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**ECONOMIC SANCTIONS IMPOSED BY THE UNITED STATES AGAINST CUBA: THE THIRTY-NINE YEAR OLD EMBARGO CULMINATING WITH THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996**

**DIGNA B. FRENCH\***

**I. INTRODUCTION**

In 1960, the United States imposed an economic embargo against Cuba, which nearly eliminated any ties the island had with its northern neighbor. The United States, when faced with the nationalization of American owned corporations, implemented a now thirty-nine year old trade embargo. At the time of its inception, the embargo was justified. The United States wanted to expedite change in the Cuban form of government while protecting its own national security because Cuban-Soviet relations were growing apace with the development of world communism. Today, however, while Cuba's government remains unchanged, world communism no longer poses a significant threat to the territorial integrity of the United States. Indisputably, this archaic embargo has not achieved its main purpose and the Cuban population continues to suffer the consequences.

The United States could have attempted to bring democracy to Cuba without causing such significant suffering to the Cuban people. Further, the United States could have protected its national security by scrutinizing every move that Cuba made in order to sanction any action that might negatively impact the United States. On March 12, 1996, President William Clinton signed the Cuban

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Liberty and Democratic Solidarity (Libertad) Act of 1996<sup>1</sup> (hereinafter referred to as the Helms-Burton Act), causing the United States to actually intensify the trade embargo. The Helms-Burton Act goes beyond the bounds of the trade embargo by attempting to dissuade other countries from negotiating with Fidel Castro's Cuba. It permits United States citizens to bring suit in United States courts against foreigners who do business in or with Cuba. The international community has completely repudiated the Helms-Burton Act as a violation of international law. Its extraterritorial effect has been unacceptable to Cuba, other countries, and United States nationals alike.

Cuba lies just ninety miles off the coast of the United States, yet trade between the two countries is virtually nonexistent. Although the United States restored relations with such countries as China, Korea, Vietnam, and the former Soviet Union, U.S.-Cuban relations remain mutually confrontational.<sup>2</sup>

## II. THE 1959 TRADE EMBARGO

Since the early 1960's, U.S.-Cuban relations have been plagued by the economic embargo that President Dwight D. Eisenhower imposed against the island. Soon thereafter, in 1964, President John F. Kennedy reinforced the sanctions imposed by Eisenhower by placing a near total embargo against Cuba.<sup>3</sup> The main provisions of the embargo are: 1) a prohibition of virtually all direct

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1 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114 [H.R. 927], 110 Stat. 785 [hereinafter Helms-Burton Act].

2 Policy Alternatives for the Caribbean and Central America, An Alternative U.S. Policy Toward Cuba, 2 (1988). United States allies, such as Spain and Canada, have been able to resolve their differences with Castro's Cuba, however, U.S. and Cuban policies remain mutually confrontational.

3 Kirby Jones, *Opportunities for U.S.-Cuban Trade: A Study*, JOHNS HOPKINS UNIVERSITY SCHOOL OF ADVANCED INTERNATIONAL STUDIES, 3 (1988).

commerce between the United States and Cuba; 2) a blockage of all assets in the United States belonging either to Cuba or to Cuban nationals, including frozen bank accounts; 3) a prohibition of the importation of any product fabricated completely or in part from Cuban materials, even if manufactured in other countries; 4) a rescinded Cuban "Most Favored Nations" status; 5) a denial of the right of any United States vessel to carry American or non-American goods to Cuba or to enter a Cuban port; 6) a ban on aid to any country which provides assistance to Cuba; and 7) the blacklisting of all ships involved in trading with Cuba, without regard to the country of registry, including a prohibition of any such ship from entering United States ports.<sup>4</sup>

### III. JUSTIFICATIONS FOR THE EMBARGO

The United States initially implemented the economic embargo against Cuba in accordance with the Trading with the Enemy Act.<sup>5</sup> This Act extends the President's powers, during times of peace, to take emergency measures against a foreign state in an effort to protect national security.<sup>6</sup> In 1960, the United States had viable national security reasons for implementing the embargo. The radical nature of Castro's revolution and the deterioration of the island's relations with the United States grew apace with Cuban-Soviet rapprochement.<sup>7</sup> Today, however, the original purposes of the economic embargo have ended.<sup>8</sup> The Cold War is over; Cuba

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4 *Id.*

5 Trading with the Enemy Act of 1917, 50 U.S.C. App. § 5 (1988).

6 Shari-Ellen Bourque, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L. J. 191, 208 (1995).

7 JAIME SUCHLICKI, *CUBA FROM COLUMBUS TO CASTRO* 163 (1990).

8 Joanna R. Cameron, *The Cuban Democracy Act of 1992: The International Implications*, 20 SPG FLETCHER F. WORLD AFF. 137 (1996).

