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Helms Burton: Social Policy and Norm Definition

Manuel A. Rodriguez*

I. Introduction

The Cuban Liberty and Democratic Solidarity Act, popularly known as the Helms Burton Act, is defensible when reviewed from the historical and foreign policy context, U.S. national security perspective, Cuban social concerns, and interpretations of current and developing international law. It is imperative that any review of Helms Burton be filtered through these considerations, which provide much greater context than currently in fashion. Criticisms of Helms Burton have been focused on the narrow constructions of current international law. Contemporary criticism has often ignored these foreign policy, social, and international law considerations against which Helms Burton was developed. Discussion of these considerations would mitigate much of the criticism.

II. Background

A. The Act

President Clinton enacted the Cuban Liberty and Democratic Solidarity Act in March of 1996.¹ The Act is divided into four Titles, or components, whose aim is to implement specific policies and foreign policy goals regarding the nation of Cuba.² Title I of the Act is largely a codification of current American policy regarding economic sanctions and embargoes of Cuba.³ Title II of the Act is a promise of economic assistance to a democratic Cuba and the requirements and factors that

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¹ Juan Azel, *Free Trade in the Western Hemisphere Symposium: What's All the Commotion About? International Attacks on the Validity of the Cuban Liberty and Democratic Solidarity Act*, 28 U. MIAMI INTER-AM. L. REV. 703, 4 (1997) [hereinafter Azel].

² H.R. 927, 104th Cong. (1996) [hereinafter H.R.].

³ *Id.*

would authorize this assistance.⁴ Title III of the Act "creates a federal cause of action, on behalf of U.S. citizens whose property was confiscated without compensation by Cuba, against those who traffic in that property."⁵ It is this section of

the Act that has generated significant controversy and which has been widely assailed as extraterritorial in nature and contrary to international law and norms.⁶ Because of foreign indignation over the provisions of Title III, the right to bring lawsuits has been continuously suspended since the original enactment of the Act.⁷

Finally, Title IV provides for the exclusion from the United States of foreign nationals "who have confiscated property of United States nationals or who traffic in such property."⁸ Included within the Act are statements of Congressional findings and purposes which attempt to define the Act almost completely as a function of American foreign policy and America's overarching view of the Castro regime as a morally reprehensible and illegitimate government which consistently violates international law both domestically and abroad.⁹

B. The Historical Relationship between the United States and Cuba

As a means of analyzing the legal and political implications of the Act, it is important to filter this analysis through the prism of the rich historical context of U.S./Cuba relations throughout the last century. This historical dimension has been shared with few other nations in contemporary American history. The United States and Cuba have historically developed ties unlike most other countries. The sinking of the battleship Maine in the latter half of the 19th century culminated in the Spanish-American war. American soldiers fought and died to liberate Cuba of its Spanish oppressors and instill in the island the virtues of self-governance and democracy. The tumultuous and often sordid history of the island following the Spanish-American war is undisputed and cannot

⁴ *Id.*

⁵ Brice M. Clagett, *International Symposium on the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: The Controversy Over Title III of the Helms-Burton Act: Who Is Breaking International Law - The United States, or the States That Have Made Themselves Co-Conspirators With Cuba in Its Unlawful Confiscations?* 30 GEO.WASH. J. INT'L L. & ECON. 271, 2 (1997) [hereinafter Clagett].

⁶ *Id.* at 272.

⁷ *Id.* at 272.

⁸ H.R., *supra* note 2.

⁹ *Id.*

be characterized as anything but periods of dictatorship and corruption interspersed with brief experiments in democracy. The ferocious dictatorship of Fulgencio Batista culminated in an idealistic vision of a Cuba liberated of its chains where the masses would achieve the elusive dream of equality. This dream however, proved to be short-lived, as Fidel Castro commandeered the island as his personal domain under the guise of communism.

