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

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INTRODUCTION

On February 9, 1995, U.S. Senator Jesse Helms (R-North Carolina) and U.S. Representative Dan Burton (R-Indiana) co-sponsored the Cuban Liberty and Democratic Solidarity Act of 1995 (Helms-Burton Act).\(^1\) Designed to discourage foreign investment in Cuba and to hasten the demise of Fidel Castro’s communist regime, the Helms-Burton Act set out:

(1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western hemisphere;
(2) to strengthen international sanctions against the Castro government;
(3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;
(4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;
(5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and
(6) to protect United States nationals against confiscatory

takings and the wrongful trafficking in property confiscated by the Castro regime.\(^2\)

The Helms-Burton Act is comprised of four broad titles dealing with different aspects of U.S. relations with Cuba.\(^3\) Title I contains provisions aimed at tightening the economic embargo against Cuba.\(^4\) These provisions include a prohibition on the importation and commercial exchange of merchandise that has been transported, located, or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba; a denial of foreign aid to independent states of the former Soviet Union found to be providing support for military and intelligence facilities located in Cuba; a prohibition against indirect financing of Cuba; and opposition to Cuban membership in international financial institutions.\(^5\) Title II outlines future U.S. policy toward Cuba upon the demise of Castro’s communist regime.\(^6\) More specifically, Title II deals with U.S. policy toward a transition government and an eventual democratically elected government in Cuba; assistance for the Cuban people; coordination of assistance programs; termination of the economic embargo of Cuba; and settlement of outstanding U.S. claims to confiscated property in Cuba.\(^7\) Title III, the most controversial provision of the Helms-Burton Act, states that “any person that . . . traffics in property which was confiscated by the Cuban government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages.”\(^8\) Lastly, Title IV provides for the exclusion from the United States

\(^2\) Id. § 3, 110 Stat. at 788-89.
\(^3\) See id. 110 Stat. at 785-86.
\(^5\) See id.
\(^7\) See id.
\(^8\) See id. tit. III, § 302(a)(1), 110 Stat. at 815. Damage awards under Section 302 are calculated as follows:

SEC. 302. LIABILITY FOR TRAFFICKING IN CONFISCATED PROPERTY CLAIMED BY UNITED STATES NATIONALS.

(a) CIVIL REMEDY.

(1) LIABILITY FOR TRAFFICKING.

(A) . . . money damages in an amount equal to the sum of:

(i) the amount of which is the greater of:

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest;

(II) the amount determined under section 303(a)(2), plus interest; or

(III) the fair market value of that property, calculated as being either the current value
of aliens who have confiscated property of U.S. nationals or who traffic in such property.9

Opponents of the Helms-Burton Act have been especially critical of Titles III and IV of the Act.10 Creating a cause of action for U.S. nationals against those individuals or corporations trafficking in confiscated property, opponents charge, amounts to unreasonable extraterritorial legislation since the act of trafficking occurs entirely outside the United States.11 In addition, opponents claim that this provision will lead to an unmanageable flood of litigation: the claims of approximately 5,911 U.S. companies and individuals to property seized by the Castro government during the 1959 revolution total about $6 billion.12 Similarly, opponents claim that Title IV’s provision denying visas to executives of corporations trafficking in confiscated property, as well as their families and agents, represents an unacceptable extension of U.S. law.13 Despite vocal opposition to the bill, President Clinton signed

9 See id. tit. IV, § 401, 110 Stat. at 822–24. In relevant part, Title IV, Section 401 states:

(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 had 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;

(2) traffics in confiscated property, a claim to which is owned by a United States national;

(3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or

(4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).


12 See George Stuteville, Clinton to Re-Examine Helms-Burton Provision, INDIANAPOLIS STAR, Dec. 9, 1996, at A01.

the Helms-Burton Act into law on March 12, 1996, in the aftermath of Cuba's brutal attack on two unarmed U.S. civilian aircraft over international waters which resulted in the deaths of four anti-Castro Cubans living in Florida.\textsuperscript{14} President Clinton, however, conditioned his enactment of the law upon the inclusion of a provision in the bill which would enable him to suspend the implementation of Title III's creation of a cause of action against those individuals and corporations trafficking in confiscated property.\textsuperscript{15} Hence, Title III, Section 306, of the enacted law empowers the President to suspend the effective date of Title III's cause of action provision if he determines that the suspension is necessary to U.S. national interests and will expedite the rise of democracy in Cuba.\textsuperscript{16} As the expiration of the initial suspension neared, President Clinton opted to utilize Section 306 to suspend the implementation of the Title III cause of action for an additional six months. President Clinton conditioned this suspension upon continued efforts by U.S. allies to promote democracy and human rights in Cuba.\textsuperscript{17}

