 2, § 6023(11).

189. *See id.* § 6082(a)(1)(A).

190. *See id.* § 6023(12)(A). Real property utilized for residential purposes is excluded from the definition of property subject to the Act's provisions unless, as of March 12, 1996, the claim has been certified pursuant to the International Claims Settlement Act and is occupied by an official of the Cuban government or the ruling political party in Cuba. *See id.* § 6023(12)(B).

191. *See id.* at §§ 6023(4)(A)(i), (ii). Courts in which claims asserted pursuant to the Act are pending are specifically instructed to ignore the act of state doctrine in their deliberations and determine the legality of the Cuban government's confiscation of the contested property. *See id.* at § 6082(a)(6). The act of state doctrine precludes U.S. courts from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). *See also* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

192. *See* Helms-Burton Act, *supra* note 2, §§ 6023(4)(B)(i)- (iii).

193. "Knowingly" is defined in the Act as having actual knowledge or reason to know. *See id.* § 6023(9).

194. *See id.* §§ 6023(13)(A)(i)-(iii). The definition of "trafficking" in confiscated property is extremely broad and includes any person who:

> sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property [or] engages in a commercial activity using or otherwise benefiting from

include any national, regardless of his or her date of naturalization, and any other legal entity organized under the laws of the United States or any of its territories, commonwealths or possessions, and having its principal place of business in the United States.[195] Subject matter jurisdiction of all such claims resides in the U.S. district courts.[196] However, the amount of the claim must exceed fifty thousand dollars exclusive of interest, costs, and attorneys' fees in order to invoke this jurisdiction.[197]

In proving the merits of a claim to ownership of confiscated property, the court is required to accept as conclusive a certification of a claim to ownership of that interest that has been made by the Foreign Claims Settlement Commission pursuant to Title V of the International Claims Settlement Act of 1949.[198] If an action filed pursuant to the Act has not been certified by the Foreign Claims Settlement Commission, the court may appoint a special master, which may be, in fact, the Commission to make determinations regarding the ownership of the property in question and the amount of the claim.[199] In any event, the court is prohibited from accepting as conclusive any findings, orders, judgments or decrees from administrative agencies or courts of foreign countries or international organizations that determine the invalidity or amount of a claim unless such determinations were made pursuant to binding international arbitration to which the United States or the claimant submitted the claim.[200] Further, the Act does not authorize or require the claims of Cuban nationals who

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> confiscated property or causes, directs, participates in, or profits from, trafficking . . . by another person, or otherwise engages in trafficking through another person.

Id.

"Trafficking" in confiscated property does not include:

> the delivery of international telecommunications signals to Cuba, the trading or holding of securities publicly traded or held . . . transactions and uses of property incident to lawful travel to Cuba . . . [and] transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban government or the ruling political party in Cuba.

Id.

195. *See id.* §§ 6023(15)(A), (B).

196. *See id.* § 6081(11).

197. *See id.* § 6082(b).

198. *See id.* § 6083(a)(1). *See also* International Claims Settlement Act of 1949, 22 U.S.C. § 1643 (1994).

199. *See* Helms-Burton Act, *supra* note 2, § 6083(a)(2).

200. *See id.* § 6083(a)(3).

became U.S. citizens after their property was confiscated to be included in the existing claims certified to the Secretary of State by the Foreign Claims Settlement Commission for the purpose of future negotiation with a friendly government in Cuba upon the restoration of diplomatic relations.[201]

There are few available defenses for persons alleged to be trafficking in property confiscated from U.S. nationals. Defendants may avail themselves of the statute of limitations set forth in Section 6084 which requires that litigation based upon the Act be initiated no more than two years after the trafficking giving rise to the action has ceased to occur.[202] Defendants may also allege that a claimant has elected his remedy by seeking compensation for the same harm pursuant to other applicable statutes thereby prohibiting the initiation of litigation pursuant to the Act.[203] Additionally, the right of U.S. nationals to initiate litigation pursuant to the Act may be suspended by the President[204] or terminated if the President determines that a democratically-elected government is in power in Cuba.[205]

Assuming that a claimant successfully establishes liability for trafficking, said claimant is entitled to an award of damages. The amount of such damages is the greatest amount resulting from three alternate methods of calculation. Initially, the claimant may receive an award equal to that certified to the claimant by the Foreign Claims Settlement Commission pursuant to the International Claims Settlement Act of 1949.[206] In the alternative, the claimant may receive the amount determined by the special master appointed pursuant to Section 6083(a)(2) of the Act plus interest or the fair market value of the property

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201. *See id.* § 6083(c)(1).

202. *See id.* § 6084.

203. *See id.* § 6082(f)(1)(B). This section further provides that a person who initiates litigation pursuant to the Act may not bring a civil action under any other law seeking compensation by reason of the same subject matter. *See id.* § 6082(f)(1)(A).

204. *See id.* §§ 6082(h)(1)(A), 6064(a).

205. *See id.* § 6082(h)(1)(B). However, with regard to litigation initiated prior to such suspension or termination, Section 6082(h)(2) provides as follows:

> the suspension or termination of rights under paragraph (1) shall not affect suits commenced before the date of such suspension or termination (as the case may be), and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if the suspension or termination had not occurred.

Id. § 6082(h)(2).

206. *See id.* § 6082(a)(1)(A)(i)(I). There is a presumption that the amount for which a person is liable is the amount certified to the claimant by the Foreign Claims Settlement Commission. This presumption is rebuttable by clear and convincing evidence that the amount of liability as calculated by Sections 6082(a)(1)(A)(i)(II) or (III) is a more appropriate amount. *See id.* § 6082(a)(2).

calculated as the greater of its current value or its value at the time of confiscation plus interest.[207] All successful claimants are entitled to an award of court costs and reasonable attorneys' fees.[208] Interest is calculated from the date of confiscation to the date on which the litigation was initiated.[209]

However, the liability of a person trafficking in confiscated property may be increased under certain circumstances. Any person that traffics in confiscated property certified by the Foreign Claims Settlement Commission shall be liable in damages in an amount equal to three times the amount of damages as determined by Section 6082(a)(1)(A)(i) plus costs and reasonable attorneys' fees[210] if a U.S. national owns a claim with respect to that property.[211] Additionally, a U.S. national may be entitled to recover treble damages if such national, after the end of the three month period set forth in Section 6082(a)(1)(A), provides written notice to the person trafficking in the national's property and said person continues to traffic in such property thirty days from the date such notice was provided.[212] In any event, the property of a foreign state shall be immune from attachment and execution to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.[213]

Finally, Section 6085(b)(1) of the Act grants the President the authority to suspend the initial effective date[214] of Title III for a period of no more than six months if the President determines the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.[215] Section 6085(b)(2) allows the President to continue to suspend the effective date of Title III for additional six month periods of time upon the same findings as required for the initial suspension.[216] President Clinton utilized this authority to suspend implementation of Title III for six month periods on July 16, 1996, January 3, 1997, and July 16, 1997.[217] The President also has the authority to suspend the operation of Title III for not more than six months after it has

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207. *See id.* §§ 6082(a)(1)(A)(i)(II), (III).

208. *See id.* § 6082(a)(1)(A)(ii).

209. *See id.* § 6082(a)(1)(B).

210. *See id.* §§ 6082(a)(3)(c)(i), (ii).

211. *See id.* § 6082(a)(3)(A).

212. *See id.* § 6082(a)(3)(B). The notice required by this section must be in writing, posted by certified mail or personally delivered, contain a demand to cease and desist the trafficking activities and provide notice of intent to initiate litigation. *See id.* §§ 6082(a)(3)(D)(i)-(iii).

213. *See generally* 28 U.S.C. § 1611(c) (1994).

214. The effective date of Title III was August 1, 1996. *See* Helms-Burton Act, *supra* note 2, § 6085(a).

215. *See id.* § 6085(b)(1).

216. *See id.* § 6085(b)(2).

217. *See supra* notes 141-65 and accompanying text.

become effective[218] and continue to renew this suspension every six months.[219] However, such a suspension does not affect litigation commenced prior to the date of suspension, and such litigation continues in the same manner and with the same effect as if the suspension had not occurred.[220] The President may also rescind any suspension upon determining that rescission will expedite a transition to democracy in Cuba.[221]

Title IV, encompassing Section 6091 of the Act, provides for the exclusion from the United States of aliens who have participated in the confiscation of property from U.S. nationals or who traffic in such property. Specifically, the Secretary of State and the Attorney General are required to exclude any alien seeking to enter the United States who, after March 12, 1996:

> has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national; traffics in confiscated property, a claim to which is owned by a United States national; 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 United States national; or is a spouse, minor child, or agent of a person excludable [as set forth above].[222]

The terms "confiscated" and "confiscation" are defined as any seizure of ownership or control of property by the Cuban government without the property having been returned, adequate and effective compensation having been paid or without any claim to the property having been settled pursuant to an internationally recognized agreement or procedure.[223] These terms also include the repudiation, default, or failure of the Cuban government to pay any debt of a confiscated enterprise, a debt which is a charge on confiscated property, or a debt incurred in satisfaction of a confiscated property claim.[224] "Trafficking" in confiscated property is defined as a knowing and intentional disposal, receipt, investment in, use of, or profit from confiscated property without the

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218. *See* Helms-Burton Act, *supra* note 2, § 6085(c)(1)(B).
219. *See id.* § 6085(c)(2).
220. *See id.* § 6085(c)(3).
221. *See id.* § 6085(d).
222. *See id.* § 6091(a).
223. *See id.* §§ 6091(b)(1)(A)(i), (ii).
224. *See id.* §§ 6091(b)(1)(B)(i)-(iii).

authorization of the U.S. national holding a claim to the property.[225] However, only trafficking in confiscated property occurring on or after March 12, 1996 may result in exclusion.[226] The exclusion penalty is further narrowed by Section 6091(d)(1) which limits it to aliens seeking to enter the United States on or after March 12, 1996.[227] Further, an exemption is provided by Section 6091(c) in those instances where the Secretary of State finds that entry into the United States is necessary for medical reasons or for purposes of litigation of an action under Title III.[228] In any event, Congress expressly requested that the Departments of State and Justice enforce these restrictions vigorously and, at the very least, compile a

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225. *See id.* §§ 6091(b)(2)(A)(i)-(iii). The definition of "trafficking" in confiscated property is remarkably broad and specifically includes any person who:

> transfers, distributes, brokers, or otherwise disposes of confiscated property;
> purchases, receives, obtains control of, or otherwise acquires confiscated property;
> improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after March 12, 1996, manage, lease, possess, use or hold an interest in confiscated property;
> enters into a commercial arrangement using or otherwise benefiting from confiscated property; or causes, directs, participates in, or profits from, trafficking by another person, or otherwise engages in trafficking through another person.