Castro's socialist visions proved to be nothing more than the delusions of a dictator who perpetrated a hoax on the Cuban people and the world, and who single-handedly proceeded to dismantle and destroy the island and usurp the hopes and dreams of several generations of Cubans.¹⁰ Cuba today is in ruins, little more than a shell of its former self and no longer the pearl of the Caribbean. Grotesque inequality between the Communist apparatchiks and those they rule is common. Cuba's infrastructure crumbles for want of repair and its people drive automobiles considered antiques in the United States. The vast majority rides bicycles on a daily basis. They do this not to work or produce, but to stand in line for meager rations that consist of little more than rice and beans. The vast majority have ceased productive work in favor of the underground economy, which is essentially a crude economy based on the medieval concepts of barter and exchange. Doctors are paid more to drive taxis than to deliver babies, while women walk the streets in search of clients, an open secret among the European nationals who frequent Cuba as tourists.

Notions of U.S. interventionism and colonialism regarding the island nation typify criticism of the Act. Critics deride the notion of U.S. foreign policy directed at crippling or hindering the economy of a sovereign state and Cuba's attempts at self-definition vis-à-vis its socialist conventions and centralized economic principles. Any attempt to constrain the analysis of the Act along traditional paradigmatic norms of international law and contemporary notions of extraterritorial behavior would ignore the 100-year relationship that has shaped and defined Cuban-American ties. The simple answer would ignore the thousands of American lives and service members lost in the Spanish-American war in their successful attempt to liberate the island from its Spanish oppressors. The degree of interconnectedness between the two nations has historically been great, and the isolationist aberration of the current Cuban regime has not diminished the United States' involvement in and desire to see Cuba restored to democracy. Asserting that this behavior is paternalistic and colonial is to ignore the historical antecedents that have

¹⁰ *See id.*

governed the relationship. The United States does not assert colonial intentions with respect to Cuba, but rather seeks to insure its freedom.¹¹

III. The Social Dimensions of the Act

The social context offers greater support for Helms Burton than even the historical context. Human rights violations in Cuba have been well defined and noted by many charitable groups and organizations. There are circumstances in which doing business with a gross human rights violator itself breaches some duty to the international community sufficient to expose a state or its entities to unilateral economic retaliation from other states. International human rights laws authorize states to prescribe and punish violations wherever they occur, and prohibit not only the direct commission of these acts, but their aiding and abetting. The sale of weapons to a genocidal state presumably would violate the international prohibition against genocide, for example, and justify economic retaliation against the supplying state. The trials of the Nuremberg industrialists imputed international criminal liability to business entities that assisted the Nazi regime. If doing business with a gross human rights violator can be analogized to aiding and abetting, a third party entity may have sufficiently breached its international duties to justify peaceful retaliation.¹²

The United States would be negligent in allowing this complicity to occur ninety-five miles from its shores. Admittedly, the United States has not pursued this policy with other states that routinely and grotesquely violate the human rights of its citizens. The most obvious example of this is China, with whom the United States actively trades and in fact has conferred most favored nation trading status ("MFN"). Some justifications for this bifurcation in policy are readily apparent, though. China represents a direct threat to the security and well being of the United States and the world, and is considered by many a military superpower. The United States, as a superpower and fiduciary of global security has chosen a policy of engagement rather than confrontation in attempting to diffuse the confrontational nature of the relationship, rather than pursuing long abandoned Cold War policies of isolation and NATO encroachment. China's human rights abuses are even more egregious than those of Cuba's, yet the security implications and costs of applying unilateral and secondary trade sanctions to China may far outweigh the

¹¹ *Id.*

¹² Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 64 (2001) [hereinafter Cleveland].

limited benefits and abilities of the United States to effect change in this giant country. Foreign policy considerations dictate that the United States engage the Chinese rather than isolate them. It also may be unlikely that unilateral trade sanctions would work to effect change within a nation of this size. Clear manifestations of this policy could be seen in the United States' granting to China of MFN trading status. It was abundantly clear that "[b]usiness support for trade relations with China and the need for China's cooperation with non-nuclear proliferation policies toward North Korea led President Clinton to renew China's MFN status and de-link trade from human rights in 1994."¹³ However, the imposition of unilateral economic sanctions cannot be underestimated, as sanctions can contribute to the process of norm definition and internalization on various levels."¹⁴