The Cuban government's confiscation of a sizable amount of property belonging to U.S. nationals, as well as Cuban citizens, during the first decade of the Cuban Revolution has never been directly addressed by the U.S. government, which has opted instead to use economic pressure tactics.\textsuperscript{18} The Helms-Burton Act represents a principled, unwavering stance against Cuba's illegal seizure of U.S. property, a clear

\textsuperscript{15} See John F. Harris, \textit{Clinton Delays Effect of Cuba Lawsuit Act; Battle With Trading Partners Averted}, \textit{WASH. POST}, July 17, 1996, \textit{available in LEXIS}, Intlaw Library, Currents File. "President Clinton decided yesterday that averting a confrontation with U.S. trading partners was more important than imposing sanctions on foreign firms operating in Cuba. He delayed by at least six months the effective start of a new law that leaves such businesses open to lawsuits in federal courts." \textit{Id.}
\textsuperscript{16} See Helms-Burton Act, 110 Stat. at 821-22. Title III, Section 306(b)(2) states:

\begin{quote}
The President may suspend the effective date under subsection (a) for additional periods of not more than 6 months each . . . if the President determines and reports in writing to the appropriate congressional committees at least 15 days before the date on which the additional suspension is to begin that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.
\end{quote}

\textit{Id.}

\textsuperscript{17} See Susan Riggs, \textit{Will Obscure Canadian Law Bring U.S. Policy to Heel?; Ottawa Fights U.S. Ban on Trading With Cuba}, \textit{BALTIMORE SUN}, Jan. 5, 1997, at 5F.
\textsuperscript{18} See Ratchik, \textit{supra} note 11, at 344-47.
 violation of international law, and punishes those individuals and corporations who are currently reaping benefits from this stolen property. In addition, the Helms-Burton Act, with its strengthening of the U.S. embargo against Cuba, seeks to accelerate the demise of Fidel Castro's regime which has blatantly violated basic human rights and has adamantly opposed any form of democracy. Despite its goals of protecting U.S. property interests abroad, upholding human rights in Cuba, and accelerating the advent of democracy in Cuba, the Helms-Burton Act has been heavily criticized by members of the international community.

Part I of this Note provides a brief history of Cuba's expropriation of U.S. property. Part II discusses both the intended and unintended effects that the Helms-Burton Act has had upon Cuba. Part III explores international reaction to the Act. Part IV provides an in-depth analysis of the Helms-Burton Act, focusing specifically on its constitutionality, its validity under international law, and its consistency with U.S. trade agreements. This Note concludes that the Helms-Burton Act is both a legal and effective vehicle for redressing U.S. property claims, bringing an end to Castro's human rights abuses, and expediting the rise of democracy in Cuba.

I. HISTORY OF CUBA'S EXPROPRIATION OF U.S. PROPERTY IN CUBA

With Fidel Castro's rise to power in 1959 came a fundamental shift in the Cuban economy from capitalism to communism. Early in the Castro years, Cuba and the Soviet Union developed a relationship of comradery and cooperation. Initially, Communist party members gradually assumed government positions. Next, Cuba and the Soviet Union completed their first commercial transaction in 1960 when Cuba received Soviet oil in exchange for sugar. In addition to becoming one of Cuba's trading partners, the Soviet Union provided Cuba

19 See id. at 346.
20 See id. at 372–73; see also Lucio, supra note 10, at 326.
22 See Bourque, supra note 13, at 195–96; Ratchik, supra note 11, at 344.
23 See Bourque, supra note 13, at 196.
24 See id.
25 See id.
with "low credit loans, technical advancements, and a steady supply of crude and refined petroleum." 26

As Cuba's relationship with the Soviet Union improved, the United States' relations with Cuba gradually deteriorated. 27 With the adoption of the Fundamental Law of the Republic, the Cuban Government established a statutory basis for its confiscatory measures. 28 Under the redistributive Agra Reform Law (LRA), foreign property owners lost their land to the Cuban government which in turn divided the property into "small and medium-size farms, co-operatives, and special development acreages." 29 After these confiscations, the United States expressed its concern that such takings must be coupled with the corresponding payment of "prompt, adequate, and effective compensation." 30

U.S.-Cuba relations deteriorated even further when, beginning on October 26, 1959, the Cuban government adopted legislation which required the re-registration of mining claims, and passed a new petroleum law. 31 In addition, on May 17, 1960, upon the refusal of U.S.-owned oil refineries to follow Cuban demands and process Soviet oil, the Cuban government seized the refineries. 32 In retribution, the U.S. Congress amended the Sugar Act of 1948, thereby vesting in the President authority to establish a Cuban sugar quota. 33 Before President Eisenhower could announce his decision to suspend Cuba's sugar quota, however, the Cuban government authorized the expropriation of U.S.-owned property. 34 This decree represented a clear violation of