Id.

"Trafficking" in confiscated property does not include:

> the delivery of international telecommunications signals to Cuba;
> the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;
> transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel;
> transactions and uses of property by a person who is both a citizen of Cuba and resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

Id. §§ 6091(b)(2)(B)(i)-(iv).

226. *See id.* § 6091(d)(2).

227. *See id.* § 6091(d)(1).

228. *See id.* § 6091(c).

computerized list of all persons potentially subject to exclusion.[229] Unlike Title III, the President has no authority to suspend the operation of Title IV.

IV. THE HELMS-BURTON ACT: SERVING THE U.S. INTERNATIONAL AND NATIONAL INTERESTS?

A. The Helms-Burton Act and the U.S. International Interests

Despite its purported purposes of encouraging an early end to the Castro regime through the expression of support for the initiation of democratic processes in Cuba, serving the national security interests of the United States and preventing trafficking in property confiscated from American nationals, the Helms-Burton Act does not serve U.S. international interests. The Act is inconsistent with the U.S.'s long-standing opposition to secondary boycotts and jeopardizes the leadership role of the United States in various international institutions. Further, the isolationist policy towards Cuba expressed in the Act will fail without the cooperation of the international community. Finally, the Act may also serve to prolong, if not strengthen, the Castro regime.

The Helms-Burton Act is inconsistent with the U.S.'s long-standing opposition to secondary boycotts.[230] For example, in 1950, the Arab League Council, the executive branch of the Arab League,[231] recommended that member states compile a blacklist of third country ships that carried Jewish immigrants or military cargo to Israel.[232] The boycott was subsequently expanded to include all firms making a "material contribution to the strength of Israel."[233] "Material contributions" were defined as the establishment of plants in Israel, the use of an agent or principal office located in Israel and actions taken to develop Israel's

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229. *See* H.R. REP. NO. 104-202, *supra* note 4, at 42. A House Republican staff member characterized Congress's expectation as "more than just a symbolic, take-a-few-scalps sort of approach . . . we would expect . . . there will be a considerable number of people that would be excluded [from visiting the U.S.]." Paul Blustein & Thomas W. Lippman, *U.S. to Act on Cuba Boycott Rules,* WASH. POST, May 25, 1996, at F1.

230. By the term "secondary boycott," the author means restrictions upon international trade directed at one country as well as other countries and businesses located therein doing business and maintaining relations with the primary target of the boycott. *See* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 951-52 (1986).

231. The Arab League was organized in 1945 by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria, and Yemen.

232. *See* NORMAN VANDER CLUTE, LEGAL ASPECTS OF THE ARAB BOYCOTT 12 (1977).

233. *Id.* at 16. *See also* EDWARD HOTALING, THE ARAB BLACKLIST UNVEILED (1977).

natural resources.[234] "Material contributions" also included: entering into a partnership with an Israeli company; holding shares of an Israeli company; supplying advice or technical assistance to Israeli manufacturing plants; and permitting an Israeli company to use the name or trademarks of a foreign company.[235] Exceptions existed for the armaments, tourist, petroleum, insurance and banking industries.[236] Non-Israeli companies engaging in these activities were prohibited from doing business with members of the Arab League or companies located therein.[237] The United States led the opposition to the Arab boycott not only on the basis that the measures targeted an important ally, Israel, but also on the basis that secondary boycotts violated international law.[238] Titles III and IV of the Helms-Burton Act are completely contrary to this policy of active opposition to secondary boycotts.

The Helms-Burton Act also jeopardizes the leadership role of the United States in international affairs and various international institutions. For example, Section 6034 of Title I of the Act seeks to prevent the Castro regime from joining or benefiting from membership in international financial institutions such as the World Bank and the IMF.[239] Section 6034(a)(1) specifically requires the Secretary of the Treasury to instruct the U.S. executive director of each international financial institution enumerated in the Act to use the vote of the United States to oppose Cuban membership until a democratically-elected government is in power in Cuba.[240] Additionally, if any international financial institution designated in the Act approves a loan or other assistance to Cuba over U.S. opposition, the Secretary of the Treasury is instructed to withhold U.S. contributions to such institution in an amount equal to the loan or other assistance to the Cuban government.[241]

This section of the Act undermines American leadership by requiring the United States to withhold funds owed to such institutions.[242] When combined with

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234. *See* VANDER CLUTE, *supra* note 232, at 16-17.

235. *See id.* at 16.

236. *See id.* at 17. Exceptions to the boycott are permitted where the "higher interests of an Arab state require them." *See id.* at 17.

237. The resolutions of the Arab League have no legal force and effect until League member states adopt internal laws and procedures implementing the resolutions. As such, there is considerable variance among Arab states with regard to the boycott, and each state maintains its own rules with regard to the enforcement of the boycott within its territory.

238. *See* HOTALING, *supra* note 233, at 18-26. *See also U.S. Expects Furor Over Trade Sanctions at Summit, supra* note 124, at A20; *Helms-Burton Law Should Be Repealed,* S.F. CHRON., Jan. 13, 1997, at A18.

239. *See* Helms-Burton Act, *supra* note 2, § 6034.

240. *See id.* § 6034(a)(1).

241. *See id.* § 6034(b).

242. *See* H.R. REP. NO. 104-202, *supra* note 4, at 54.

the one and one half billion dollar delinquency in American contributions to the World Bank and regional development banks, further withholding of contributions will seriously damage, if not fatally injure, the leadership role of the United States in these international financial institutions.[243] This section of the Act also improperly politicizes lending decisions by the World Bank and the IMF in contravention of their articles of organization.[244] For example, Article IV, Section 10 of the Articles of the World Bank prohibits the Bank and its officers from interfering in the political affairs of member states or from taking the political character of any member state into account in reaching their decisions.[245] This section also states that only economic considerations shall be relevant to the Bank's decision process.[246] In addition, Article III, Section 5(b) requires the Bank to "make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted . . . without regard to political or other non-economic influences or considerations."[247] As such, any decision by the World Bank regarding the extension of financial assistance to Cuba which is based upon either Cuba's current political situation or U.S. pressure based upon such political situation would be *ultra vires* by its own articles.

The articles of agreement of the IMF do not expressly contain comparable provisions but do contain traces of concern about the role of political considerations in decision making. For example, the IMF and its officers are prohibited from objecting to a member state's proposal to alter the par value of its currency upon the basis of the member's "domestic social or political policies."[248]

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243. On February 27, 1997, Treasury Secretary Robert Rubin urged the U.S. Congress to appropriate funds to resolve the U.S. delinquent contributions to the World Bank and regional development banks. Secretary Rubin stated that a refusal to resolve this delinquency would jeopardize U.S. leadership of international financial institutions. *See Congress Implored to Pay World Bank*, S.F. CHRON., Feb. 28, 1997, at A12.

244. By the term "politicize," the author means interference with "the exercise by the state of its coercive power over those subject to its jurisdiction or over the relations of the state with other states" under circumstances evidencing a noneconomic motivation. *See* JOSEPH GOLD, INTERPRETATION: THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL LAW 439, 475 (1996).

245. Article IV, Section 10 of the World Bank's articles of agreement provides, in part, that "[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned." Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. IV, § 10, 60 Stat. 1440, T.I.A.S. No. 1502.

246. This section of the articles of agreement provides that "[o]nly economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." *Id.*

247. *Id.* art. III, § 5(b).

248. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. IV, § 5(f), 60 Stat. 1401, T.I.A.S. No. 1501.

The articles also prohibit the IMF from publishing reports on "changes in the fundamental structure of the economic organization of members."[249] In addition, IMF decisions must be based upon the purposes set forth in Article I which, according to at least one scholar, must be interpreted to require the IMF articles to parallel those of the World Bank with regard to the exclusive role of economic considerations in the decision making process.[250] Thus, as with the World Bank, any IMF decision based upon the current political situation in Cuba or pressure exerted by the United States as a result thereof would implicitly violate the IMF's articles of agreement.

Another example of how the leadership role of the United States in international affairs is jeopardized by the Helms-Burton Act is in the arena of international trade. In 1993, the United States implemented the NAFTA with two of its largest trading partners, Canada and Mexico.[251] Article 1603(1) of Chapter Sixteen of the NAFTA grants temporary entry to business persons traveling between the United States, Canada and Mexico.[252] "Temporary entry" is defined as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence."[253] "Business persons" are defined as "citizen[s] of a Party who [are] engaged in trade in goods, the provision of services or the conduct of investment activities."[254] Restrictions may be placed upon such free movement only for public health and national security reasons.[255]

However, Section 6091 of the Act mandates the exclusion from the United States of persons who have confiscated property or trafficked in such

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249. *Id.* art. XII, § 8.

250. *See* Joseph Gold, *Political Considerations are Prohibited by Articles of Agreement When the Fund Considers Requests for Use of Resources,* IMF SURVEY, May 23, 1983, at 146-48.

251. *See* NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (1994).

252. *See* NAFTA, *supra* note 28, ch. 16, art. 1603(1). Article 1603(1) specifically provides, in part, 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." *See id.* For an excellent discussion of free entry of business travelers pursuant to the NAFTA, see JUDITH H. BELLO, ET AL., NAFTA: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 247-50 (1994).

253. NAFTA, *supra* note 28, ch. 16, art. 1608.

254. *Id.* Business persons are further defined to include visitors engaged in international business activities related to research and design, growth, manufacture and production, marketing, sales, distribution, after-sales service, and other general services; traders who carry on substantial trade in goods or services between their own country and the country they wish to enter; intra-company transferees; and certain categories of professionals who meet minimum educational requirements or possess equivalent credentials. *See id.* at Annex 1603, Sections A-D and Appendix 1603.A.1.

255. *See id.* art. 1603(1).

property claimed by a U.S. national after March 12, 1996.[256] Corporate officers and controlling shareholders of entities who have engaged in such activities are also subject to exclusion as well as spouses and minor children of such persons.[257] Section 6091 does not require a finding that such exclusions are necessary to serve the national security interests of the United States prior to their imposition. Although U.S. accession to the NAFTA did not modify the embargo against Cuba, the statement of administrative action purporting to memorialize this reservation made no mention of excluding Canadian and Mexican nationals from the United States pursuant to an enhanced sanctions regime.[258] Rather, the statement of administrative action expressed the parties' eagerness to secure the rights of their citizens to enter the territories of the other countries to conduct business.[259]

Reaction from Canada and Mexico to the Helms-Burton Act was immediate and overwhelmingly negative. Mexican President Ernesto Zedillo condemned the Act as hindering the freedom of Mexican businesses and raising barriers to the detriment of international trade and investment.[260] Canada, Cuba's largest trade partner,[261] also harshly condemned the Act and characterized it as "[t]aking aim at its foe and shoot[ing] at its friends."[262] In addition to enacting rules to block the application of the Act within its boundaries,[263] Canada also threatened to submit Title IV's exclusion provisions to the NAFTA's dispute resolution process.[264] Mexico joined Canada in this threat.[265] The United States denied the allegation that Title IV violates or is otherwise inconsistent with the spirit of the NAFTA. Further, the United States vowed to oppose any effort to submit the controversy to a dispute resolution panel. It remains an open question whether the United States would conform its conduct to the decision of such a

256. *See* Helms-Burton Act, *supra* note 2, §§ 6091(a)(1), (2).