Sanctions contribute to domestic internalization by incorporating attention to human rights concerns into the political processes of the sanctioning state. They also contribute to transnational internalization by the broader international community by attracting foreign attention to human rights concerns and generating multilateral pressure on the target state. Unilateral action [such as Helms Burton] can thus contribute to the definition and incorporation of rights into the international system.¹⁵

This argument presupposes that economic sanctions can play a broader role in the development of the international system rather than merely seeking to alter a specific state's behavior.¹⁶ Harold Koh asserts:

[T]hat this process occurs through repeat interactions between states and a variety of domestic and transnational actors, which produce interpretations of applicable global norms and ultimately the internalization of those norms into states' domestic values and processes. Rather than focusing narrowly on punitive interactions between states, Koh sees repeated participation in transnational legal processes is the key factor in the move from onetime grudging compliance with international norms to habitual internalized obedience.¹⁷

¹³ *Id.* at 44.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

Unfortunately, foreign policy and global security concerns may mitigate the benefits of this policy towards countries capable of global military destabilization, such as China.

IV. The National Security Dimension

Further support for the overall policy implications of the Helms Burton Act, whose coercive influence attempts to promote and transition Cuba away from the Castro regime and towards democracy, lies in Cuba's hemispheric security threat.

Cuban foreign policy has traditionally insisted on the subversion of democratic institutions in South and Central America through indirect military force and assistance. Many of these threats have been realized, as in the case of Nicaragua. Cuban Armed Forces and military assistance were directly implicated in assisting the Sandinistas to achieve their goals. Cuban foreign policy has consistently advocated the expansion of its socialist ideas worldwide, and has engaged its military in areas as geographically distant as Angola.¹⁸ For approximately 30 years, beginning in the 1960s, Cuba engaged in almost relentless efforts to subvert democratic institutions throughout Latin America.¹⁹ This period ended only with the implosion of the Cuban economy and its inability to secure financing from the former Soviet bloc to modernize its military. In many respects, Cuba behaved and reacted much like a military superpower, wielding its influence wherever and whenever the Soviets beckoned.

It is this behavior that cemented America's resolve to isolate Cuba and deprive it of the vital economic currency it required to sustain and modernize its military. Cuba's subversive efforts were quite costly, and required enormous amounts of direct capital infusion, manpower, and Soviet subsidies to maintain. Beginning with the Cuban missile crisis in the 1960s, the United States realized that its closest neighbor to the South was not only a threat militarily but attempting to acquire nuclear weaponry that could potentially be unleashed against America. American foreign policy regarding Cuba has been a function of this threat for 40

¹⁸ David M. Shamberger, *The Helms-Burton Act: A Legal and Effective Vehicle For Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime*, 21 B.C. INT'L & COMP. L. REV. 497, 497-537 (1998).

¹⁹ Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making A Case for the United States Under the GATT National Security Exception*, 11 FLA. J. INT'L L. 559, 559-584 (1997) [hereinafter Alexander].

years.²⁰ Even today, while not having the wherewithal to engage subversively in remote areas, Cuba's hostile intentions were noted in the downing of two civilian aircraft that briefly migrated into its airspace.²¹ This was known as the Brothers to the Rescue incident.²² Cuba's engagement with many European countries in its efforts to promote tourism have nonetheless inspired no change in its hostility towards the United States, and the Helms Burton act was a direct reaction to the civilian incident.²³

Insofar as Helms Burton continues to isolate Cuba and deprive it of the economic potential to resuscitate its war making capability, Helms Burton and the embargo have been unqualified successes.²⁴ Complete deprivation of the economic inputs required to revive its military capacity must be a unilateral goal of the United States. The fact that our European neighbors do not perceive Cuba as a military threat is a factor and a function of the geographic distance between them and Cuba. Predictably, Cuba is unlikely to engage in remote conflicts requiring vast sums of capital and dramatic subsidies because it lacks an adequate source of funding. This said, however, the Cuban military remains among the most prepared and armed in the Western Hemisphere, and as recently demonstrated, is willing to sacrifice two civilian aircraft to dramatically emphasize this point.²⁵ The overall policy guidelines of Helms Burton evidenced by Title I of the Act must not only remain in place but must be strengthened. Until and unless the Cuban government begins the process of dismantling its offensive capability to a purely defensive posture or demilitarizes altogether, the United States should not undermine the policy guidelines of Title I or of the economic embargo against Cuba.