26 See id.
27 See Ratchik, supra note 11, at 345.
28 See id. at 344.
29 See id. at 344-45 & n.15.
30 See id. at 345 & n.17.
31 See id. at 345.
32 See Ratchik, supra note 11, at 346. This confiscation episode involved a Texaco company refinery. One of Texaco's refineries located in Cuba refused to refine oil received from the Soviet Union. In response, the Cuban Government confiscated all of the company's assets located on the island. In addition, the Cuban Government took over the assets of Esso and Shell companies the next day. See Bourque, supra note 13, at 196 & n.28, citing ROBERT E. QUIRK, FIDEL CASTRO: THE FULL STORY OF HIS RISE TO POWER, HIS REGIME, HIS ALLIES, AND HIS ADVERSARIES 209, 318-19 (1993).
33 See Ratchik, supra note 11, at 346. This confiscation episode involved a Texaco company refinery. One of Texaco's refineries located in Cuba refused to refine oil received from the Soviet Union. In response, the Cuban Government confiscated all of the company's assets located on the island. In addition, the Cuban Government took over the assets of Esso and Shell companies the next day. See Bourque, supra note 13, at 196 & n.28, citing ROBERT E. QUIRK, FIDEL CASTRO: THE FULL STORY OF HIS RISE TO POWER, HIS REGIME, HIS ALLIES, AND HIS ADVERSARIES 209, 318-19 (1993).
34 See id. at 346. In Proclamation No. 3355, President Eisenhower reduced Cuba's remaining sugar quota from 739,752 tons to 39,752 tons. See id. at 346 n.26, citing Proclamation No. 3355, 25 Fed. Reg. 6414 (1960). In a calculated move, Castro amended "Article 24 of the Cuban Constitution to allow for confiscation 'by competent authority' and for a cause of 'national interest'" one day before the enactment of the expropriation decree. See id. at 346 n.27. In
international law with respect to the taking of property. Despite vocal U.S. opposition to the expropriation decree, on October 13, 1960, the Cuban government enacted two more confiscatory measures aimed at expropriating the remaining significant foreign-owned businesses and some Cuban companies.

Faced with blatant aggression toward U.S. property interests in Cuba, Congress responded by enacting the Foreign Assistance Act of 1961, which empowered the President to impose an economic embargo against Cuba. Coupled with the economic embargo, the Cuban Assets Control Regulations hindered Cuba's ability to access its assets located in the United States and prohibited U.S. citizens and corporations from maintaining business relationships with Cuba. Lastly, Congress attempted to ascertain U.S. property claims against Cuba and allowed U.S. nationals to bring such property claims against the Cuban government under the amended International Claims Settlement Act of 1948. Cuba, however, never compensated any of the claimants. By the end of 1962, the U.S. stance toward Cuba had shifted from that of trading partner and political ally to that of economic and political enemy.

The severing of political and economic ties with the United States coupled with a struggling economy had grave consequences for Cuba. Deprived of U.S. machinery and supplies for transportation, mining, communications, and utilities, Cuban businesses, unable to obtain replacement parts and deprived of vital U.S. raw materials, floundered. While Cuban economic production dwindled, the United States remained steadfast in its isolationist policy toward Cuba since lifting the embargo in any way would have been interpreted as a weakness of U.S. resolve in the eyes of Marxist-Leninist regimes in Latin America. Cuba's worries did not end here. Under U.S. pressure, the Organiza-

Justifying its enactment of the expropriation decree, the Cuban Government cited "economic and political aggression on the part of the United States" as its motivation for adopting the expropriating measure." See id.

35 See id. at 346.
36 See id. at 347.
37 See id.
38 See Ratchik, supra note 11, at 347.
39 See id.
40 See id.
41 See Bourque, supra note 13, at 197.
42 See id. at 198.
43 See id.
44 See id.
tion of American States (OAS) expelled Cuba from its membership, thereby creating a regional trade boycott of Cuba by all Latin American countries with the exception of Mexico. 45

In the 1970s, U.S.-Cuba relations continued to deteriorate when, contrary to U.S. opposition, Cuba intervened in Angola. 46 Consequently, the United States instituted a strict travel ban against Cuba, effectively ceasing all foreign trade with the Cuban economy. 47 During his two-term administration, President Reagan employed stringent policies to frustrate Cuban debt negotiations, urged U.S. corporations located abroad to avoid trading with Cuba, and called upon U.S. nationals to refrain from sending supplies and other items to Cuba. 48