257. *See id.* §§ 6091(a)(3), (4).

258. *See* North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. DOC. No. 103-159, vol. 1, 103d Cong., 1st Sess. 175 (1993).

259. *See id.*

260. *See* Charles Trueheart, *Neighbors Slam U.S. on Cuba,* WASH. POST, June 14, 1996, at A38.

261. Canadian-Cuban trade totaled approximately five hundred million dollars in 1995. This amount does not include the millions of dollars spent in Cuba by Canadian tourists. *See* Howard Scheider, *Canada and Cuba: Booming Partners,* WASH. POST, Oct. 20, 1996, at A1. Additionally, Canadians companies have invested approximately five hundred million dollars in Cuba. *See* Douglas Farah, *Cuba Signs Broad Pact with Canada,* WASH. POST, Jan. 23, 1997, at A1.

262. Swardson, *supra* note 28, at A7.

263. *See* Foreign Extraterritorial Measures Act, *supra* note 25 at ch. F-29, §§ 5, 7.

264. *See* Swardson, *supra* note 28, at A7. *See also* Crary, *supra* note 28, at A8.

265. *See* Swardson, *supra* note 28, at A7. *See also World Trade Panel to Review Anti-Cuba Law, supra* note 28, at C2.

panel should it be adverse to Title IV. In any event, the discord generated by Title IV may delay, if not derail, the economic integration anticipated by the NAFTA.

Title IV also poses a threat to U.S. leadership in the GATT and the WTO. In 1994, the United States ratified the Uruguay Round of multilateral trade negotiations pursuant to the GATT. Among its many provisions, the Uruguay Round created the WTO. The Uruguay Round delegated to the WTO the duty of enforcement of member states' obligations pursuant to the GATT.[266] These obligations include those set forth in the GATS, a side agreement to the GATT which attempts to establish the principle of free trade in the international trade in services.[267] The GATS contains several addenda including one entitled "Annex on the Movement of Natural Persons Supplying Services."[268] The primary purpose of this annex is to recognize the importance of the free movement of persons supplying services to the ultimate success of the GATS.[269] The annex

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266. *See* Agreement Establishing the World Trade Organization, in Uruguay Round Trade Agreement, H.R. DOC. No. 316, 103d Cong., 2d Sess. 659 (1994).

267. *See* GATS, *supra* note 29.

268. *See id.* The Annex on the Movement of Natural Persons Supplying Services provides as follows:

> This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
>
> The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
>
> In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.
>
> The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

Id.

269. *See* THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND UNITED STATES IMPLEMENTING LEGISLATION 541-42 (Terence P. Stewart, ed., 1996).

establishes temporary entry for service suppliers or employees of service providers as a goal of the GATS.[270] The annex excludes from its coverage permanent immigration by member state nationals and those persons employed as goods suppliers, as well as those engaged in service industries outside the scope of the member states' specific commitments.[271] The freedom of movement set forth in the annex may be restricted for public health and national security reasons.[272] This freedom may also be subject to enforcement measures taken by member states at their respective borders as long as such measures are not imposed in such a manner as to nullify or impair the member states' commitments.[273]

However, as previously noted, Section 6091 of the Act requires the exclusion of persons who have confiscated or trafficked in property claimed by U.S. nationals or who are corporate officers or controlling shareholders of entities who have engaged in such activities. No finding of national security concerns is required prior to the imposition of the exclusion penalty. Section 6091 is thus inconsistent with American obligations pursuant to the GATS because it allows for the exclusion of aliens without requiring specific findings of fact which trigger the permissible reasons for exclusion pursuant to the GATS. Such arbitrary exclusions clearly nullify or impair American commitments pursuant to the GATS as well as the benefits to be gained by other member states arising from these commitments. In any event, the American sanctions regime in place against Cuba at the time of the ratification of the GATS did not contain the enhanced exclusionary penalty as set forth in Section 6091 of the Act and, at the very least, is inconsistent with the annex's goal of securing free temporary entry of persons employed in service industries on a worldwide basis.

Besides Canada and Mexico, the United States received an equally negative reaction from its other trading partners. The strongest response to the Act came from the European Union. On October 16, 1996, the European Union requested that the WTO create a panel to determine the compatibility of the Act with the GATT.[274] The European Union's request was strongly supported by Canada and Mexico.[275] Although the United States initially exercised its right to block the European Union's request,[276] on November 20, 1996, the WTO agreed

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270. GATS, *supra* note 29.

271. *See id.*

272. *See* GATS, *supra* note 29, arts. XIV, XIV *bis.*

273. Annex on Movement of Natural Persons Supplying Services, *supra* note 29.

274. *See Europeans Begin Attack on U.S. Law on Cuban Trade, supra* note 30, at A9.

275. *See* Crary, *supra* note 28, at A8.

276. *See Europeans Begin Attack on U.S. Law on Cuban Trade, supra* note 30, at A9.

to create a panel to resolve the ongoing dispute regarding the Act.[277] Members of the panel were named on February 20, 1997.[278]

The very existence of the dispute over the compatibility of the Act with the GATT is not in and of itself troubling. Trade disputes between countries arise and are resolved on a routine basis in this era of increased globalization of business. The troubling aspect of this dispute is the American response to the WTO's decision to create a dispute panel to study the Act. The Clinton Administration has characterized the controversy regarding the Act as "a political and policy dispute" rather than a trade dispute.[279] The American position is that the WTO is an inappropriate forum for the resolution of this controversy,[280] and the decision to proceed with the case could endanger the very existence of the WTO.[281] As such, the Clinton Administration publicly announced its intention to boycott the panel's hearing.[282] The European Union vowed to continue its challenge to the Act despite the U.S.'s announced intent to boycott the hearing.[283]

Recognizing the threat posed by the dispute to the WTO, the United States and the European Union reached a temporary settlement of their dispute on April 11, 1997.[284] Under the terms of the accord, the Clinton Administration pledged to support the European Union in persuading Congress to repeal Title IV of the Act.[285] Additionally, the settlement required both sides to attempt to negotiate common "disciplines and principles" for protecting the rights of companies and individuals whose property has been seized in violation of

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277. *See World Trade Panel to Review Anti-Cuba Law, supra* note 28, at C2.

278. Appointed to the panel were Arthur Dunkel, a former director general of the GATT, Tommy Koh, a Singaporean diplomat, and Edward Woodfield, a former New Zealand ambassador to the United States. *See WTO Panel to Study US-Cuba Case,* ASSOCIATED PRESS, Feb. 20, 1997.

279. *See Lippman, supra* note 147, at A1.

280. *See U.S. Will Ignore WTO Cuba Panel,* ASSOCIATED PRESS, Feb. 20, 1997. *See also U.S. Angered by WTO-Cuba Plan,* ASSOCIATED PRESS, Feb. 20, 1997.

281. *See id. See also WTO Panel to Study Helms-Burton Law, supra* note 31, at A33. The Clinton Administration stated that the World Trade Organization's decision to proceed would pose "serious risks" for the future of the institution. *See World Trade Panel to Review Anti-Cuba Law, supra* note 31, at C2.

282. *See U.S. Vows to Boycott WTO Panel,* WASH. POST, Feb. 21, 1997, at A1. *See also U.S. Tackles Tough Trade Disputes,* ASSOCIATED PRESS, Feb. 21, 1997.

283. *EU May Press U.S. on Cuba Law,* ASSOCIATED PRESS, Feb. 25, 1997.

284. Canada and Mexico were not included as parties to the temporary settlement. Both countries have insisted that they be included as parties to the settlement. *See Mexico Troubled by US-Europe Pact,* ASSOCIATED PRESS, Apr. 18, 1997. *See also EU, U.S. Reach Deal on Cuba Trade,* ASSOCIATED PRESS, Apr. 12, 1997; *Canada Wants In on Cuba Deal,* ASSOCIATED PRESS, Apr. 11, 1997.

285. *See EU, U.S. Reach Deal on Cuba Trade, supra* note 284. *See also U.S., Europeans Delay Battle on Cuba Trade,* ASSOCIATED PRESS, Apr. 12, 1997, at A10.

international law.[286] This accord would apply to Cuba as well as all other states where confiscation of property has occurred.[287] For its part, the European Union agreed to temporarily suspend prosecution of its complaint before the WTO.[288] However, this suspension expired on October 15, 1997, and, absent a final settlement, the European Union is free to revive its claims.[289]

As noted by the WTO Director-General Renato Ruggiero, the WTO dispute panel procedure is "the only rules-based system with enforcement capacity" in the international trading system.[290] An American decision not to comply with an adverse decision of the dispute panel could undermine the effectiveness of the WTO.[291] Further, a decision upholding the Act on national security grounds could also undermine the WTO's effectiveness by paving the way for similar action by other countries.[292] The U.S. challenge to the Act could undermine the dispute resolution procedures that the United States insisted upon including in the Uruguay Round agreements and render the WTO moribund or, at the very least, deny it much-needed institutional credibility.

The inconsistent use and application of boycotts by the United States also threatens its leadership role in international affairs. For example, the United States maintains an embargo against North Korea but nevertheless has provided it with aid in the form of food.[293] Further, the United States has, in the past, imposed or threatened to impose sanctions against countries engaged in human rights violations but, at the same time, has ignored equally egregious violations in

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286. *See U.S., Europeans Delay Battle on Cuban Trade, supra* note 285, at A10. *See also Trade Clash on Cuba is Averted,* WASH. POST, Apr. 12, 1997, at A1.

287. *See id.*

288. *See EU, U.S. Reach Deal on Cuba Trade, supra* note 284.

289. *See Trade Clash on Cuba is Averted, supra* note 286, at A1. *See also U.S., Europeans Delay Battle on Cuba Trade, supra* note 285, at A10; *EU, U.S. Reach Deal on Cuba Trade,* ASSOCIATED PRESS, Apr. 11, 1997.

290. *See Europeans Begin Attack on U.S. Law on Cuban Trade, supra* note 30, at A9.