threatens neither the United States national security nor its economy.<sup>9</sup> Under such circumstances, the economic embargo imposed against Cuba is no longer justified under the Trading with the Enemy Act because it has no application in a post-Cold War setting.<sup>10</sup>

#### IV. DELETERIOUS EFFECTS OF THE EMBARGO

The foreign policy aim of the embargo is to indirectly encourage an expedient change in the Cuban form of government by stifling Cuban economic development.<sup>11</sup> Although this aim is valid, the practical result of such a foreign policy has had deleterious effects upon the United States, the people of Cuba, and third countries. The policy seeks to impose the United States' democratic ideals and beliefs, as defined by the United States, onto the Cuban people and other nations, without considering that Cuba no longer poses a threat to the United States' national security.<sup>12</sup>

The economic embargo against Cuba has not been completely in vain because Cuba's economy has undoubtedly destabilized; however, the consequences produced are not those originally intended by the Eisenhower and Kennedy administrations. As of 1998, Castro remains in power and a democratic form of government has not been developed within Cuba. What has occurred, however, as a direct result of the embargo, is that both the United States and Cuba have been disadvantaged *vis-à-vis* the international community.

As a direct result of the trade embargo, the United States has suffered a loss from an economic point of view. The embargo denies

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9 Bourque, *supra* note 6, at 208.

10 Jerry W. Cain Jr., *Recent Developments: Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call For an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379, 391 (1994).

11 Bourque, *supra* note 6, at 214.

12 *Id.*

United States businesses access to a growing market that is being devoured by occidental competitors.<sup>13</sup> In fact, before the embargo, the United States was Cuba's primary trade partner, with 75.4% of Cuba's imports coming from its northern neighbor.<sup>14</sup> In the past thirty-nine years, however, the United States' trade with Cuba has been virtually eliminated, thereby allowing foreign competitors, such as Spain and Canada, to become the principal beneficiaries. Moreover, Cuba's commercial relations with Communist nations were essentially nonexistent prior to the enforcement of the embargo.<sup>15</sup> Therefore, the continued application of the embargo instigated, solidified, and made Cuba dependent on a significant Soviet-Cuban relation.<sup>16</sup> This, of course, is counterproductive to the embargo's main objective. Until the Soviet Union's demise, it was Cuba's primary trade partner, followed by Japan, Spain and Canada.<sup>17</sup>

Following the collapse of the Soviet Union, many other countries rushed to Cuba to establish business relations with the island, yet the embargo, established thirty-nine years ago, prevents the United States business community from competing directly in the Cuban market.<sup>18</sup> The value of potential business lost has been estimated to be approximately \$6 billion.<sup>19</sup> The United States has not achieved its moral aim of supporting a transition to a democratic form of government in Cuba. The embargo has, however, had an adverse

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13 JONES, *supra* note 3, at 21.

14 DONALD L. LOSMAN, *INTERNATIONAL ECONOMIC SANCTIONS: THE CASES OF CUBA, ISRAEL AND RHODESIA* 22 (1979).

15 *Id.*

16 JONES, *supra* note 3, at 20.

17 LOSMAN, *supra* note 14, at 28.

18 Cameron, *supra* note 8, at 143.

19 *Id.* at 144.

and unfortunate effect for the United States and its business community.

Inevitably, the economic embargo imposed has effected the island. This embargo, however, has neither completely destroyed the Cuban economy nor ousted Castro from power.<sup>20</sup> In addition, the loss of the United States market also severely impacted Cuba's hard currency earnings.<sup>21</sup> Nevertheless, economic hardship actually strengthened ties between the Soviet Union and Cuba.<sup>22</sup> Losing its most important trade partner essentially forced Cuba to cement permanent relations with the Communist world.<sup>23</sup> As relations between the United States and Cuba deteriorated, closer Soviet-Cuban ties developed.<sup>24</sup> With the collapse of the Soviet Union, however, the embargo seems to have taken its toll on the island. Unfortunately, the Cuban civilians have suffered the most; their living conditions have worsened from an already chaotic situation without any signs of revival.

Cuba's economic crisis seems to be affecting every aspect of daily life on the island.<sup>25</sup> The government strictly rations basic staples such as bread, meat, milk, sugar, eggs, tobacco and fuel.<sup>26</sup> Additionally, Cuba is experiencing shortages in areas where it once

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20 JONES, *supra* note 3, at 20.