II. EFFECTS OF THE HELMS-BURTON ACT

Since its enactment, the Helms-Burton Act has affected Cuba in both intended and unintended ways. 49 As intended, the Helms-Burton Act has already begun to stem the tide of investment and financial assistance to Cuba. 50 Despite President Clinton’s suspension of Title III, threats of lawsuits and sanctions under Helms-Burton have inflicted major blows to Cuba’s economy. 51 U.S. Undersecretary of Commerce Stuart E. Eizenstat pointed out that on at least twelve occasions, activities on confiscated property have come to abrupt halts out of fear of legal action. 52 Foreign companies have become astutely aware of the implications of occupying, dealing in, or profiting from confiscated properties. 53 This recognition was evidenced by two Spanish firms involved in tobacco marketing and hotels that notified the U.S. State Department that their respective businesses did not involve disputed U.S. properties. 54

45 See id.
46 See Bourque, supra note 13, at 199.
47 See id.
48 See id.
50 See Stuteville, supra note 12, at A01.
51 See id.
52 See Stanley Meisler, Clinton Extends His Suspension of Anti-Castro Law Another 6 Months; Caribbean: President Says Allies’ Own Pressure On Cuba Justifies Postponing Permission For Americans To Sue Foreign Firms Doing Business There, L.A. TIMES, Jan. 4, 1997, at A6. Eizenstat cited the decision of the Mexican-owned company CEMEX, one of the world’s largest cement companies, to withdraw an investment from Cuba. See id.
53 See Stuteville, supra note 12, at A01.
54 See id.
In addition, several European banks have decided to withdraw loans to Cuba, effectively depriving Cuba of the necessary capital to harvest its sugar crops—"a critical component of the country's economy."\(^{55}\) Numerous countries simply have reconsidered their intentions to invest in Cuba.\(^{56}\) For instance, the Dutch bank ING and Spanish firm Banco Bilboa Vizcaya recently withdrew financing packages totalling nearly $60 million a year.\(^{57}\) Furthermore, two European countries that sell both Cuban sugar and sweeteners derived from it have terminated all business relations with Cuba and have notified the U.S. State Department.\(^{58}\)

Thus far, the United States has sanctioned only two companies under the Helms-Burton Act.\(^{59}\) The United States denied the principals of the Sherritt International Corporation, a Canadian mining company, and their immediate families, permission to enter the country, in response to the corporation's operation of a nickel mine previously owned by Freeport-MacMoran Inc., of New Orleans.\(^{60}\) The United States imposed the same punishment on the Mexican telecommunications conglomerate Grupo Domos for using Cuban properties formerly owned by the ITT Corporation.\(^{61}\) The U.S. government meted out both of these penalties under Title IV of the Helms-Burton Act.\(^{62}\)

The Helms-Burton Act has adversely affected Cuba, inflicting increasing economic pressure on an already struggling economy.\(^{63}\) The pool of potential lending institutions as well as previously reliable capital sources has grown smaller in light of potential sanctions under Helms-Burton.\(^{64}\) In this respect, Helms-Burton has curtailed the Cuban government's ability to undertake new educational, infrastructural, and health projects.\(^{65}\) These new economic hardships created by Helms-Burton threaten to jeopardize the "social contract" that "holds

\(^{55}\) See id.
\(^{56}\) See id.
\(^{57}\) See id.
\(^{58}\) See Stuteville, supra note 12, at A01.
\(^{59}\) See id.
\(^{60}\) See Arthur Golden, Accounts Receivable After 37 Years, U.S. Says Cuba Owes Americans $5.6 Billion U.S. Claims Against Cuba for Seized Property Amount to Almost Four Times Cuba's Annual Export Earnings, SAN DIEGO UNION-TRIBUNE, Sept. 22, 1996, at I-1.
\(^{61}\) See id.
\(^{62}\) See Stuteville, supra note 12, at A01.; see also Helms-Burton Act, 110 Stat. at 822-24.
\(^{64}\) See id.
\(^{65}\) See id.
the Cuban government responsible for health, education, housing, and food in return for the citizens’ loyal support. 66 Such a rift between the Cuban government and the citizenry is exactly what Helms-Burton envisaged as a way of bringing an end to the Castro regime. 67

On the other hand, the Helms-Burton Act has seemingly had some unintended effects. 68 According to John Kavulich, chairman of the independent and non-partisan U.S.-Cuba Trade and Economic Council in New York, Cuba has obtained the necessary funding for its sugar harvest activities from other sources. 69 Kavulich claims that none of the 5,911 businesses and corporations entitled to bring claims under Helms-Burton have indicated an intent to do so. 70 For the time being, Cuba’s socialist economy has prevented the Act’s impact from being felt by average Cubans. 71 Thus far, critics claim that the tightening of the U.S. trade embargo on Cuba has neither made rationed goods scarcer, nor the exorbitant prices of goods sold exclusively for U.S. dollars higher. 72 Although critics claim that the current hardships of Cuban citizens have not created widespread discontent with Castro’s government, it is important to note that citizens are wary of openly discussing such problems under an authoritarian regime that censors the press, restricts access to the ballot boxes, and harshly punishes its critics. 73