291. *See id.* Julius Katz, a former deputy U.S. trade representative, has characterized the U.S. announced position to boycott the dispute resolution panel proceeding as one which "runs a major risk of tearing down the WTO." *U.S. to Boycott Trade Hearing on Anti-Cuba Law,* S.F. CHRON., Feb. 21, 1997, at A12. *See also Save the WTO,* WASH. POST, Feb. 24, 1997, at A18.

292. *See World Trade Panel to Review Anti-Cuba Law, supra* note 28, at C2. *See also* William Raspberry, *Our Cuban Obsession,* WASH. POST, Feb. 24, 1997, at A19; *Save the WTO, supra* note 291, at A18; *U.S. to Boycott Trade Hearing on Anti-Cuba Law, supra* note 291, at A12.

293. *See generally* 31 C.F.R. § 500.201 (1996). *See also* Donald L. Losman, *A Look at . . . The Case Against Sanctions: Good Intentions Gone Bad,* WASH. POST, Oct. 6, 1996, at C3.

other countries.[294] The use of sanctions similar to those contained within the Act also presents a "slippery slope problem" for the current and future administrations. Although President Clinton has attempted to distinguish between the sanctions contained within the Act and the Arab boycott against Israel, he has yet to clearly articulate when such sanctions are a legitimate tool of U.S. foreign policy.[295] One administration aide aptly noted that if Cuba is a legitimate target for unilateral sanctions imposed by the United States, then "why not Burma, North Korea or even China?"[296] Clearly, such inconsistency does not enhance the U.S. leadership role in international affairs.

Finally, the U.S. leadership role in international affairs is threatened through the appearance of weakness if the Clinton Administration and future administrations continue to suspend implementation of Title III of the Act. The Clinton Administration has indicated that such suspensions will continue indefinitely as long as U.S. allies continue their efforts to promote democracy and human rights in Cuba.[297] However, every suspension constitutes a loss of "a perfect opportunity to send a strong message to the Castro dictatorship and to those who prop it up financially."[298] As noted by Republican presidential candidate Robert J. Dole, the Clinton Administration's current policy is a weak compromise which neither benefits U.S. claimants nor punishes the Castro regime and those who financially support it.[299] Undoubtedly, a policy which contains severe penalties that are never imposed is no deterrent at all. The net effect of such a policy is to undermine the credibility of the policymaker. Title III of the Helms-Burton Act and its repeated suspension by the Clinton Administration is such a policy–a policy which "does more to make the United States look silly

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294. For example, the U.S. imposed sanctions against South Africa in protest of its policy of apartheid and against the Peoples' Republic of China after the Tienanmen Square massacre but elected to ignore equally egregious human rights violations in Guatemala, the Dominican Republic, and South Korea. *See* Losman, *supra* note 293, at C3.

295. President Clinton stated that there was "'quite a difference' between the Arab boycott against Israel and the Helms-Burton [Act] which he said 'is directed against the only country remaining in our hemisphere which is not a democracy.'" *See* Losman, *supra* note 293, at C3. However, President Clinton offered no specific examples of these differences.

296. *See id. See also* Charles Lewis, *Orchestrated Outrage About Cuba,* WASH. POST, Feb. 19, 1997, at A21. *See also* Raspberry, *supra* note 292, at A19. Other potential targets of unilateral American sanctions include Indonesia, Nigeria, Pakistan, and Turkey based primarily on these countries' abysmal human rights records. *See Burma Campaign Has Business Fighting Trend Toward Sanctions,* WASH. POST, Mar. 4, 1997, at C1.

297. *See* notes 153 and 154 and accompanying text.

298. *Clinton Eases Helms-Burton,* S.F. CHRON., Jan. 4, 1997, at A3.

299. *See Clinton Delays Effect of Cuba Lawsuit Act, supra* note 142, at A1.

than it does to dampen the enthusiasm of multinational corporations for investing in Cuba."[300]

The Helms-Burton Act also fails to serve the U.S. international interests as it bases American foreign policy on the further isolation of Cuba which will fail without the support of the community of nations. Initially, it must be noted that economic sanctions are generally ineffective as a weapon against unpopular regimes. For example, the United Nations imposed numerous economic sanctions on Saddam Hussein's Iraq subsequent to its invasion of Kuwait in August 1990, but none of these sanctions achieved the goal of forcing an Iraqi withdrawal. Indeed, it has been noted that had the sanctions been given six to twelve months to achieve effectiveness, the Gulf War and the plunder of Kuwait may have been prolonged, Iraqi military positions would have been reinforced, and the coalition may have fallen apart.[301] Further, Saddam Hussein remains firmly entrenched in power six years after the end of the Gulf War. Other examples demonstrating the general ineffectiveness of economic sanctions include North Korea, where a dictatorial Communist regime remains in power despite over forty-five years of sanctions, and Iran, where Islamic fundamentalists have retained a firm grip on the reins of power for the past seventeen years. In Latin America, the U.S. military rather than economic sanctions brought down the dictatorships of Manuel Noriega in Panama and Rauol Cedras in Haiti. Economic sanctions have proven to be "an imprecise and expectably ineffective tool" of American foreign policy.[302]

The Castro regime is perhaps the poster child for the ineffectiveness of economic sanctions. Despite thirty-five years of pressure asserted by the greatest economic power in world history located a scant ninety miles from its coastline, Cuba remains firmly under the spell of Castro and the Communist Party.[303] The

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300. *Concerted Action Against Castro, supra* note 165, at B12. For example, subsequent to the renewal of the suspension of Title III in January, 1997, France signed a trade agreement with Cuba which provides for investment guarantees, repatriation of profits, arbitration procedures, and guarantees against nationalization. In so doing, France warned the United States not to interfere with French companies transacting business in Cuba. *See France Signs Trade Accord With Cuba,* ASSOCIATED PRESS, Apr. 25, 1997. *See also France Approves Cuba Trade, Warns U.S.,* S.F. CHRON., Apr. 26, 1997, at A12.

301. *See* Losman, *supra* note 293, at C3.

302. Georgie Anne Geyer, *Castro Owes Clinton a Thank-You Letter,* CHI. TRIB., Nov. 22, 1996, at 31. *See also* Ved Nanda, *U.S. Cuba Policy is Flawed,* DENV. POST, June 23, 1996, at D4. Lawrence S. Eagleburger, who served as Secretary of State under President George Bush, characterized secondary boycotts as exemplified by the Helms-Burton Act as "nuts . . . an exercise in American imperialism . . . [serving only to] get our allies mad at us." *U.S. Expects Furor Over Trade Sanctions at Summit, supra* note 124, at A20.

Helms-Burton Act seems unlikely to alter this scenario. Although the Act has had some limited success in causing foreign companies to close their Cuban operations or deny financing to Cuban projects,[304] the majority of foreign companies have remained in Cuba while their host governments actively contest the Act's legality.[305] A battle to succeed an aging and enfeebled Castro, a recognition of international political realities or a complete collapse of the Communist Party machinery seem more likely to bring an end to totalitarian rule in Cuba than another barrage of economic sanctions.

In any event, the sanctions imposed by the Helms-Burton Act will not succeed in driving Castro from power given the widespread hostility of the international community.[306] In endorsing the Act, Congress and the Clinton Administration have apparently concluded that maintaining amicable relations with American trading partners is less important than "needling a pathetic old communist who represents absolutely no threat to the United States."[307] Rather, the Act further isolates the United States from participating in shaping the future

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303. Former United States Representative James Symington (Democrat, Missouri) characterized American policy towards Cuba over the last thirty-five years as follows:

> If the intent of the past two generations of U.S. policy toward Cuba has been to render its economy comatose, its energy consumption reduced nearly by half, its agricultural production wobbly, its diet restricted, its plumbing and street lamps non-operational, its professional classes earning less than busboys, and many of its young women streetwalkers, I would pronounce the policy a considerable success. If, however, the intent has been to alter Cuba's form of government or remove its leader, I would conclude otherwise.

James W. Symington, *A Look at . . . Changing Cuba; Why Not Smother Them With Cruise Ships,* WASH. POST, Mar. 9, 1997, at C3.

Representative Symington concludes that a policy easing travel restrictions and allowing limited American investment in Cuba would serve to "erode Castro's ideological base and the institutional support required to maintain it." *See id.*

304. *See supra* notes 131-36 and accompanying text.

305. *See supra* notes 137-40 and accompanying text.

306. *See* Acheson, *supra* note 1, at A28. *See also* H.R. Rep. No. 104-202, *supra* note 4, at 53. Carlos Fernandez de Cosio, the Cuban Foreign Ministry official responsible for relations with the United States, admitted that while the Helms-Burton Act has made the lives of ordinary Cubans more difficult, "it is not what [Senator Helms] said, that the law would bring this government to its knees in a year." *Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16. *But see Helms Projects Castro Ouster,* ASSOCIATED PRESS, Mar. 12, 1997, wherein Senator Helms predicted an end to the Castro regime in the foreseeable future as a direct result, in part, of the Helms-Burton Act. *See also Helms Sees End to Castro's Rule,* ASSOCIATED PRESS, March 12, 1997.

307. Stewart, *supra* note 25, at 8.

of Cuba, ceding that role to the European Union, Canada, Mexico, and other countries maintaining economic and political relations with Cuba.[308]

The Act has succeeded in setting the entire world against the United States.[309] As previously noted, Canada amended its Foreign Extraterritoriality Act to provide for fines and prison terms for company managers who comply with judgments entered pursuant to the Act.[310] Additionally, in January 1997, Canada and Cuba entered into an agreement which provided, in part, for the negotiation of a "Foreign Investment Protection and Promotion Agreement" setting forth ways in which they can act against the United States in retaliation for the Act.[311]

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308. *See* Oliphant, *supra* note 165, at A23.

309. *See* Geyer, *supra* note 302, at 31.

310. *See* Canadian Extraterritorial Measures Act, *supra* note 25, ch. F-29, § 5, 7. Section (5)(1)(b) of the Canadian Extraterritorial Measures Act provides, in part, as follows:

> [w]here, in the opinion of the Attorney General of Canada, a foreign state or foreign tribunal has taken or is proposing or is likely to take measures affecting international trade or commerce of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty, the Attorney General of Canada may, with the concurrence of the Secretary of State for External Affairs . . . prohibit any person in Canada from complying with such measures . . . .

Id.