21 LOSMAN, *supra* note 14, at 26.

22 JONES, *supra* note 3, at 20.

23 LOSMAN, *supra* note 14, at 46.

24 SUCHLICKI, *supra* note 7, at 165.

25 David Golove and Michael Krinsky, UNITED STATES ECONOMIC MEASURES AGAINST CUBA. PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES, 139 (1993).

26 *Id.*

had substantial resources.<sup>27</sup> As a means of subsistence, Cubans have developed a black market wherein they raise and sell their own goods. Clearly, the trade embargo has negatively affected the island. Unfortunately, those living in Cuba are the ones most negatively impacted.

#### V. THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996

Undoubtedly, the economic embargo did not achieve its primary purpose. The United States had two possible alternatives once faced with this inadequacy: either to strengthen or to remove the economic embargo against Cuba. The United States opted for the former. On March 12, 1996, President Clinton signed the Helms-Burton Act into law,<sup>28</sup> intensifying the longstanding embargo.

The Helms-Burton Act attempts to internationalize the United States trade embargo against Cuba and to impose United States ideals upon third countries.<sup>29</sup> Its purpose is to deter nationals from third countries, and third countries themselves, from doing business or investing in Cuba.<sup>30</sup> As a result, the Cuban government will be denied any capital generated by such ventures.<sup>31</sup> The Act itself contains language stating that its implementation seeks "international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected

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27 *Id.*

28 Andreas F. Lowenfeld, *The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996).

29 Interview with Eloy Gutierrez Menoyo, President of Cambio Cubano, in Miami, Fla. (Feb. 24, 1997) [hereinafter Menoyo].

30 Lowenfeld, *supra* note 28, at 426.

31 *Id.* at 427.



government in Cuba, and for other purposes.”<sup>32</sup> The other purposes, defined in section 3 of the Act, are as follows: assisting the Cuban people in regaining their freedom, providing for the continued national security of the United States in the face of continued threats from the Castro government, including mass migration to the United States, and protecting United States nationals against confiscatory takings and wrongful trafficking in property confiscated by the Castro government.<sup>33</sup>

Among other proposed measures, the Helms-Burton Act bans United States sugar imports from third countries that buy sugar from Cuba. Similarly, it provides for the denial of visas to foreigners who use, manage, or profit from property located in Cuba that was expropriated from United States citizens by the Cuban government. The Act requires a reduction of contributions to international financial institutions that extend loans to Cuba. It also permits United States citizens (including Cuban exiles who have become naturalized citizens) to use United States courts to bring suits regarding claims to property expropriated by the Castro regime now being used by third parties.<sup>34</sup>

The Helms-Burton Act is composed of four major titles. Title I of the Act, entitled Strengthening International Sanctions Against the Castro Government, intensifies the economic embargo against Cuba.<sup>35</sup> It mixes both restrictions and incentives in an effort to achieve a democratic form of government in Cuba. Among other measures, section 107 of Title I includes upgrading television broadcasting to Cuba, and section 106 reduces aid to countries of the

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32 Helms-Burton Act, *supra* note 1.

33 *Id.* at 788.

34 Elizabeth Abi-Mershed, *United States Economic Measures against Cuba. Proceedings in the United Nations and International Law Issues*, 89 AM. J. INT'L L. 868 (1995).

35 Jonathan R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 349 (1996).

former Soviet Union who pay Cuba money in order to use intelligence gathering facilities located on the island.<sup>36</sup> Furthermore, Title I seeks to end indirect financing of Cuba by prohibiting American people and companies from providing loans, credits, or any other type of financing for transactions involving property that once belonged to a United States national.<sup>37</sup> The Act's objective is also applied against foreign financial institutions under section 104(b).<sup>38</sup> Finally, section 110 of Title I restricts the importation of Cuban products into the United States and products which were transported through, or which derived in part from, Cuban products.<sup>39</sup>

Title II of the Act provides for United States assistance to a free and independent Cuba. Under Title II of the Act, once the President of the United States determines that a "transition to a democratically elected government in Cuba has begun,"<sup>40</sup> he may provide various forms of financial aid to the island, and the economic

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36 Matias F. Travieso-Diaz, *Actions Needed for Lifting the U.S. Trade Embargo Against Cuba*, 3 U. MIAMI Y.B. INT'L L. 53, 78 (1995).

37 Helms-Burton Act, *supra* note 1, at 794:  
Section 103(a) Prohibition - . . . no loan, credit or other financing may be extended knowingly by a United States national, a permanent resident alien, or United States agency to any person for the purpose of financing transactions involving any confiscated property the claim of which is owned by a United States national.

38 *Id.* at 795:  
Section 104(b) Reduction in United States Payments to International Financial Institutions - If any international financial institution approves a loan or other assistance to the Cuban Government over the opposition of the United States, then the Secretary of the Treasury shall withhold from payment to such institution an amount equal to the amount of the loan or other assistance . . .