It has been noted that sanctions may have a number of less tangible but nevertheless desirable effects on the behavior of both the target and other foreign states. As Richard Parker puts it, the failure of sanctions to topple Castro is often cited as support for the inefficacy of economic sanctions employed for high foreign policy purposes. Yet the alert citizen and policymaker might well ask, did sanctions nonetheless weakened Castro's ability to finance counter-revolutionary movements

²⁰ *Id.* at 562.

²¹ *Id.*

²² *Id.*

²³ *See id.* at 563.

²⁴ *Id.* at 562.

²⁵ *Id.* at 563.

in Latin America; did they force the Soviet Union to deplete its own resources subsidizing Castro; and/or did economic sanctions force Castro to liberalize his state run economy more than he otherwise might have done? Did the hardships imposed by sanctions on Cuba serve to deter other countries from choosing the Communist and expansionist path during those years when international communism still had some charisma overseas?²⁶

National security concerns may not seem as prescient given the economic demise of the Cuban economy and its ability to generate conflict, yet similar sanctions have been successfully applied more recently by the United States to Iraq.²⁷ The economic sanctions applied to Iraq were primarily motivated to "undermine Saddam Hussein's grip on power and to ensure that the Iraqi government will give the U.N. special commission charged with eliminating Iraq's weapons of mass destruction unfettered access to disputed sites."²⁸ The United States believes that Hussein is a ruthless dictator who can be constrained only through the implementation of sanctions and threats.²⁹ The same argument can also be raised by the United States against the Cuban regime, which has described Castro as a "ruthless dictator, responsible for carrying out human rights abuses on his own soil and fostering Communist insurgency throughout Central America."³⁰

V. Title III and Property Expropriation

The international outcry over the supposed extraterritorial provisions of the Helms Burton act, namely, Title III are quite defensible within the context of international law and conflict resolution. Castro's confiscation of private property and expropriation of foreigners' property without compensation to its owners became one of the most egregious transgressions of Cuban and international law.³¹ Expropriation of

²⁶ Cleveland, *supra* note 12, at 86.

²⁷ Alexander, *supra* note 19, at 573.

²⁸ *Id.* at 573.

²⁹ *Id.*

³⁰ *Id.*

³¹ Kathleen S. Adams, *Subchapter III of the Helms Burton Act: A Reasonable Assertion of United States Extraterritorial Jurisdiction?* 21 HAMLINE L. REV. 147, 147-80 (1997).

property held by American interests was clearly violative of international laws and standards in effect in the 1960s.³² It is also noted that:

Under traditional principles of sovereignty, the Cuban government's expropriations would have been legal if justified by public purpose and by the payment of prompt, adequate, and effective compensation to the private owner. Under customary international law, an expropriating state acts in clear violation of customary international law if it fails to provide prompt, adequate, and effective compensation to the private owner. An expropriation is also illegal if it "includes interference with the assets of international organizations and taking contrary to promises amounting to estoppels."³³

Additionally, the confiscation of property owned by Cubans clearly violated Cuba's Constitution of 1940, which was still the guiding document of Cuban jurisprudence, though the current dictator, Fulgencio Batista, had effectively usurped the legitimate mechanism of constitutional amendment.³⁴ The 1940 Constitution, though, guaranteed Cuban citizens the right to own and use property without interference from the government and established equitable compensation guidelines when property was otherwise confiscated or appropriated for the public domain.³⁵ These mass expropriations from both American and Cuban interests were gross human rights violations and violated one of the most ancient and time-honored of individual privilege: the notion of property rights.³⁶ Although confiscation of property owned by Cubans was technically not violative of then current international standards, at a minimum these confiscations were violative of the human rights of their owners, especially when motivated by political and social dogma.³⁷ Castro's regime discriminatorily confiscated property from the previous

³² Robert E. Freer, Jr., Presentation For The Fifth Annual Meeting: Association For The Study Of The Cuban Economy, 13 (August 12, 1995) (transcript available at Freer & McGarry, P.C.) [hereinafter Freer].