Section 7(1)(a) of the Canadian Foreign Extraterritorial Measures Act provides, in part, that "[e]very person who contravenes an order made under section . . . 5 . . . is guilty of an indictable offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or both . . . ." *See id.* at ch. F-29, §7(1)(a). The prohibitions and penalties set forth in Sections 5(1)(b) and 7(1)(a) were specifically applied to the Helms-Burton Act by an order issued by Allan Rock, the Attorney General of Canada, and Andre Ouellet, the Canadian Minister of Foreign Affairs, on January 12, 1996. *See* Amendment to Foreign Extraterritorial Measures (United States) Order 1992, *supra* note 25.

311. *See* Farah, *supra* note 261, at A1. The agreement also contained provisions "broadening and deepening cooperation" on human rights through academic exchanges and joint seminars and in the administration of justice through exchanges of judges and judicial training. *Cuba Human Rights' Uphill Battle,* ASSOCIATED PRESS, Jan. 22, 1997. The agreement was concluded by Canadian Foreign Minister Lloyd Axworthy during a visit to Cuba in January 1997. Axworthy became the highest-ranking Canadian official to

Mexico has considered similar legislation and, in conjunction with Canada, has complained that Title IV of the Act violates the NAFTA.[312] The European Union successfully requested the creation of a dispute resolution panel to determine the consistency of the Act with the GATT.[313] Nearly all of Latin America's democracies, joined by Spain and Portugal and acting through the Ibero-American Summit, condemned the Act and urged the United States to reconsider its enforcement.[314] The United Nations General Assembly joined in this condemnation by resoundingly adopting a resolution calling upon the United States to end its economic embargo of Cuba.[315]

International opposition to the Act is primarily based upon the perceived extraterritorial application of U.S. law. The European Union condemned the Act as an attempt by the United States to "unilaterally determine or restrict the European Union's economic and commercial relations with any other state . . . [in violation of] general principles of international law and the sovereignty of independent states."[316] The Ibero-American Summit concluded that the Helms-Burton Act is tantamount to extraterritorial enforcement of U.S. law.[317] Canada accused the United States of engaging in "unacceptable behavior . . . in foisting its foreign policy onto Canada and other countries, threatening Canadian business [and] threatening anyone who wants to do legal business with Cuba."[318] Mexico characterized the Act as "contrary to international rights and the fundamental principle of nonintervention in the internal matters of other nations."[319] The Vatican also criticized the Act on the basis of its perceived extraterritorial

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visit Cuba in more than twenty years. Axworthy's visit was greeted with polite skepticism by the Clinton Administration. *See Clinton Skeptical on Cuba Meeting,* ASSOCIATED PRESS, Jan. 23, 1997. *See also U.S. Blasts Canadian Cuba Visit,* ASSOCIATED PRESS, Jan. 21, 1997; *U.S. Decries Cuba Visit,* ASSOCIATED PRESS, Jan. 21, 1997. Conversely, Senator Jesse Helms likened Axworthy to Neville Chamberlain and condemned his trip as "shameful" and the agreements as "propaganda ploys" orchestrated by Castro. *See Canadian Minister Meets Castro,* ASSOCIATED PRESS, Jan. 22, 1997. *See also Clinton 'Skeptical' on Canada-Cuba Pact,* WASH. POST, Jan. 24, 1997, at A26.

312. *See supra* notes 130 and 251-78 and accompanying text.

313. *See supra* notes 130 and 266-78 and accompanying text.

314. *See supra* notes 32 and 33 and accompanying text.

315. *See supra* note 34 and accompanying text.

316. *3 Allies Join Call Against Cuba Embargo, supra* note 34, at A19. *See also* Robert Reid, *U.N. Expected to Renew Call for End to US Embargo on Cuba,* ASSOCIATED PRESS, Nov. 12, 1996.

317. *See Latin America Rejects U.S. Law, supra* note 33. *See also Latin Summit Blasts Embargo Against Cuba, supra* note 33, at A12; *U.S. Urged to Drop Cuban Law, supra* note 33; *Castro Gets Support, Advice, supra* note 33.

318. *Lippman, supra* note 147, at A1.

319. *See id.*

application.[320] Based upon these criticisms, the Helms-Burton Act may truly be deemed "international busybody politics."[321]

The response of other countries to the Helms-Burton Act also sets dangerous precedents for their future relations with the United Staes. Implementation of the Act threatens to ignite a cycle of reprisals and retaliation between the United States and its allies.[322] These measures may take many forms and may include countersuits to offset damages awarded pursuant to Title III and blacklisting of American companies that take advantage of the Act. Canada has already passed legislation that would allow any person subjected to damage awards in American courts to countersue in Canadian courts for amounts equal to those damage awards.[323] Canada also enacted blocking statutes preventing enforcement of judgments entered pursuant to the Act and proposed the imposition of special taxes on U.S. subsidiaries as well as restrictions upon the entry of American executives conducting business transactions in the country.[324] The European Union also adopted similar legislation forbidding European companies or individuals from complying with litigation initiated in the United States pursuant to the Act and allowing affected companies to countersue in the national courts of the member states.[325] As Representative Lee H. Hamilton, the ranking Democrat on the House International Relations Committee, stated, the Congress has "opened a whole new ball game here . . . [which] could easily come back to bite us."[326]

The Helms-Burton Act also encourages American trading partners to enact this type of legislation and, in so doing, perhaps reopen old wounds relating to past uncompensated confiscations of property. American investments throughout the world might be jeopardized if other states enact laws similar to the

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320. *See Vatican Criticizes U.S. Anti-Cuba Law, supra* note 35, at A12.

321. Geyer, *supra* note 302, at 31.

322. French President Jacques Chirac warned the Clinton Administration that implementation of the Helms-Burton Act threatened to ignite "a dangerous cycle of reprisals between the European Union and the United States." Robert A. Rankin, *G7 Leaders Assail U.S. Policy: Bid to Outlaw Nations Cited,* DENV. POST, June 29, 1996, at A2. Deputy National Security Advisor Samuel R. Berger agreed with President Chirac's remarks by noting that complete implementation of the Act could start "a troubling cycle of retaliation and counter-retaliation." *Clinton Delays Effect of Cuba Lawsuit Act, supra* note 142, at A1.

323. *See Clinton Eases Helms-Burton, supra* note 298, at A3. *See also* Howard Schneider, *Canadians Fire Back at U.S. Law; Helms-Burton Retort Passes Unanimously,* WASH. POST, Oct. 10, 1996, at A41; Swardson, *supra* note 28, at A7.

324. *See* Foreign Extraterritorial Measures Act, *supra* note 25, at §§ 5(1)(b), 7(1)(a). *See also* Amendment to Foreign Extraterritorial Measures (United States) Order 1992, *supra* notes 25; Stewart, *supra* note 25, at 8.

325. *See EU Gives Clinton an Opportunity, supra* note 149, at C2. *See also EU Votes to Retaliate Over US Law on Cuba,* BOSTON GLOBE, Oct. 29, 1996, at A12.

326. *U.S. Expects Furor Over Trade Sanctions at Summit, supra* note 124, at A20.

Helms-Burton Act and such laws become accepted international practice. For example, American investments in properties in Eastern Europe and the former Soviet Union may be disputed as well as investments in countries where former owners were forcibly expelled from their properties such as Israel. In fact, American claims to the continental United States may be questioned by Mexican nationals dispossessed of their property located throughout the Southwest at the end of the Mexican-American War.[327] In this same vein, legislators in Canada introduced the "American Liberty and Democratic Solidarity Act" in July 1996. The act mockingly suggests that Canadians have a right to compensation against companies or individuals trafficking in land seized from loyalists during the American Revolution.[328] Despite provisions contained within the 1783 Treaty of Paris promising reparations to loyalists whose property was confiscated during the Revolution, not a single claim was ever paid.[329] As such, Canadian lawmakers have proposed the revocation of visas and licenses to Americans and the imposition of penalties on Canadian holdings of businesses or individuals who own property in the United States formerly belonging to loyalists.[330] These claims could be monumental in scope because an estimated 100,000 people fled to Canada during the Revolution and have approximately three million surviving descendants in Canada today.[331] Although the "American Liberty and Democratic Solidarity Act" was proposed in jest, opponents to the Helms-Burton Act in Congress correctly noted that if provisions similar to Title III were adopted elsewhere, "no bilateral property agreement would be safe from subsequent litigation."[332]

The Helms-Burton Act may also discourage a successful and peaceful transition to democracy in Cuba. One of the primary purposes of the Act is "to assist the Cuban people in . . . joining the community of democratic countries that are flourishing in the Western Hemisphere."[333] However, if the Act succeeds in worsening economic conditions in Cuba, it "increases the likelihood of violent change."[334] Such violent change clearly does not serve the U.S. interests. Rather,

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327. Fidel Castro himself noted this possibility in a speech given in Mexico City, Mexico on February 7, 1997. In his speech, Castro stated that the United States wrongfully appropriated Mexican interests in Arizona, California, New Mexico and Texas through successive invasions occurring during the first half of the nineteenth century. *See Castro Blasts Clinton, U.S.*, ASSOCIATED PRESS, Feb. 7, 1997.

328. *See* Howard Schneider, *Canada Spawns a Helms-Burton Spoof*, WASH. POST, July 25, 1996, at A24. *See also* Crary, *supra* note 28, at A8.

329. *See* Schneider, *supra* note 328, at A24.

330. *See id.*

331. *See id.*

332. H.R. REP. NO. 104-202, *supra* note 4, at 56.

333. *See* Helms-Burton Act, *supra* note 2, § 6022(1).

334. H.R. REP. NO. 104-202, *supra* note 4, at 53. *See also Ex-Clinton Aides Knock Cuba Policy*, ASSOCIATED PRESS, Apr. 20, 1997 wherein Richard Feinberg, the

as correctly noted by dissenting members of the House International Relations Committee, the U.S. chief goal "should be a peaceful transition in Cuba to a democracy and market economy."[335] Unlike the United States, the European Union and Canada have determined that the most expedient way to foster democracy in Cuba is through a policy of active engagement including international trade and human rights advocacy.[336] Such a realistic approach is likely to prove more successful than the U.S. policy of isolation.