39 *Id.* at 800.

40 *Id.* at 806, 810.

embargo may be lifted. Thirty-nine years later, however, it appears that the Cuban people will continue to suffer as a result of the unresolved differences between the United States and Castro's Cuba. Further, section 202 of Title II maintains that the President of the United States will be the one to determine when a transitional or democratically elected government is in power in Cuba. Until then, the United States will not develop a plan to provide economic assistance to the island.<sup>41</sup> Many opponents of the Helms-Burton Act maintain that the President of the United States should not decide whether a democratically elected government develops in Cuba.<sup>42</sup> They believe, rather, that the people living in Cuba should make that determination for themselves.<sup>43</sup>

The most controversial part of the Act, Title III, is entitled Protection of Property Rights of United States Nationals. Title III internationalizes the thirty-nine year old embargo by discouraging foreign investors from engaging in business with Cuba.<sup>44</sup> It creates a cause of action for United States citizens against any person or government that traffics in property that once belonged to a United States citizen and that was confiscated by the Castro regime.<sup>45</sup> This measure, designed to protect United States property rights abroad, has justifiably caused an international uproar. Under Title III, a United States national can recover up to three times the current fair market value of the property in question.<sup>46</sup> Recovery is permitted if the person or government trafficking in the confiscated property has received notice of the United States national's claim of ownership

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41 *Id.*

42 Menoyo, *supra* note 29.

43 *Id.*

44 Travieso-Diaz, *supra* note 36, at 80.

45 *Id.*

46 Helms-Burton Act, *supra* note 1.

and if the third party has been provided a copy of the portion of the Act that specifies this remedy.<sup>47</sup>

Finally, Title IV of the Act provides that foreigners who have been involved in trafficking in or through confiscated property be excluded from the United States.<sup>48</sup> It is important to note that in the recent past, the United States has not adopted a statute even remotely similar to the Helms-Burton Act. This is the case even though it had the opportunity to do so with Chile, Argentina, Brazil, Haiti, the former Soviet Union, East Germany, Czechoslovakia, Poland, Spain, Portugal, Vietnam, Taiwan, and China.<sup>49</sup>

## VI. JUSTIFICATIONS FOR THE HELMS-BURTON ACT

The United States passed the Helms-Burton Act mainly as a result of the substantial number of foreigners investing in Cuba. With the fall of the Soviet Union, Castro found himself without the massive economic influx needed to maintain his socialist regime. In an effort to revitalize the island's economy, Castro implemented

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47 *Id.* at 82.

48 Helms-Burton Act, *supra* note 1, at 822:  
Section 401(a) Grounds for Exclusion - The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act:

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

49 LOWENFELD, *supra* note 28, at 422.

limited economic reforms.<sup>50</sup> As a result, foreign investors began to do business in Cuba.<sup>51</sup> The United States got involved after it became apparent that the property being negotiated had been expropriated by the Cuban government from United States citizens. Under international law, expropriated property must be compensated "adequately, promptly and effectively"<sup>52</sup> in accord with the Hull Formula. However, Cuba and the United States have failed to reach an agreement regarding compensation for United States citizens' property which the Cuban government expropriated during the early years of the revolution.

#### VII. INTERNATIONAL REACTION TO THE HELMS-BURTON ACT

Litigation in United States courts, for ownership of property in Cuba or for the trafficking in property located in Cuba that once belonged to United States nationals, is inconsistent with the goal of a democratically elected government.<sup>53</sup> It is unconscionable for the United States to unilaterally announce a nonexistent national security issue in order to pass the Helms-Burton Act.<sup>54</sup> The international community, which includes some of America's closest allies, has denounced the idea that anyone trafficking in property that once belonged to United States citizens should be subject to litigation in the United States. In fact, an almost universal outcry developed

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50 RATCHIK, *supra* note 35, at 343.

51 *Id.*

52 LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS, 730 (1993).

53 LOWENFELD, *supra* note 28, at 424.

54 Interview with Alan C. Swan, Professor of Law, University of Miami School of Law, Coral Gables, Fla. (Feb. 26, 1997) [hereinafter Swan].

because of the arrogance behind the Helms-Burton Act.<sup>55</sup> Several governments, specifically Canada, Mexico, and the European Union, vehemently opposed the Helms-Burton Act.<sup>56</sup> These countries, and many others, feel that their sovereignty has been invaded by the United States attempting to dictate with whom they may negotiate. Therefore, in response to the Helms-Burton Act, their respective legislations have launched counterattacks.<sup>57</sup> For example, the Canadian government, adamant against being strong-armed by the United States, passed a law to bar companies operating in Canada from obeying the Helms-Burton Act or “. . . observing any directive, instruction, intimation of policy, or other communication”<sup>58</sup> from the United States that furthers the trade embargo implemented against Cuba. Mexico and the European Union have also adopted similar blocking legislation against the Helms-Burton Act.<sup>59</sup>