³³ *Id.* at 11.

³⁴ Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and A Survey of Restitution Schemes For A Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 321-355 (2000) [hereinafter Ortiz].

³⁵ *Id.* at 327.

³⁶ *Id.* at 323.

³⁷ *Id.* at 328.

governments' followers and wielded these confiscations as punishment for domestic political opposition.³⁸

Finally, as a means of punishing the United States for their continued criticism of the regime, Castro enacted laws that forcibly expropriated all U.S. owned businesses and assets in Cuba.³⁹ Effective compensation has never been provided to either Cuban citizens whose properties were confiscated or American interests.⁴⁰ The general rule of compensation is well established and is directly applicable to the Cuban government's confiscations. Under U.S. law, the compensation rule gained informal recognition as the "Hull formula," when U.S. Secretary of State, Cordell Hull, outlined the requirements of prompt, adequate, and effective compensation to the Mexican government during a 1939 dispute over Mexico's nationalization of foreign owned oil fields. The compensation rule is underpinned by a cornerstone of international law, the international minimum standard... which dictates the supremacy of a moral standard of the treatment of aliens over national standards. Although the global community has not reached consensus on the debate, the international minimum standard has gained increasing support throughout the twentieth century, including the support of a majority of states at The Hague Codification Conference and United Nations affirmation through the General Assembly's 1962 Declaration on Permanent Sovereignty over National Resources.⁴¹

Many countries have struggled with the concept of restitution in post autocratic periods. Most recently, the Germans have struggled to implement a mechanism fair to both the current in prior owners. Concepts of restitution are time-honored and well recognized, and Helms Burton and Title III are simply attempts by the United States to begin to codify this restitution and ensure its eventual implementation. Additionally, Title III provides advance notice to the entire world that the the United States, like many other countries, will seek restitution for its citizens when the opportunity arises.⁴² The mere fact that this property was illegally confiscated and does not belong to its current owners should not be in dispute. As noted, restitution schemes have been frequent throughout history, and although controversial, have gained contemporary acceptance.

³⁸ *Id.*

³⁹ *Id.* at 332.

⁴⁰ Freer, *supra* note 32, at 11.

⁴¹ *Id.* at 12.

⁴² *Id.* at 19.

Criticism of Title III is based on its supposed extraterritorial nature, but a literal reading of the Act simply provides nationals of the United States who have had property confiscated by the Cuban government a mechanism for preventing others from trafficking in property that belongs to them, and further provides a remedy in U.S. courts for this trafficking.⁴³ Furthermore, traffickers in confiscated property have no claim against the Cuban government for protection of their interests in expropriated property, nor do they have any viable defense against suits by U.S. nationals. Their precarious position is due to the fact that they cannot claim to be bona fide purchasers. By knowingly and intentionally engaging in joint ventures involving confiscated property, third party traffickers have tainted their own legal status with Cuba's international law violations. Libertad is consistent with international law, which recognizes that effective title cannot properly be transferred; more specifically, international law recognizes that a property interest gained through confiscation cannot properly be transferred.⁴⁴

A proper analogy would indicate that someone who knowingly purchases an item that has been stolen should know that the item is subject to return to its rightful owner and that she is subject to penalties for knowingly purchasing the item.⁴⁵ The supposed extraterritorial effect of this act is simply a failure of international law to codify what is commonly understood.⁴⁶ Key to this understanding is the world communities' recent acknowledgment of Jewish restitution efforts due to the illegal confiscation of property by the Nazis during World War II. Although initially resisted, most governments involved in this restitution effort have acknowledged and validated these restitution schemes. Helms Burton simply attempted to do the same thing and was, as the saying goes, ahead of its time. The policy implications of Title III further the state interests of protecting the property rights of United States nationals and of discouraging international investment in the Cuban economy. This disincentive to invest in Cuban property conforms to the security policy implications of weakening the Cuban economy as a preventive measure to a gradual renewal of the Cuban military. If understood from both the practical and policy implications, Title III should survive scrutiny and be applauded for its attempt to codify a policy that prevents trafficking in stolen property and which will ultimately result in a restitutionary