The Act also impedes the establishment of one of the primary attributes of democratic capitalism, specifically, the recognition and protection of private property rights. The fundamental nature of private property to democratic capitalism is recognized in the Act itself and its legislative history. Section 6081(1) of the Act recognizes the fundamental right of individuals to own and enjoy property.[337] Further, the Report of the House International Relations Committee states that "[e]conomic development is not possible without private property, and property rights do not exist in Cuba today."[338] However, Title III is predicated on a finding that Cuba's confiscation of property belonging to U.S. nationals was illegal thereby preventing the Castro regime from granting clear title to potential future owners. This legal uncertainty may impede any transition to democratic capitalism in Cuba by discouraging outside investors who could never be certain whether their property is subject to a claim pursuant to the Act.[339] This very circumstance has been noted by the U.S. State Department which concluded that Cuba has had limited success in attracting investors due, in part, to the lack of clear titles to confiscated property.[340] The Act has already begun to interfere with the limited degree of certainty of title afforded property owners in Cuba. Such interference can only serve to impede rather than enhance private property rights which are crucial to the establishment of a democratic Cuba.[341]

Additionally, the Helms-Burton Act is an overreaction to the Castro regime. The Act and its legislative history are replete with references to the

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former Latin America specialist for the National Security Council stated that "current U.S. policy increases the probability that there will eventually be a violent breakdown in Cuba." *See id.*

335. H.R. REP. NO. 104-202, *supra* note 4, at 53.

336. *See Commerce and Human Rights,* WASH. POST, Jan. 24, 1997, at A22. *See also* Farah, *supra* note 261, at A1; Thomas W. Lippman, *EU Policy Puts Strings on Cuba Ties,* WASH. POST, Dec. 4, 1996, at A28.

337. *See* Helms-Burton Act, *supra* note 2, § 6081(1).

338. H.R. REP. NO. 104-202, *supra* note 4, at 24.

339. *See id.* at 56. The Act has succeeded in slowing new foreign investment in Cuba which, in turn, has slowed recovery from the economic downturn which characterized the Cuban economy in the late 1980s and early 1990s. *See Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16.

340. *See* CUBA: STATE DEPARTMENT NOTES, *supra* note 36, at 10.

341. *See supra* notes 133-36 and accompanying text.

alleged threat to international peace and security posed by the Castro regime. These threats emanate from many sources including Cuba's alleged involvement in the international narcotics trade,[342] engagement in acts of armed subversion,[343] and violation of human rights.[344] The Act concludes that the Castro regime is a "most powerful obstacle to democratic and free market reform."[345] Whatever truth may exist in these claims, it is an overstatement to conclude that such actions constitute a breach of international peace and security sufficient to justify imposition of sanctions pursuant to Chapter VII of the United Nations Charter.[346] Rather, as J. William Fulbright, chairman of the Senate Foreign Relations Committee during the Kennedy administration, is alleged to have stated while reviewing the plans for the Bay of Pigs operation, Cuba is "a thorn in the flesh, but not a dagger in the heart."[347]

This overreaction is most apparent in comparing the sanctions imposed upon Cuba with those imposed upon the Soviet Union during the Cold War. For example, during the 1970s, American-Soviet relations were under considerable strain as a result of the provision of Soviet weaponry to the Egyptian army during the 1973 Middle East War, the Soviet intervention in the Angolan civil war, rising Soviet military expenditures, and human rights concerns. As a result, in 1975, the U.S. Congress enacted legislation which prohibited the Soviet Union from receiving more than three hundred million dollars in new credits from the Eximbank without presidential and congressional determinations that such new credits were in the national interest of the United States.[348] Further, on August 1, 1978, President Jimmy Carter placed all exports of oil and gas exploration and production equipment to the Soviet Union on the Commodity Control List thereby requiring that all such exports receive a validated license from the U.S. Department of Commerce.[349]

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342. *See* Helms-Burton Act, *supra* note 2, § 6021(13).

343. *See id.* § 6021(14); *see also* H.R. REP. NO. 104-202, *supra* note 4, at 30.

344. *See* Helms-Burton Act, *supra* note 2, §§ 6021(15), 6031(1).

345. H.R. REP. NO. 104-202, *supra* note 4, at 24.

346. *See* Helms-Burton Act, *supra* note 2, § 6031(2).

347. JAMES T. PATTERSON, GRAND EXPECTATIONS, THE UNITED STATES, 1945-1974, 493 (1996).

348. *See* Stanley J. Marcuss, *New Light on the Export-Import Bank*, *in* UNITED STATES FINANCING OF EAST-WEST TRADE 266 (Paul Marer, ed., 1975). The restriction also included a total prohibition upon financing for fossil fuel production and a forty million dollar limit upon credits for fossil fuel research and exploration while the three hundred million dollar ceiling remained in force and effect. *See id.*

349. *See* ERIK P. LINDELL, UNITED STATES REGULATION OF AMERICAN MULTI-NATIONAL INVOLVEMENT WITH THE SOVIET UNION DURING DÉTENTE 95, 96 (1982). Despite these restrictions, U.S. exports to the Soviet Union reached record levels in 1979 totaling in excess of three and one half billion dollars. Additionally, in October 1975, the United States and the Soviet Union signed a grain trade agreement whereby the Soviet

The Soviet invasion of Afghanistan on December 27, 1979 resulted in the imposition of additional American trade sanctions. President Carter suspended all shipments of grain to the Soviet Union beyond the eight million tons provided for in the 1975 U.S.-Soviet Union grain trade agreement, thereby blocking the sale of seventeen million tons of corn and wheat.[350] Further, the Carter administration suspended the issuance of validated licenses for export of high-technology products pending the drafting of new guidelines and invalidated all outstanding licenses.[351] President Carter also imposed a quota upon American imports of Soviet ammonia and banned the export of phosphates and related fertilizer products to the Soviet Union.[352] Finally, Aeroflot flights to the United States were severely limited, and the Soviet fishing quota in American waters was reduced by 350,000 tons.[353] As a result, American-Soviet trade declined from 3.2 billion dollars in January through November 1979 to 1.2 billion dollars during the same period in 1980.[354]

However, those sanctions pale when compared to the sanctions currently in place against Cuba. As previously noted, these sanctions include complete prohibitions upon the import of Cuban goods to the United States as well as the export of American goods and services to Cuba.[355] Dealing in Cuban origin goods and brokering in Cuban trade contracts are also prohibited.[356] There is a complete freeze on Cuban assets and on financial dealings with Cuba.[357] All property belonging to Cuba and Cuban nationals in the possession of U.S. nationals is blocked and may not be transferred or withdrawn without the authorization of the Treasury Department.[358] Most remittances to Cuba require a license from the Office of Foreign Assets Control, and travel by U.S. nationals to Cuba is severely restricted.[359] These penalties are in addition to those imposed upon third persons pursuant to Titles III and IV of the Act. Regardless of how threatening Castro was

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Union agreed to purchase a minimum of six million tons of corn and wheat from the United States annually and an additional two million tons without prior consultation with the U.S. government. Purchases in excess of the eight million ton ceiling required the approval of the U.S. government. In September 1979, the Department of Agriculture approved the sale of up to twenty-five million metric tons of corn and wheat to the Soviet Union, the largest single grain purchase in American history. *See id.* at 98.

350. *See* SHAHEEN AYUBI, ET AL., ECONOMIC SANCTIONS IN UNITED STATES FOREIGN POLICY 21 (1982).

351. *See id.* at 22.

352. *See id.*

353. *See id.*

354. LINDELL, *supra* note 349, at 99.

355. *See supra* notes 73 and 75 and accompanying text.

356. *See supra* note 74 and accompanying text.

357. *See supra* note 78 and accompanying text.

358. *See supra* notes 79-81 and accompanying text.

359. *See supra* notes 82-89 and accompanying text.

in the past, it cannot be credibly argued that such a threat exceeded the one posed by the Soviet Union during the Cold War or that such a heightened threat posed by Cuba remains today.[360]

The Helms-Burton Act also serves to strengthen the Castro regime by presenting it with expanded opportunities to appeal to Cuban nationalism through renewed attacks upon the U.S. The Act purports to "preserve United States credibility with the Cuban people as one of the few countries not willing to put aside what it knows about the Castro regime in exchange for mythical market-share."[361] However, the Act has had the opposite effect by reuniting Cubans behind the Castro regime, deepening distrust of the United States within Cuban society and reviving Castro's failing legitimacy throughout the world.[362] The Helms-Burton Act has provided Castro with a scapegoat for the failure of his economic and social policies.[363] The Act may also increase the opposition of Castro and Cuban society towards U.S.-backed reforms in areas such as democratization and human rights.

The Castro regime has acted quickly to exploit nationalist fervor generated by the Act. The Act has been translated and made widely available to the general public.[364] During consideration of the Act by the U.S. Congress, Castro traveled throughout Cuba haranguing American imperialism and exiled Cubans who, in his words, seek to "turn the clock back to 1958."[365] Cuban anger and frustration with the United States has grown as the Act's prohibitions and

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360. The long-standing American fixation on Castro as most recently evidenced by the Helms-Burton Act led one State Department official to comment that "the Cuban tail is wagging the dog on [American] foreign policy." Thomas W. Lippman, *Shoot-Down Became Diplomatic and Political Turning Point,* WASH. POST, Feb. 25, 1997, at A3. Commentator William Raspberry has noted that "[i]n the days when international Communism loomed as a threat, it made sense for the United States to be chary of Fidel Castro. But Cuba in the late 1990's is a threat to nothing of ours except our ego." Raspberry, *supra* note 291, at A19.

361. H.R. REP. NO. 104-202, *supra* note 4, at 24.

362. *See* Ana Julia Jatar, *Helms-Burton Backfire,* WASH. POST, July 22, 1996, at A19. *See also . . . Commerce and Human Rights,* WASH. POST, Jan. 24, 1997, at A22; Geyer, *supra* note 302, at 31.

363. For example, former President Jimmy Carter has condemned the Act as providing Fidel Castro with "an undeserved excuse for his own economic and political failures and for his inability and unwillingness to grant the Cuban people the freedom and democracy that they deserve." *Jimmy Carter: Helms Burton is U.S. Government's "Worst Mistake",* ASSOCIATED PRESS, Jan. 26, 1997. *See also Carter Chats with Clinton,* ASSOCIATED PRESS, Jan. 28, 1997. Canadian Prime Minister Jean Chretien has commented that the Helms-Burton Act is "making it possible for Castro to stay in power because he has an excuse: He blames the Americans." *Canadian Minister Meets Castro, supra* note 311.

364. *See* Jatar, *supra* note 362, at A19.

365. H.R. REP. NO. 104-202, *supra* note 4, at 57.

penalties have driven away potential foreign investors.[366] It appears that the United States has forgotten recent Cuban history–a "Cuba [which] has withstood–with some sense of pride–the more than thirty-five years of a United States embargo [and] the severe loss of a seven billion dollar annual subsidy from the former U.S.S.R . . . ."[367] Instead, the Act "gives Castro new scapegoats to distract the Cuban people from their real problem: Castro's authoritarian system."[368]

Finally, the Helms-Burton Act could weaken the United States in the eyes of the Castro regime if the Clinton Administration threatens to impose sanctions pursuant to Title III but continues to suspend its implementation. As previously noted, the Clinton Administration has suspended implementation of Title III on three separate occasions and has pledged to continue such suspensions as long as American allies continue their efforts to pressure the Castro regime to implement democratic and human rights reforms.[369] However, the threat of sanctions never to be imposed loses credence and constitutes no penalty or restraint upon future conduct at all.[370] As misguided as some of President Clinton's critics are with regard to his policies toward Cuba, they are correct in their assessment that repeated suspensions of Title III may result in the loss of its restraining effect upon foreign investment in confiscated properties and Cuban behavior and diminution of American willpower in the eyes of the Castro regime.[371] The severe penalties contained within Title III and their nonimplementation by a reluctant administration through repeated publicly-announced suspensions does little more than make the United States appear indecisive and conflicted. Such an appearance can hardly present a credible threat of dissuasion to foreign businesses seeking to invest in Cuba.