#### VIII. OPPONENT’S ARGUMENTS AGAINST THE HELMS-BURTON ACT

When analyzing the Helms-Burton Act, authors have been divided with regard to its legality under international law. Opponents of the Helms-Burton Act cite its extraterritorial effect as their main objection. Likewise, they cite the Act of State Doctrine and the General Agreement on Tariffs and Trade (“GATT”) to bolster their claims regarding the Helms-Burton Act’s illegality. On the other

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55 *Id.*

56 BRICE M. CLAGETT, *The Cuban Liberty and Democratic Solidarity (Libertad) Act: Title III of the Helms-Burton Act is Consistent With International Law*, 90 AM. J. INT’L L. 434 (1996).

57 Abi-Mershed, *supra* note 34, at 869.

58 *Cuban Goods at Canadian Wal-Mart Cause Flap*, THE MIAMI HERALD, March 6, 1997, at § C.

59 *Id.* at C5.

hand, proponents of the Helms-Burton Act make strong arguments in favor of its implementation. They too cite GATT, especially its security exceptions, and the Act of State Doctrine, in order to justify the Helms-Burton Act. They raise arguments regarding the various ineffective enforcement mechanisms of the international system and the spillover effect of the Cuban governmental system on the United States.

A. *Act of State Doctrine*

In 1964, the United States Supreme Court decided *Banco Nacional de Cuba v. Sabbatino*.<sup>60</sup> The Supreme Court held that pursuant to the Act of State Doctrine, the judiciary will not examine the validity of a taking of property within its own territory by a sovereign government recognized by the United States, in the absence of international agreements to the contrary, even if the taking violated customary international law.<sup>61</sup> The Act of State Doctrine maintains that every sovereign state is bound to respect every other sovereign state, and that the courts of one country will not sit in judgment of the acts of the government of another state when done within its own territory.<sup>62</sup> This doctrine was intended to keep the United States from interfering with the decisions of foreign countries.

In response to this decision, Congress enacted the Second Hickenlooper Amendment to reverse in part the *Sabbatino* case.<sup>63</sup>

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60 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963).

61 *Id.*

62 *Id.*

63 CLAGETT, *supra* note 56, at 439. The Second Hickenlooper Amendment provides that:

No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted

Under this Amendment, the judiciary will presume that it may proceed with an adjudication on the merits, unless the President of the United States officially declares that such an adjudication would embarrass the conduct of foreign policy.<sup>64</sup> It seems that suits brought under Title III of the Helms-Burton Act contradict the Act of State Doctrine as set out in *Sabbatino*.<sup>65</sup> Furthermore, since the Helms-Burton Act focuses on property in Cuba and not in the United States, the Second Hickenlooper Amendment is not applicable.<sup>66</sup> Anticipating criticism with reference to any potential violation of the Act of State Doctrine, however, the United States incorporated a disclaimer within the body of the Helms-Burton Act stating that, “[n]o court of the United States shall decline, based upon the Act of State Doctrine, to make a determination on the merits in an action . . .”<sup>67</sup> for liability for trafficking in confiscated property claimed by any United States national.

#### B. *Extraterritoriality*

The Helms-Burton Act has also encountered criticism because of its extraterritorial nature.<sup>68</sup> Normally, a country is free to impose laws governing all events within its jurisdiction. A country, however, may not reach outside of the confines of its borders and impose its will upon those outside its territory.<sup>69</sup> The Restatement (Third) of

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... based upon (or traced through) a confiscation or other taking.

64 HENKIN, *supra* note 52.

65 LOWENFELD, *supra* note 28, at 427.

66 *Id.*

67 Helms-Burton Act, *supra* note 1, at 817.

68 LOWENFELD, *supra* note 28, at 430.

69 CAIN, *supra* note 10, at 384.



Foreign Relations Law, section 402(1)(c), maintains that a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have a substantial effect within its territory.<sup>70</sup> This theory was actually incorporated into the text of the Helms-Burton Act.<sup>71</sup> The Restatement (Third), however, also states in section 403(1), that even when one of the bases for jurisdiction under section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.<sup>72</sup>

Many opponents of the Helms-Burton Act argue that the Helms-Burton Act fails to conform with the Restatement (Third) of Foreign Relations.<sup>73</sup> First, they claim that the Act attempts to correct a wrong committed by the Cuban government and not by the people or countries actually affected by the Act, over whom jurisdiction is to be exercised.<sup>74</sup> Second, they argue that the effort to impose United States policy on third countries and their nationals is unreasonable.<sup>75</sup> The act of trafficking in property confiscated by the Cuban government takes place entirely outside the territory of the United States. Therefore, opponents believe that these circumstances preclude the United States from attempting to strong-arm every other country in the world to agree not to traffic in or through Cuba.