⁴³ *Id.* at 15.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 3.

scheme. The United States' visionary attempt to establish restitutionary schemes to those that have been deprived of their property in violation of international human rights laws should serve as a model for other international jurisprudential institutions. Global adoption of the policies of Title III would uniformly ensure that "businesses and people throughout the world would have little cause to fear the unlawful confiscation of their property."⁴⁷

Many governments have been critical of Helms Burton out of sheer self-interest, given the realization that the current Castro regime will soon end upon the death to the dictator, and that their investment in Cuba could be jeopardized by any restitutionary scheme crafted to compensate the two largest classes of claimants.⁴⁸ It is estimated that "claims of U.S. nationals alone, as certified by the Foreign Claims Settlement Commission, including only simple interest at a modest rate, now total more than \$6 billion."⁴⁹ This first class of claimants easily outstrips Cuba's ability to provide restitution.⁵⁰ An even bigger class of claimants involves possible restitution to Cubans who fled Cuba and are living abroad, including those who are now Cuban Americans. Criticism of restitutionary schemes that involve this class of claimants has been vocal and fierce.

These arguments ignore the fact that many U.S. citizens of Cuban origin have resided in United States longer than they resided in Cuba, and have been productive, law-abiding members of society. Preventing U.S. citizens of Cuban origin from enjoying the protection afforded by Section 302's cause of action serves no legitimate interest. Allowing such citizens to benefit from Section 302's cause of action, however, advances the foreign policy goals of the Helms Burton Act.⁵¹

Principally, though, any exclusion of this class of claimants would be constitutionally suspect.⁵² "Excluding a class of U.S. citizens from sharing in the benefits of U.S. law on the basis of their national origin violates the equal protection guarantees of the U.S. Constitution."⁵³ Before Helms Burton, Cubans who immigrated to the United States and later became citizens of the United States lacked a forum in which to air their grievances, therefore, the strongest

⁴⁷ *Id.* at 3.

⁴⁸ Ortiz, *supra* note 34, at 340.

⁴⁹ Clagett, *supra* note 5, at 276.

⁵⁰ Ortiz, *supra* note 34, at 344.

⁵¹ Shamberger, *supra* note 18, at 517.

⁵² *Id.* at 516.

⁵³ *Id.*

justification for Title III may be found in the various exceptions to the general rule that a state may not bring an action on behalf of persons who were not its nationals at the time of the confiscation.⁵⁴ States have protected the international rights of persons who were not their nationals by making international agreements and treaties and, particularly applicable in the present context, through diplomatic action based on humanitarian concerns on behalf of nonnationals wronged by another state. These exceptions have come about primarily to mitigate the problems suffered by stateless or displaced persons and refugees.⁵⁵ A stateless person is one who lacks both the nationality of the expropriating state and the nationality of any other state. A refugee or displaced person is an individual who resides outside his own country but who still bears the nationality of that country. Despite the different labels, all of these persons are in essentially the same position; they lack a forum where they can seek compensation from their government. U.S. nationals who were Cuban citizens at the time of the confiscation of their property share the same status as stateless or displaced persons and refugees under international law. Without a country to bring a claim on their behalf, these U.S. nationals lack a forum under international law in which to seek compensation for their loss.⁵⁶

The massive economic and social upheaval created by these restitution schemes could undermine the viability of any post-Castro government, given the potential for social unrest and economic destabilization.⁵⁷ While not as serious in dollar value, potential investment losses by foreign countries to these restitution schemes are in the billions of dollars. The potential loss of this investment capital may be a catalyst in igniting current criticism of Helms Burton. Many countries and their citizens stand to lose substantial amounts of capital and investment were such restitution schemes to be implemented in the future. Fierce criticism of Helms Burton is simply a predictor of the potentially serious international economic and political crises that could develop between those countries investing heavily in Cuba and the U.S. owners of expropriated and confiscated Cuban property. In order to avert this crisis and ensure Cuba's successful transition to democratic governance and a market-based economy, efforts should be initiated to minimally develop the outlines of a restitutionary scheme.⁵⁸

⁵⁴ Azel, *supra* note 1, at 717-18.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Ortiz, *supra* note 34, at 336.