III. INTERNATIONAL AND DOMESTIC REACTION TO THE HELMS-BURTON ACT

A. International Reaction to Helms-Burton

Shortly after the passage of the Helms-Burton Act, U.S. allies around the globe expressed their opposition to the Act. 74 These countries and organizations have responded to Helms-Burton in various ways. 75 The

66 See id.
67 See id.; Helms-Burton Act, § 3(1), 110 Stat. at 788–89.
68 See Stuteville, supra note 12, at A01.
69 See id.
70 See id.
71 See Diane Bartz, Cubans Face New Year, Old Embargo and Familiar Hardships, ORLANDO SENTINEL, Jan. 5, 1997, at G5.
72 See id.
73 See id.
75 See id.
remainder of this sub-section addresses their concerns and countermeasures.

1. United Nations (U.N.)

On November 12, 1996, the U.N. General Assembly demonstrated the widespread opposition to Helms-Burton when it overwhelmingly approved a resolution urging the United States to end its 34-year embargo against Castro's regime. The vote, 138-3 with 25 abstentions, called upon the United States to repeal Helms-Burton and to end the embargo. Only Israel and Uzbekistan joined the United States in voting against the resolution.

2. The European Union (EU)

The EU, an influential voting bloc within the U.N., has been considerably more critical of Helms-Burton and has taken measures to prevent its full implementation. First, the EU convinced the World Trade Organization (WTO) dispute settlement panel to examine the validity of the Helms-Burton Act under international free trade laws. While not challenging the aim of Helms-Burton to foster democracy in communist-ruled Cuba, European officials informed the WTO that they objected to the U.S. practice of using U.S. laws against non-U.S. firms to impose its will on other countries.

In April 1997, the EU suspended its WTO case against Helms-Burton, but threatened to reinstate the action if it could not reach an agreement with the United States by October 15, 1997. Although the EU has yet to reinstate the WTO case, if it were to proceed, the

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77 See id.; Jensen, supra note 21, at 56A.
78 See Jensen, supra note 21, at 56A.
79 See Myers, supra note 21, at A6; Stuteville, supra note 12, at A01.
80 See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 38 (1995). "With respect to the governance of the GATT, a World Trade Organization (WTO) has been created to oversee an integrated dispute settlement regime and to undertake a pro-active trade policy surveillance role. In addition, membership of the WTO now entails commitment to most of the GATT codes, which are fully integrated into the GATT/WTO, and no longer operate on a conditional MFN basis." See id.
81 See Stuteville, supra note 12, at A01.
82 See Mark Tran, Europe Takes US To Court Over Cuba, GUARDIAN, Nov. 21, 1996, available in LEXIS, Intlaw Library, Curnws File; Jensen, supra note 21, at 56A.
United States would in all likelihood prevail, especially if the Clinton administration invoked the national security exemption, which allows a country to ignore global free trade rules for reasons of national security. Use of this exemption would permit the United States to disregard the pending WTO decision. The EU believes that use of this exemption will set an unhealthy precedent for nations wishing to circumvent WTO rulings. Suspicious of bureaucrats in Geneva making unfavorable rulings against its enacted legislation, Congress will certainly support the Administration's efforts to bring Helms-Burton within the national security exemption.


Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
   (i) relating to fissionable materials or the materials from which they are derived;
   (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
   (iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Id. At the Third Session (1949) of the Preparatory Committee, it was stated that "every country must be the judge in the last resort on questions relating to its own security." GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 554-56 (6th ed. 1994) [hereinafter GATT INDEX] (quoting GATT, CP.3, SR.22, Corr. 1). The question of whether and to what extent the GATT signatory nations could review the national security reasons for measures taken under Article XXI was discussed in the GATT Council in May and July 1985 in relation to the U.S. trade embargo against Nicaragua which had taken effect on May 7, 1985. Id. at 555 & n.9. (quoting C/M/188, pp. 2–16; C/M/191, pp. 41–46). The Panel noted that, while both parties to the dispute agreed that the United States, by imposing the embargo, had acted contrary to certain trade-facilitating provisions of the GATT, they disagreed on the question whether the non-observance of these provisions was justified by Article XXI(b)(iii). The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the GATT, it could find the United States neither to be complying with its obligations under the GATT nor to be failing to carry out its obligations under that Agreement. See id.; Finlay Lewis, Anti-Castro Fervor Leaves Washington Dangerously Isolated, SAN DIEGO UNION-TRIBUNE, Nov. 30, 1996, at A–31.