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70 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

71 Helms-Burton Act, *supra* note 1, at 815. Title III (9) states: International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

72 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(1) (1987).

73 LOWENFELD, *supra* note 28, at 431.

74 *Id.*

75 *Id.*

Additionally, author Andreas F. Lowenfeld clarifies this issue by providing examples of the United States' possible reactions to situations where third countries enacted laws which would affect the United States in the same way the Helms-Burton Act affects third countries.<sup>76</sup> In one such example, Iran adopted a law stating that anyone who negotiates with or within the United States will be subject to suit in Iran for up to the value that the former Shah robbed from the Iranian people. As a direct result of this law, BMW and Mercedes Benz both canceled their plans to continue to do business with the United States.<sup>77</sup> Lowenfeld concludes that all Americans would be outraged by Iran's extraterritorial law and at the German manufacturers for abiding by the law.<sup>78</sup> Moreover, Iran's exercise of jurisdiction would not be characterized as reasonable by the United States.<sup>79</sup>

### C. *The General Agreement on Tariffs and Trade*

Critics of the Helms-Burton Act believe that the Act violates the General Agreement on Tariffs and Trade (hereinafter GATT).<sup>80</sup> It is important to note that over one hundred nations, including the United States and Cuba, have joined GATT.<sup>81</sup> Article XI of GATT states that "no prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted . . . by any contracting party on the importation of any product of the territory of any other

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76 *Id.*

77 *Id.* at 432.

78 *Id.*

79 *Id.*

80 Ratchik, *supra* note 35, at 351.

81 CAIN, *supra* note 10, at 387 n.46.

contracting party . . ."<sup>82</sup> Title I of the Helms-Burton Act, however, prohibits countries which import various products from Cuba, from re-exporting them to the United States.<sup>83</sup> This provision seems to completely contradict Article XI of the GATT.<sup>84</sup> Additionally, the Helms-Burton Act may violate the Most Favored Nation obligations of the United States under GATT.<sup>85</sup> Article I of GATT, a non-discriminatory clause, requires members, including the United States, to treat like products with equal preference.<sup>86</sup> The Helms-Burton Act violates this provision by treating sugar originally purchased from Cuba differently than sugar purchased elsewhere.<sup>87</sup> Moreover, Article V of GATT provides for the complete freedom of movement of goods among member states.<sup>88</sup> This appears to be contrary to the Helms-

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82 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 831, 849.

83 Helms-Burton Act, *supra* note 1, at 800.

84 Ratchik, *supra* note 35, at 351.

85 *Id.* at 353.

86 GATT, *supra* note 82, at 831, 832. The Article states: With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports . . . and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

87 Ratchik, *supra* note 35, at 353.

88 CAIN, *supra* note 10, at 387. Among other provisions, Article V states: There shall be freedom of transit through the territory of each contracting party, via the routes most convenient or international transit, for traffic in transit to or from the territory of other

Burton Act. Finally, the clearest violation of GATT by the Helms-Burton Act is under article XXIII.<sup>89</sup> There are two ways to bring an action under article XXIII of GATT.<sup>90</sup> One can either charge another with a particular violation of a specific clause of GATT or, if no article of GATT has been violated, one can bring an action if someone denies another an expected benefit of a trade agreement.<sup>91</sup> Foreigners can easily demonstrate that the Helms-Burton Act deters them or burdens their ability to trade with Cuba, a member of GATT, thereby denying them the expected benefit of trading with the island.<sup>92</sup>

#### D. *World Trade Organization*

The last main criticism made by opponents of the Helms-Burton Act are the serious repercussions which may result from the point of view of the World Trade Organization (hereinafter WTO).<sup>93</sup> The United States champions its attempt to get the rule of law to become an integral part of the WTO by enforcing its dispute resolution mechanisms.<sup>94</sup> The United States has been at the forefront, in the attempt to establish effective courts and an appellate body; however, the Helms-Burton Act threatens this entire effort.<sup>95</sup> By passing the Helms-Burton Act, the United States unilaterally decided

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contracting parties. GATT, *supra* note 82, at A21.