⁵⁸ *Id.* at 336.

As a measure of U.S. foreign policy, Title III has been highly effective in "stifling Cuba's economic growth and has twisted the Castro regime to the brink of financial ruin."⁵⁹ Furthermore, "when compiling a cost benefit analysis and assessing the potential profits of doing business in Cuba, future investors must consider Helms Burton and its potential to mitigate profits by producing extraneous administrative burdens, subjecting the company to costly litigation, or affecting crucial trade relations with the U.S."⁶⁰ These considerations carry, by design, foreign policy and retaliatory implications to the trafficking state or actors. Extraterritorial critiques of Helms Burton are much less viable when viewed through this prism, especially since the supposed extraterritorial provisions of Helms Burton have in fact never been implemented.⁶¹ The extraterritorial provisions of Helms Burton remain bargaining tools, whose design may carry out foreign policy objectives in an indirect fashion in ways that the United States could not do directly. The creators of Helms Burton may have realized the far-reaching foreign policy implications, in spite of the continued suspension of the relevant provisions of the act.⁶² These implications have successfully furthered the foreign policy goals of the United States government for over 40 years towards Cuba, that of isolating and destroying the Cuban economy and undermining its government. While these objectives may remain controversial throughout the United States, they remain unchanged by the current administration, and therefore, valid U.S. policy.

VI. The European Union, The World Trade Organization and Title IV

The provisions of Title IV of the Helms Burton Act are among those in which the United States has traditionally remained unassailable on. These provisions "exclude from entry into the United States any foreign person, or family member thereof, who has benefited from the use of expropriated property."⁶³ These provisions are among the most defensible of any of the Helms Burton provisions, because the right of a state to regulate its borders in any way it deems necessary is well accepted. The Supreme Court of the United States has repeatedly held

⁵⁹ Bernadette Atuahene, *The Effectiveness Of International Legislative Responses To The Helms-Burton Act*, 69 REV. JUR. U.P.R. 809, 819 (2000).

⁶⁰ *Id.* at 819.

⁶¹ *Id.* at 817-18.

⁶² *Id.* at 818.

⁶³ Alexander, *supra* note 19, at 565.

that the federal power to exclude aliens “is an incident of national sovereignty” and that it is “the role of the federal government to oversee matters of national concern.”⁶⁴ The provisions of Title IV, should withstand legal scrutiny both domestically and abroad, though soundly criticized by U.S. allies in Europe. Title IV’s applicability has been affected by recent developments and understandings reached by the United States and its European allies, as discussed below.

President Bush has again suspended the Title III provisions, which continues the policy of his predecessor, Bill Clinton.⁶⁵ This decision was again justified by the need to placate American’s European allies, who would have pressed the issue before the World Trade Organization.⁶⁶ The European Union would likely have instigated a formal complaint before the World Trade Organization had Mr. Bush not invoked the waiver in July of 2001.⁶⁷ The waiver was the result of an understanding reached at the EU/US Summit on May 18, 1998, which was based on the April 1997 Understanding.⁶⁸ The Understanding has several components. The first of these:

[C]ontains a clear commitment on the part of the U.S. administration to seek from Congress the authority to grant a waiver from Title IV of Helms Burton Act (visa restrictions) without delay. With respect to Title III (submission of law suits against trafficking in expropriated property) of the Helms Burton Act, the Understanding provides for a U.S. commitment to continue to waive the right to file lawsuits, so far done on a six monthly basis and to obtain such a waiver on a permanent basis. It also addresses the issue of whether or not EU and U.S. investment assistance agencies should give assistance to investment projects in illegally expropriated property. However, the EU will not apply the disciplines until the waiver authority is applied.⁶⁹

⁶⁴ DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 55 (4th ed. 1998).