B. The Helms-Burton Act and the U.S. National Interests

In addition to failing to advance the U.S. international interests, the Helms-Burton Act does not serve the U.S. national interests. The Act does not serve the interests of the federal government by potentially flooding federal courts with expropriation litigation and creating additional difficulties for the Immigration and Naturalization Service (INS) in its processing of visa applications. The Act does not serve the interests of private industry in the United States by subjecting it to the threat of foreign retaliation and depriving it of the opportunity to open the Cuban market to American goods and services. Finally,

366. *See* note 331 and accompanying text.
367. *Group: Castro's Power Hold Firm,* ASSOCIATED PRESS, Jan. 9, 1997.
368. H.R. REP. NO. 104-202, *supra* note 4, at 57.
369. *See* notes 141-65 and accompanying text.
370. *See* notes 297-305 and accompanying text.
371. *See id.*

the Act does not serve the interests of private individuals in the United States by treating victims of foreign confiscation unequally and damaging citizens with existing expropriation claims against Cuba.

Initially, the Helms-Burton Act does not serve the interests of the U.S. government by potentially flooding federal courts with expropriation litigation. The Act has been rightfully criticized as a "litigation magnet . . . [which] will tie up United States courts for years to come because it creates an entirely new right to sue that is likely to attract thousands of lawsuits."[372] It is uncertain how many expropriation cases will be filed in the event that Title III is implemented, but estimates range from several dozen to tens of thousands.[373] Robert Muse, an attorney for Amstar Sugar Company which lobbied against the Act, predicted that the enfranchisement of thousands of Cuban Americans to sue the Cuban government for restitution of their property will result in hundreds of thousands of potential lawsuits.[374] Jerry J. Jasinowski, the President of the National Association of Manufacturers, agreed with this assessment and claimed that Title III "threatens to deluge the federal judiciary with hundreds of thousands of lawsuits."[375]

Although these estimates are likely inflated, there is a substantial likelihood that several thousand lawsuits will be filed in the event that Title III is implemented. According to the Foreign Claims Settlement Commission, approximately six thousand U.S. citizens and businesses have outstanding claims relating to confiscated property in Cuba.[376] These claims total 1.8 billion dollars.[377] In addition, the Foreign Claims Settlement Commission estimates that fifteen thousand U.S. nationals who have not filed claims with the Commission may avail themselves of litigation pursuant to Title III.[378] The Administrative Office of the United States Courts estimates that an unknown number of persons who do not have legitimate claims to confiscated property in Cuba would also initiate litigation pursuant to Title III.[379] Based upon these figures, the Congressional Budget Office estimated that the federal court system would incur two million dollars in additional costs to address cases that proceeded to trial.[380] In addition, each meritless case would cost the federal judiciary over four

372. H.R. REP. NO. 104-202, *supra* note 4, at 54.

373. *See* Michael Dobbs, *Law Allows New Claims Against Cuba*, WASH. POST, July 16, 1996, at A12.

374. *See id.*

375. *Business Groups Urge Clinton to Disallow Suits Over Seized Property in Cuba, supra* note 141, at A24.

376. *See* H.R. REP. NO. 104-202, *supra* note 4, at 45.

377. *See U.S. Revives Feud Over Cuban Properties, supra* note 61, at A10.

378. *See* H.R. REP. NO. 104-202, *supra* note 4, at 45.

379. *See id.*

380. *See id.*

thousand dollars to process.[381] The Foreign Claims Settlement Commission could also incur additional costs totaling over one million dollars per year for additional personnel needed to assist the courts in reviewing the validity of filed cases.[382] In any event, regardless of the estimates to which one subscribes, any lifting of the suspension presently in place on the filing of claims pursuant to Title III would place considerable strain on the already overburdened federal judiciary.

The Helms-Burton Act will also create a bureaucratic nightmare for the Immigration and Naturalization Service in its processing of visa applications. Unlike Title III, implementation of Title IV of the Act mandating the exclusion of aliens trafficking in confiscated property cannot be waived and is presently being enforced by the INS. Implementation and enforcement of Title IV will ultimately prove to be most difficult. As noted by opponents of the Act, Title IV will require immigration officials to ask an entirely new series of questions of every visa applicant throughout the world.[383] These questions will relate to whether the applicant has ever purchased, leased or utilized property located in or originating from Cuba.[384] These questions will also relate to the absence of any confiscatory history in the chain of title to such property and the relation of the applicant to any business entity which may own, lease or utilize property located in or originating from Cuba.[385]

Regardless of the answers received, the consular officer processing the visa application will have no independent basis for evaluating whether the information relayed by the applicant is authoritative or reliable.[386] The already overwhelmed INS may be required to review hundreds of pages of financial information and make determinations based thereon–hardly a task within its administrative competence. In addition, in the case of visa-waiver countries such as most of Western Europe, Canada and Japan, the onerous burden of determining the eligibility for admission of potential entrants would be placed upon immigration officers at every point of entry into the United States.[387] As a result, the added burden will hinder the true task of the INS to prevent illegal aliens, terrorists, felons and drug traffickers from entering the United States.[388] This is especially true given Congress' expressed attitude that Title IV be vigorously enforced to exclude a considerable number of people rather than "a symbolic, take-a-few scalps sort of approach."[389]

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381. *See id.*
382. *See id.*
383. *See id.* at 56.
384. *See id.*
385. *See id.*
386. *See id.* at 54.
387. *See id.* at 56.
388. *See id.* at 57.
389. Blustein & Lippman, *supra* note 229, at F1.

The Helms-Burton Act also fails to serve the interests of private industry in the United States in several ways. Initially, as previously noted, implementation and enforcement of the Act may jeopardize American economic interests abroad and invite foreign retaliation against American businesses.[390] Such retaliation may take the form of countersuits or special taxes to offset damages awarded pursuant to Title III or the blacklisting of American companies that avail themselves of the Act. Foreign countries may also place immigration restrictions upon the entry of American business executives in retaliation for exclusion from the United States of foreign business executives pursuant to Title IV. Finally, the Act may encourage American trading partners to enact similar types of legislation relating to other uncompensated confiscations. American investments throughout the world might be jeopardized if such laws became accepted international practice.

The Act harms the interests of private industry in two other ways. American businesses have been denied the opportunity to compete in the Cuban marketplace since the imposition of the economic embargo thirty-five years ago. Tightening the already failed embargo at this late date will only serve to place American businesses at a greater disadvantage in penetrating the marketplace in a future democratic Cuba. Commercial relations between the United States and Cuba simply will not spring up overnight upon the transition to democracy in Cuba. Rather, American businesses will find themselves engaged in fierce competition for the rebuilding of the infrastructure and satisfaction of consumer demand likely to accompany Cuban democratization. As in Vietnam, American businesses will enter the Cuban marketplace with a multi-decade competitive disadvantage.

The current American policy towards Cuba also fails to recognize the positive influence that private business may exert toward encouraging the kinds of behavior that the United States deems appropriate. Although no one would argue that the presence of Burger King in Moscow or McDonalds in Beijing have had a quantifiable positive effect upon relations between Russia and the United States and the state of human rights protections in the Peoples' Republic of China, it remains inescapable that commercial relations bring people of differing cultural and political backgrounds together. This fact has been recognized in diplomatic circles for years, hence the inclusion of trade agreements and commercial exchanges in the process of normalization of relations between countries. Such is the approach toward Cuba taken by the more-forward thinking U.S. allies such as the European Union and Canada. Although it is unduly optimistic to conclude that an American policy of "Make Whoppers, Not War" would instaneously abrogate almost four decades of innate suspicion and overt hostility, it most certainly bodes better for the future of American-Cuban economic relations than the present policy of stringent economic isolationism.

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390. *See* notes 322-32 and accompanying text.

The repercussions of the Act also may damage American businesses operating solely within the boundaries of the United States. For example, in December 1996, a wide array of Canadian religious denominations and organizations, including the Canadian Federation of Students, organized the Boycott Florida Campaign.[391] This campaign is designed to discourage Canadians from vacationing in Florida as a form of protest against the Helms-Burton Act. Although this effort will unlikely damage the Florida tourism industry as a whole, it may have a deleterious effect on the Canadian portion of this industry which attracts almost two million visitors and generates over one billion dollars annually.[392] If nothing else, such a campaign demonstrates the interconnectedness of the global marketplace and the law of unintended consequences when countries unilaterally and unwittingly disregard accepted rules of international commercial behavior.[393]

Finally, the Act does not serve the interests of private individuals in the United States. Initially, the Act discriminates between private citizens who have had their property confiscated by foreign governments. Specifically, Title III creates a special cause of action for those persons who have lost property in Cuba. However, such a cause of action does not exist for those persons whose property was confiscated by anti-American governments in Vietnam,[394] Iran, the former Soviet Union or Eastern Europe.[395] The Act provides no justification or explanation whatsoever for this distinction.

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391. *See* Howard Schneider, *Canadians Boycott Boycott of Cuba,* WASH. POST, Dec. 15, 1996, at A34. *See also Canada's College Kids Asked to Avoid Florida for Spring Break,* DENV. POST, Dec. 28, 1996, at 23A.

392. *See* Schneider, *supra* note 391, at A34.

393. In response to the announced boycott, Robin Knight of the Florida Tourism Industry Marketing Corporation suggested that Canadians "ought to be targeting North Carolina", the home state of the Act's Senate sponsor Jesse Helms. *See id.*

394. The government of Vietnam has not reached an agreement with the United States regarding the payment of compensation for property confiscated from American nationals after the conquest of South Vietnam in 1975. However, it has agreed to repay one hundred forty million dollars to the United States for debts incurred by the former South Vietnam during the Vietnam War. The majority of these debts relate to the construction of roads, power stations and water systems and the sale of grain. *See Vietnam Says It Will Repay Debts to U.S.,* S.F. CHRON., Mar. 11, 1997, at A11.