85 See Tran, supra note 82.
86 See id.
87 See id.
In addition to filing its grievance with the WTO, the EU has taken retaliatory measures. Specifically, the EU has adopted retaliatory legislation instructing EU companies to ignore the Helms-Burton Act if their interests are threatened by compliance with the law. This legislation also allows EU companies to bring counterclaims in European courts to recover any financial penalties resulting from lawsuits brought under Helms-Burton.

Lastly, consistent with its approval of Helms-Burton's aims, the EU passed a resolution urging Cuba to improve its policies on human rights and political freedoms. This legislative action, however, appears to have been motivated more by political and economic interest than by bona fide concern for human rights abuses within Cuba. For instance, while the EU called for "a peaceful transition to a pluralist democracy, respect for human rights, and fundamental freedoms in Cuba," it never indicated that trade and investment with Cuba would be conditional upon advancements in these areas. In essence, with the passage of this resolution, the EU provided President Clinton with a necessary pretext to suspend the implementation of the Title III cause of action provision for six months.

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88 See Myers, supra note 21, at A6.
90 See id.
91 See Myers, supra note 21, at A6. The EU resolution warned that its cooperation with Cuba in business and trade matters depended on "improvements in human rights and political freedom." Id. In addition, the EU called for the release of political prisoners and reforms in Cuba's criminal codes. See id. Lastly, the EU indicated that its members would increase their support for opposition groups within Cuba. See id.
92 See Meisler, supra note 52, at A6.
93 Id.
94 See Myers, supra note 21, at A6. In pertinent part, Title III, Section 306(b) of the Helms-Burton Act provides:

(b) SUSPENSION AUTHORITY.

(1) SUSPENSION AUTHORITY. The President may suspend the effective date under subsection (a) for a period of not more than 6 months if the President determines and reports in writing to the appropriate congressional committees at least 15 days before such effective date that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.

(2) ADDITIONAL SUSPENSIONS. The President may suspend the effective date under subsection (a) for additional periods of not more than 6 months each, each of which shall begin on the day after the last day of the period during which a suspension is in effect under this subsection, if the President determines and reports in writing to the appropriate congressional committees at least 15 days before the date on which the
3. Canada

One of the Helms-Burton Act’s greatest critics has been Canada.95 For the most part, Canada adamantly opposes Helms-Burton because of "principle, profits, and the broader issue of American hegemony."96 Like the EU, Canada passed retaliatory legislation in response to Helms-Burton.97 The newly-enacted "blocking" orders outlaw judgments handed down under Helms-Burton.98 Under the "blocking orders," Canadians sued under Helms-Burton can file counterclaims in Canadian courts to recover damages awarded by U.S. courts.99

In 1985, Canada passed the Foreign Extraterritorial Measures Act (FEMA) in order to mitigate the effects of the U.S. embargo against Cuba.100 As opposition to U.S. policy toward Cuba has grown, Canada may finally implement FEMA, which would undermine the embargo by making it illegal for Canadian companies to refuse to trade with Cuba.101 FEMA specifically targets Canadian subsidiaries of U.S. companies.102

Under FEMA, Canadian subsidiaries of U.S. companies would have to inform the Canadian government if their U.S. head offices ordered them to decline investment in Cuba.103 Implementation of the law would essentially force subsidiaries to decide between defying their parent companies or facing a $10,000 fine or five year prison term imposed by the Canadian government.104 Hence, FEMA coerces companies "to defy U.S. foreign policy and punishes them if they do not."105

While on the surface FEMA appears to be a strong counter-measure to Helms-Burton, it falls far short of really binding Canadian subsidiaries of U.S. companies.106 Thus far, subsidiaries have evaded the pen-

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95 See Riggs, supra note 17, at 5F.
96 See id.
98 See Riggs, supra note 17, at 5F.
99 See id.
100 See id.
101 See id.
102 See id.
103 See Riggs, supra note 17, at 5F.
104 See id.
105 See id.
106 See id.
alties under FEMA by "citing 'other' reasons for non-involvement with Cuba."107 In this respect, Canadian subsidiaries are essentially immune to FEMA's provisions since the Canadian government has no effective means of ascertaining the real motivations behind the business decisions of these companies.108