89 Swan, *supra* note 54.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

that it simply will not submit to the WTO.<sup>96</sup> The United States, an enthusiastic backer of the WTO, refuses to recognize its jurisdiction with reference to the Helms-Burton Act.<sup>97</sup> The United States might anticipate a judgment entered against it by the WTO, which could lead to a political outcry and a potential move to pull the United States out of the WTO.<sup>98</sup>

#### IX. PROPONENTS' ARGUMENTS IN FAVOR OF THE HELMS-BURTON ACT

The Helms-Burton Act, while highly criticized, also has numerous supporters. Some supporters argue that United States nationals are being victimized and their rights and interests accordingly prejudiced, by foreigners and countries who traffic in property that lawfully belongs to United States nationals and that Castro illegally expropriated. The prejudice to them has a substantial effect on the United States; therefore, the United States has a legitimate reason, and an interest, in preventing such trafficking by third country nationals.<sup>99</sup>

##### A. *Extraterritoriality*

The extraterritorial aspect of the Helms-Burton Act does not deter supporters who vigorously advocate an end to foreign investment in what they consider tainted Cuban property. Supporters argue that based upon the historical relationship between the United States and Cuba, and their proximity to each other, Cuba's insistence upon suppressing democracy and refusing to obey international law

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96 *Id.*

97 *Id.*

98 *Id.*

99 Clagett, *supra* note 56.

impacts the United States substantially in various ways. An example is the ongoing crisis caused by the abundant number of Cubans fleeing Cuba and reaching the shores of the United States.<sup>100</sup> They claim this is a legitimate justification for the implementation of the Helms-Burton Act.

### B *Ineffective International Enforcement Mechanisms*

Another argument favoring the legality of the Helms-Burton Act is that international enforcement mechanisms are weak and ineffective.<sup>101</sup> Since the jurisdiction of international tribunals is consensual, confiscation cases can rarely be litigated in such a forum.<sup>102</sup> For example, the International Court of Justice has two types of jurisdictions: (1) contentious, which requires either express or implied consent of the states parties to the action, and (2) advisory, which provides advisory opinions that are non-binding upon the parties to the action.<sup>103</sup> According to supporters of the Helms-Burton Act, under the contentious jurisdiction of the International Court of Justice, Cuba would never agree to become a party to an action for property they confiscated in 1959, and under the advisory jurisdiction, Cuba would not be bound by the result of the Court. Interestingly, the Helms-Burton Act anticipates such inefficiency and it incorporates mention of it into Title III of the Act.<sup>104</sup>

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100 *Id.* at 435.

101 *Id.* at 436.

102 *Id.*

103 HENKIN, *supra* note 52, at 807.

104 Helms-Burton Act, *supra* note 1, at 814. Section 301(8) states: The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the

X. FOREIGNERS' KNOWLEDGE REGARDING TAINTED  
PROPERTY IN CUBA

The Helms-Burton Act is also justified because traffickers are fully aware, or at least should be fully aware, that they are dealing with tainted property.<sup>105</sup> Supporters maintain that traffickers knowingly risk legal action being brought against them within the United States.<sup>106</sup> The Helms-Burton Act itself maintains that, "[t]he United States Department of State has notified other governments that the transfer to third parties of properties confiscated by the Cuban Government 'would complicate any attempt to return them to their original owners.'"<sup>107</sup> Furthermore, many argue that Castro's confiscation was internationally unlawful ". . . because its purpose was to retaliate against United States nationals for acts of their government, and was directed against United States nationals exclusively."<sup>108</sup> Therefore, traffickers cannot rely on, nor is the United States required to respect, the confiscation that took place in Cuba in 1959.<sup>109</sup>

A. *Act of State Doctrine*

With reference to the Act of State Doctrine, supporters of the Helms-Burton Act argue that the United States Supreme Court, in *Sabbatino*, clearly enunciated that neither the United States Constitution nor international law required the Act of State

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expense of the rightful owners of the property.

105 Clagett, *supra* note 52, at 437.

106 *Id.*

107 Helms-Burton Act, *supra* note 1, at 814.

108 *Id.*

109 Clagett, *supra* note 52, at 438.

Doctrine.<sup>110</sup> Furthermore, they argue that the Act of State Doctrine results in frustrating the application of international law and in denying litigants their day in court.<sup>111</sup> In addition, the Helms-Burton Act anticipates the Act of State Doctrine as a potential argument against the Helms-Burton Act. Therefore, a disclaimer is included in Title III of the Helms-Burton Act in order to avoid such criticism.<sup>112</sup>

#### B. *General Agreement on Tariffs and Trade*

Finally, with reference to any possible violation of GATT, supporters of the Helms-Burton Act argue that Article XXI of GATT allows the contracting states to take any action which the state considers necessary for the protection of its essential security interests.<sup>113</sup> Therefore, a contracting party may impose protectionist measures if it feels that such measures are necessary in order to preserve its national security.<sup>114</sup> However, a counter argument states that absent a threat of communism at a global level, Cuba's government, the only communist State in existence in the Western Hemisphere, is no longer a threat to the United States. Therefore, the security exceptions under article XXI of GATT no longer applies.<sup>115</sup>

Supporters of the Helms-Burton Act strongly advocate that it is properly justified and nonviolative of international law. Without regard to the Helms-Burton Act's extraterritorial effect, supporters

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110 *Id.* at 440.