395. Congressional opponents of the Act noted this distinction in their dissenting views attached to the report of the House International Relations Committee. The opponents of the Act specifically noted that:

> [o]ur concern is that this bill creates a special right to sue in United States courts that is available only to those who have lost property in Cuba. We do not believe that those who lost property in Cuba are more deserving than those who lost property in Germany, Eastern Europe, Vietnam or Russia.

Further, the Act broadens the number of potential claimants. The original cutoff date established by the U.S. government for claims relating to property confiscated by the Cuban government was 1967.[396] In order to be eligible, such claimants had to be U.S. citizens at the time of the Cuban Revolution.[397] However, Section 6082(a)(1)(A) provides for the imposition of liability upon any person who traffics in property which was confiscated by the Cuban government from a U.S. national on or after January 1, 1959.[398] Section 6023(15) of the Act defines the term "United States national" as including "any United States citizen."[399] The effect of this provision is to create an entirely new class of claimants consisting of Cuban immigrants who fled to the United States and have since become naturalized U.S. citizens. No similar cause of action is provided to naturalized U.S. citizens who fled other countries where hostile regimes confiscated private property. This distinction is constitutionally suspect because it confers legal rights upon one group of citizens which are unavailable to similarly situated citizens without providing any reason for such a distinction.[400]

Additionally, the Act injures private citizens with existing certified claims for expropriation by potentially interfering with their eventual recovery. Opponents of the Act noted that implementing Title III may result in a "legal free-for-all" which would discourage the Cuban government from settling previously-filed certified claims.[401] At the very least, Title III would severely complicate the settlement process by creating an additional class of claimants and an additional forum in which unresolved claims may be pending. Further, the opponents of the Act expressed concern that compensation would be determined not upon the merits of the claims but rather by the quality of legal representation and the financial resources of targeted defendants.[402] The new class of claims created by the Act could also exhaust the limited amount of monies available to the entire pool of claimants and lead to inequities in distribution.[403] The opponents of the Act concluded that it "undermines the ability of the United States Government to ensure that the interests of all Americans will be fairly represented."[404] This fear was confirmed by the Clinton Administration in a memorandum dated September 1995 which warned that Title III of the Act "would diminish the prospects of the

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H.R. REP. NO. 104-202, *supra* note 4, at 55.

396. *See* Dobbs, *supra* note 373, at A12.

397. *See id.*

398. See Helms-Burton Act, *supra* note 2, § 6082(a)(1)(A).

399. *See id.* § 6023(15).

400. *See Business Groups Urge Clinton to Disallow Suits Over Seized Property in Cuba, supra* note 141, at A24.

401. *See* H.R. REP. NO. 104-202, *supra* note 4, at 55.

402. *See id.*

403. *See id.*

404. *See id.*

certified claimants for getting their property back."[405] Cuba's National Assembly also confirmed this fear in December 1996 when it enacted the "Law of Reaffirmation of Cuban Dignity and Sovereignty."[406] This act provides, in part, that any U.S. national who files a claim under Title III of the Act will be prohibited from participating in any future settlement between the United States and Cuba on the payment of compensation for confiscated property.[407] Such developments may serve to sacrifice the claims of certified claimants which have been pending for at least thirty years at the altar of rabid anti-Castro hysteria and petty political ploys.

V. CONCLUSION

The Castro regime has been the bane of every U.S. president since Dwight D. Eisenhower. The heightened attention bestowed upon the Castro regime in the 1960s as the only Communist government in the Western Hemisphere is understandable given the excesses of the Cold War rivalry existing between the United States and the Soviet Union at the time. Castro himself only served to increase the attention paid by the United States to Cuba through confrontational policies designed to subvert American interests in the hemisphere. These policies included developing close political and economic ties to the Soviet Union, inviting Soviet military personnel and missiles to Cuba, attempting to develop nuclear capabilities, and destabilizing democratic governments throughout Latin America. The Cuban economic embargo is but one of many American responses to these policies.

Yet despite the ruinous effects of thirty-five years of stifling economic sanctions, the Castro regime remains firmly in power. Castro has outlasted eight

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405. *See* Dobbs, *supra* note 373, at A12. The memorandum also concluded that the Act was contrary to international law and would increase the risk of foreign litigation incurred by U.S. companies. *See id.*

406. *See Cuba Counters U.S. Law*, WASH. POST, Dec. 26, 1996, at A39. *See also Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16.

407. *See Cubans Blame Slowdown on Helms-Burton Act, supra* note 96, at A16. The law also declares invalid any claim made pursuant to the Act and grants Cubans the right to sue the United States if they have been "victims of physical harm or property damage caused by actions supported by the United States" such as murder, physical injury or economic damage inflicted by the Batista dictatorship or other "criminals in the pay of North American imperialism." *See id.* The law also criminalizes activity which aids in the implementation of the Helms-Burton Act in Cuba such as the provision of information or speaking in favor of the Act. *See id.* The law also assists foreign companies in hiding investments through "fiduciary companies, financial institutions or investment funds and establishes that any money sent to Cubans by relatives living abroad is tax-exempt and can be deposited in interest-bearing, hard-currency accounts in Cuba." *See id.*

American presidents and is well on his way to outlasting a ninth president.[408] The world has changed dramatically in this period of time. Cuba's primary benefactor, the Soviet Union, exists no more, having degenerated into a rabble of fledging states themselves vying for foreign aid on their uneven courses to free market economies and democratic capitalism. The Soviet Union's successor, Russia, has shown little interest in or ability to sustain the past Soviet policies of economic and monetary infusions into Cuba. Maps have been redrawn throughout the world, and oppressive regimes such as those in Eastern Europe and South Africa have collapsed. Democracy and capitalism, the twin pillars of individual personal freedom and economic fulfillment, have enjoyed a rebirth and resultant renaissance. Events such as these played more of a role than U.S. efforts in isolating Cuba from the international community. Yet, despite these occurrences, U.S. policies toward Cuba remain firmly rooted in the traditional Cold War heritage of the 1960s.

The time has come for the United States to re-evaluate its policies toward Cuba–including its economic embargo–in light of the political and economic realities of the post-Cold War world.[409] Although the hyperbolic rhetoric of strident anti-communism may still enthrall those whose political ideologies lie right of center, such positioning no longer serves the U.S. international and national interests. Three and one-half decades of hostility cannot be undone or healed overnight, but efforts to reconcile the United States and the people of Cuba should commence immediately. The United States should strive to better understand Cuban anxieties concerning the American colossus ninety miles to the north. Further, the United States should undertake efforts to reconcile with the leaders of Cuba's future, the people themselves, and mitigate the damage done to the U.S.'s image in Cuba by decades of blatant interventionism and economic sabotage. Finally, the United States should do what it does best, organize and lead a multilateral effort to pressure the Castro regime in areas of vulnerability such as human rights in a manner consistent with international law and the U.S. international obligations.

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408. *See Group: Castro's Power Hold Firm, supra* note 367, at A3. *See also Hardline Communists Prevail in Cuba,* ASSOCIATED PRESS, Aug. 27, 1997.

409. *See Group: Castro's Power Hold Firm, supra* note 367, at A3. This conclusion was recently reached by a delegation of the United States Association of Former Members of Congress which visited Cuba in December 1996. In its report, the delegation concluded "[a]s Cuba no longer exports subversion or fronts for a hostile superpower, the basis now exists for a major policy reassessment." *See id.* Former Florida Representative Louis Frey, a Republican, chaired the delegation, which also included former Representatives James Symington (Democrat, Missouri), Michael Barnes (Democrat, Maryland), Toby Roth (Republican, Wisconsin), John Christensen (Republican, Nebraska), Senator Dennis DeConcini (Democrat, Arizona), Walter Raymond, Jr., a former presidential advisor on national security and Timothy Towell, the former U.S. ambassador to Paraguay. *See id.*

How best to accomplish this tripartite policy toward Cuba remains problematic and beyond the scope of this article. However, the Clinton Administration has taken two important steps toward implementing a new post-Cold War policy toward Cuba. Initially, President Clinton refocused his efforts on areas where Cuba is particularly susceptible to international rebuke such as democratic reform and human rights.[410] The desired effect of this effort is that international attention will be drawn away from the oft-criticized aspects of American policies toward Cuba such as the economic embargo and Title III of the Helms-Burton Act. Further, President Clinton's focus on democratic reform and human rights assisted in accomplishing the second important step in implementing a new policy toward Cuba, specifically, the forging of an international consensus condemning the excesses of the Castro regime and conditioning future economic relations on correction of such excesses.[411] The recent resolution of the European Union conditioning future trade and economic aid on improvements in human rights and political freedom in Cuba is but one example of American consensus-building in this regard.[412] The administration correctly concluded that a policy which works in concert with American allies rather than that which further alienates such allies is the proper option with regard to Cuba. What thirty-five years of unilateral American sanctions have been unable to accomplish, the Clinton Administration clearly hopes to achieve through a "convergence of governments, of business and labor and nongovernmental interests increasingly focused on the promotion of democracy and human rights."[413]

President Clinton should complete the reorientation of American policy toward Cuba from one of unilateral action to one of multilateral cooperation by correcting his only misstep in this area, specifically, the signing of the Helms-Burton Act into law in March 1996. The Act is inconsistent with the U.S. long-standing opposition to secondary boycotts and jeopardizes the leadership role of the United States in various international institutions. Further, the Act bases the U.S. Cuban policy on isolation which will fail without the cooperation of the international community. The Act may also serve to prolong if not strengthen the very regime it is designed to topple. Finally, the Act does not serve the interests of the U.S. government, private industry or individuals. Although President

410. *See Deft Move on Cuba, supra* note 165, at C6.

411. In announcing his suspension of Title III of the Helms-Burton Act for an additional six month period on January 3, 1997, President Clinton clearly signaled the initiation of a new multilateral focus in U.S. policy towards Cuba when he stated "[d]uring the coming six months and thereafter, we will continue working with our allies to develop the most comprehensive, effective measures to promote democracy in Cuba that we can." *Clinton Delays Cuba Sanctions, supra* note 147.

412. *See* Thomas W. Lippman, *EU Policy Puts Strings on Cuba Ties, supra* note 336, at A28.

413. *Lippman, supra* note 147, at A1.

Clinton may continue to suspend implementation of Title III indefinitely, the charade of automatic future suspensions should not continue. Further, the president has no authority to suspend Title IV which has already damaged American relations with its allies including its largest trading partner Canada. As such, President Clinton should actively seek the repeal of Titles III and IV of the Helms-Burton Act by the U.S. Congress.[414] Only by seeking such a repeal will President Clinton free himself of the failed policy of unilateralism of his predecessors and, perhaps, be the last American president to confront a Castro-dominated Cuba.

414. *See Helms-Burton Law Should Be Repealed, supra* note 238, at A18.