Moreover, Canada has charged the United States with violating its obligations under the North American Free Trade Agreement (NAFTA).109 While it is clear that NAFTA created mechanisms that may provide critics of Helms-Burton with access to arbitral resolution of their claims, including the claim that Title III violates customary international law,110 the U.S. statement of administrative action accompanying NAFTA explicitly stated that U.S. accession to NAFTA did not modify or alter the U.S. sanctions against Cuba.111 Specifically, Canada has charged the United States with violating the liberalized regime for business immigration under Chapter 16 of NAFTA.112

107 Id.
108 See Riggs, supra note 17, at 5F.
109 See Lowenfeld, Congress and Cuba, supra note 74, at 432.
111 See Helms-Burton Act, tit. I, § 110, 110 Stat. at 800. The statement of administrative action accompanying that trade agreement specifically states the following:

(1) "The NAFTA rules of origin will not in any way diminish the Cuban sanctions program . . . . Nothing in the NAFTA would operate to override this prohibition."
(2) "Article 309(3) [of the NAFTA] permits the United States to ensure that Cuban products or goods made from Cuban materials are not imported into the United States from Mexico or Canada and that United States products are not exported to Cuba through those countries."


Article 1603: Grant of Temporary Entry
1. Each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603.
2. A Party may refuse to issue an immigration document authorizing employment to a business person where the temporary entry of that person might affect adversely:
   (a) the settlement of any labor dispute that is in progress at the place or intended place of employment; or
   (b) the employment of any person who is involved in such dispute.
3. When a Party refuses pursuant to paragraph 2 to issue an immigration document authorizing employment, it shall:
   (a) inform in writing the business person of the reasons for the refusal; and
   (b) promptly notify in writing the Party whose business person has been refused entry
In addition to its opposition to Helms-Burton’s effect on non-U.S. companies, Canada has opposed the Act because of its disagreement with the United States’ economic strangulation approach. Instead, Canada believes that “nurturing economic, political, and educational ties between Cuba and Canada” would better serve the livelihood of the Cuban people and the promotion of democracy. As the world has seen in places like Eastern Europe, the Soviet Union, China, Korea, and Taiwan, however, promoting change through engagement can be effective, but often requires a great deal of time.

Despite the imminence of U.S. sanctions, Canada and Cuba have enjoyed vast economic interaction. Trade between the two countries has expanded so much that Canada is now Cuba’s largest trading partner. Canada has provided Cuba with “strong diplomatic ties, renewed Canadian foreign aid to assist the island’s development, and a steady stream of tourists.”

Canada and Cuba conducted approximately $500 billion in business last year—a sizable increase from $219 million in 1990. Additionally, Canadian tourism to Cuba increased sixteen percent in 1995, with more than 140,000 Canadian tourists visiting the island country. Furthermore, a significant number of Canadian companies attended the Havana International Trade Fair in November 1996 to explore economic opportunities in Cuba.

of the reasons for the refusal.

4. Each Party shall limit any fees for processing applications for temporary entry of business persons to the approximate cost of services rendered.

Id. at 664–65.


114 Id.

115 See id.

116 See Deborah Ramirez, In Canada, U.S. Finds Friendly Foe; Neighbors Ignoring Helms-Burton Law, SUN-SENTINEL, Nov. 29, 1996, at 1A.


118 Id.

119 See Ramirez, supra note 116, at 1A.

120 See id.

121 See id. For example, Sherritt International Corp. (Toronto) recently sold “$675 million of debentures for capital projects in Cuba, including telecommunications, sugar, and oil refining.” Id. In addition, Wilton Properties Limited, a Canadian real estate group, signed a “$400 million joint venture to build 11 hotels in Cuba.” Id.
4. Mexico

Like Canada and the EU, Mexico has expressed its opposition to the Helms-Burton Act. In addition, Mexico has followed in Canada’s and the EU’s footsteps, enacting retaliatory legislation. On October 1, 1996, Mexico’s Chamber of Deputies passed a bill retaliating against the Helms-Burton legislation; this bill imposes fines of up to $300,000 on Mexican citizens abiding by extraterritorial laws such as Helms-Burton. Under this legislation, Mexican companies are obligated to follow Mexican law first and to inform the Mexican government when it is apparent that their activities may subject them to penalties under Helms-Burton.

Thus far, the United States has charged only one Mexican company with violating the Helms-Burton Act. In 1994, Grupo Domos, a Mexican telecommunications conglomerate, spent $750 million to acquire forty-nine percent of Cuba’s telephone company. The United States charges that Grupo Domos is trafficking in property confiscated from ITT, the U.S. telecommunications company that ran the telephone system before the Cuban revolution. If Grupo Domos wishes to abide by Helms-Burton, it must withdraw its investment in Cuba. Otherwise, Javier Garza Calderon, Grupo Domos’ president, his family, four other executives, and their families will lose their U.S. visas.