⁶⁵ *Helms Burton Waiver Extended; Bush Opts To Avoid Conflict With European Allies*, LATIN AMERICA REGIONAL REPORTS: CARIBBEAN & CENTRAL AMERICA, August 21, 2001.

⁶⁶ *Id.*

⁶⁷ Jim Lobe, *Politics-U.S. Cuba Relations Frozen In Cold War Hostility*, INTER PRESS SERVICE, July 17, 2001.

⁶⁸ Report On United States Barriers To Trade And Investment, EUROPEAN COMMISSION (2001).

⁶⁹ *Id.* at 8.

The second major element of the Understanding is that the U.S. will seek to restrain its use of secondary boycotts and unilateral sanctions. The Understanding also makes clear that the EU still considers Helms-Burton illegal, and reserves the right to resume its case before the World Trade Organization should U.S. sanctions be forthcoming or the waivers not materialize.⁷⁰ This compromise, albeit temporary, resolves a possibly contentious dispute involving the World Trade Organization, and allows both parties to declare a partial victory. The United States succeeds in involving the EU in identifying and denying aid to investment projects involved with expropriated properties, and the EU receives a waiver of the Title IV provisions.⁷¹

Finally, the United States avoids a diplomatically sensitive confrontation with the World Trade Organization. If pressed by the World Trade Organization, the United States would almost certainly have invoked the national security exception, Article XXI, of the General Agreement on Tariffs and Trade (GATT).⁷² "Pursuant to this exception, a contracting party can escape its obligations under the agreement and take any action that it considers necessary for the protection of its essential security interests in time of war or other emergency in international relations."⁷³ Security interests are inherently self-defining, and states have nominally taken the position that their definition is unassailable.⁷⁴ The EU therefore would ultimately prefer not to challenge the U.S. implementation of this exception, since they too may need to avail themselves of its powerful and sweeping language.⁷⁵ This exception is crucial to the maintenance of agreements such as GATT, because they provide a measure of flexibility, without which, most nations would not participate.⁷⁶ It stands to reason that avoiding a challenge to the U.S. implementation of the security exception was in the interests of all parties involved, since they too might need to avail themselves of its benefits, and ultimately led to the agreement reached. Thus, the GATT security exception remains a viable, if not manipulative, means of

⁷⁰ *Id.* at 8.

⁷¹ *Id.*

⁷² Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 414 (2001).

⁷³ *Id.* at 415.

⁷⁴ *Id.* at 417.

⁷⁵ *Id.*

⁷⁶ *Id.*

creating flexibility within the GATT agreement.⁷⁷ Self-definition by states of their security requirements remains the norm.

VII. Conclusion

The United States continues to achieve foreign policy goals through the Helms Burton legislation. While many of the provisions of the Act are controversial, unilateral, and perhaps extraterritorial, most of the onerous provisions have been continuously delayed, waived or never implemented. Thus, the Act, by its mere existence, has indirectly achieved what it could not do directly, that of isolating and undermining the Castro regime and preventing an influx of foreign investment. By itself, the Act will not topple the Castro dictatorship, but will continue to isolate the regime and create a hostile climate for its existence. Should foreign policy goals and objectives change towards the Castro regime, the Act could quietly be repealed and its non-enforceable provisions would evaporate as a footnote to American legislative history. Helms Burton has encouraged new, non-violent methods of enforcing foreign policy mandates and created a growing awareness of the consequences of property confiscations worldwide. These egregious acts have consistently been deemed throughout history as the manifestations of sovereign entities, mostly occurring with impunity and little or no accountability to the dispossessed. Forging accountability often requires bold action and leadership, which the United States has, to the displeasure of many, once again provided. History may bear witness that the United States helped initiate a regime of worldwide accountability and discourse over these issues.

⁷⁷ *Id.*