111 *Id.*

112 Helms-Burton Act, *supra* note 1, at 817.

113 GATT, *supra* note 82, at 876.

114 Cain, *supra* note 10, at 388.

115 *Id.* at 391.



feel that it is a proper way of preventing Castro's Cuba from receiving much needed funds and benefitting from property that in reality does not belong to the island. The property was wrongfully confiscated in 1959, therefore, its rightful owners should be properly compensated or traffickers harshly punished.

#### XI. UNITED NATIONS RESOLUTION CALLING FOR AN END TO THE EMBARGO

On November 3, 1993, the Forty-Eighth General Assembly of the United Nations adopted a resolution calling for the end of the United States' embargo against Cuba.<sup>116</sup> The Resolution was passed by an eighty-eight to four vote, with fifty-seven abstentions.<sup>117</sup> The United States did not comply with the resolution. Although United Nations resolutions are not binding, they are strong indicators of the international sentiment on a particular issue. With such an overwhelming majority voting in favor of this particular resolution, opponents of the embargo believe the United States might have reconsidered its position towards Cuba. As stated above, however, rather than lift the embargo, the United States intensified the embargo by implementing the Helms-Burton Act.

#### XII. CONCLUSION

The United States has the right, as part of its national sovereignty, to choose its partners. Under such an interpretation, the thirty-nine year old trade embargo imposed by the United States against Cuba is legally proper. From an ethical point of view, however, the embargo is inappropriate. The main problem raised by the policies implemented against Cuba does not involve the trade

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116 *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, G.A. Res. 48/16, U.N. GAOR, 48th Sess., Agenda Item 30, U.N. Doc. A/Res/48/16 (1993).

117 CAIN, *supra* note 10, at 379.

embargo *per se*, but the Helms-Burton Act itself. When an embargo infringes on a third country's sovereignty, it is likely that the embargo violates international law.<sup>118</sup> Such is the case with the Helms-Burton Act.

The United States has not achieved its purpose with over thirty-nine years of the existence of economic sanctions imposed against Cuba. Moreover, Cuba has been unable to achieve its objective of complete liberalization from the shadow of the United States. In essence, both countries have suffered detrimental effects and neither has achieved its primary goals. Those living on the island have been, and continue to be, the ones most affected by the inability of the United States and Cuba to reach a civilized agreement.

The United States cannot rely on the moral argument of bringing democracy to Cuba as a justification for the continued implementation of the trade embargo and of the Helms-Burton Act. These policies have proven to achieve opposite and deleterious effects from which they were designed to accomplish. From an ethical viewpoint, both the thirty-nine year old trade embargo and the Helms-Burton Act are clearly at fault.<sup>119</sup> These foreign policies have caused suffering for over eleven million Cubans. Tragically, these people have absolutely nothing to do with either the governing mechanisms within the island or with the existing differences between the United States and Cuba.<sup>120</sup> Their confrontational policies towards each other have not achieved any positive outcome for nearly four decades. From the American point of view, democracy has yet to be implemented in Cuba and Fidel Castro continues to be in power.

The United States should abandon its hostile policies towards Cuba and seek an alternative approach in an effort to try to achieve what thirty-nine years of antagonism and animosity has not been able to accomplish: a democratic form of government in Cuba that will

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118 *Id.* at 395.

119 Menoyo, *supra* note 29.

120 *Id.*

benefit the United States, Cuba and most importantly, millions of Cubans presently living in the island, suffering the inevitable negative side effects of the unfriendly relations between these two neighbors. A civilized approach between these two countries to try to negotiate the existing differences might work, as it did between the United States and Vietnam. For example, small businesses flourish throughout the island of Cuba. The United States might try and consider this a small step towards capitalism on behalf of the Cuban government. In return, Cuba might recognize the United States' efforts in aiding the Cuban people, such as the thousands of immigrants arriving on Florida's shores. This is not to suggest that the United States must accept, or even recognize, the Cuban form of government or that Cuba must accept the actions by the United States. It is simply an alternative to thirty-nine years of failures that just might work.