Under Mexican law, however, Grupo Domos faces fines up to $300,000 if it obeys Helms-Burton. On the other hand, if Grupo Domos ignores Helms-Burton, and ITT prevails in U.S. court, Mexican courts may simply ignore any decision rendered against Grupo Domos and permit Grupo Domos to bring a counterclaim against ITT in Mexican courts for an identical amount of damages. Under its legislation, the Mexican government could place a lien on ITT’s Mexican

123 See Sheridan, supra note 122, at D1.
124 See id.
125 See id.
126 See id.
127 See id.
128 See Sheridan, supra note 122, at D1.
129 See id.
130 See id.
131 See id.
132 See id.
properties, such as its Sheraton hotels, if the company refused to pay damages pursuant to a Mexican court’s judgment.133

In addition to instituting retaliatory legislation, Mexico has argued that the Helms-Burton Act violates U.S. obligations under NAFTA.134 Mexico, like Canada, has argued that Title IV of Helms-Burton violates the liberalized regime for business immigration under Chapter 16 of NAFTA.135

IV. ANALYSIS OF THE HELMS-BURTON ACT

A. Constitutionality of the Helms-Burton Act under the U.S. Constitution

The Helms-Burton Act, on its face, presents interesting questions of constitutionality. Some opponents have charged that the Act violates the U.S. Constitution.136 Specifically, opponents have argued that Helms-Burton violates equal protection.137 The following section examines this claim in light of the U.S. Supreme Court’s treatment of equal protection under the Constitution.

1. The Validity of the Helms-Burton Act under Equal Protection

The guarantee of equal protection applies to actions by both state138 and federal139 governments. The Equal Protection Clause of the Fourteenth Amendment applies only to state and local governments.140 Nothing in the Constitution explicitly requires that the federal government provide equal protection of the laws.141 Where the federal gov-

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133 See Sheridan, supra note 122, at D1.
134 See Lewis, supra note 84, at A–31.
135 See NAFTA, supra note 112, ch. 16, art. 1603.
138 U.S. Const. amend. XIV, § 1.
139 U.S. Const. amend. V.
140 U.S. Const. amend. XIV, § 1. Section 1 of the Fourteenth Amendment states: “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Id.
141 See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). “The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth
ernment makes a classification which, if it were by a state, would violate the Fourteenth Amendment’s Equal Protection Clause, the Court has treated this as a violation of the Fifth Amendment’s Due Process Clause.\textsuperscript{142} In this respect, the equal protection component of the Due Process Clause of the Fifth Amendment imposes the same limits on the exercise of federal power that the Equal Protection Clause of the Fourteenth Amendment places on the exercise of state power.\textsuperscript{143}

Under equal protection, there are varying degrees of judicial scrutiny depending upon the nature of the governmental classification involved.\textsuperscript{144} The first type of judicial scrutiny under equal protection is the “mere rationality” standard.\textsuperscript{145} The statutes reviewed under this lowest-level scrutiny are generally ones which involve economic issues.\textsuperscript{146} Under the “mere rationality” standard, the Court asks only whether it is conceivable that the classification bears a rational relationship to a government objective which is not prohibited by the Constitution.\textsuperscript{147} At the other end of the spectrum, the Court will use “strict scrutiny” in examining any statute which is based upon a “suspect classification” or which impairs a “fundamental right.”\textsuperscript{148} Where strict scrutiny is invoked, the classification will be upheld only if it is necessary to promote a compelling governmental interest.\textsuperscript{149} Lastly, in a few situations, the Court has engaged in a scrutiny that is more probing than the “mere rationality” standard, but less rigid than the “strict scrutiny” standard.\textsuperscript{150} The Court uses this “middle-level” review in cases involving classifications based on gender and illegitimacy.\textsuperscript{151} Where this “middle-level” review is applied, the Court determines whether the means chosen by the legislature serve important governmental objectives and are substantially related to achievement of those objectives.\textsuperscript{152}

Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.” \textit{Id.}
\textsuperscript{142} \textit{See id.} at 500.
\textsuperscript{143} Sanchez Statement, \textit{supra} note 137, at 22; \textit{see} Bolling, 347 U.S. at 500.
\textsuperscript{144} \textit{See generally} GERALD GUNThER, CONSTITUTIONAL LAW 601-702 (12th ed. 1991).
\textsuperscript{145} \textit{See id.} at 608.
\textsuperscript{146} \textit{See id.} at 609.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at 636. Classifications based upon race are a classic example of a “suspect” class. \textit{See id.}
\textsuperscript{149} The right to vote is an example of a fundamental right. \textit{See id.}
\textsuperscript{144} \textit{See GUNThER, supra} note 144, at 636.
\textsuperscript{152} \textit{See Craig,} 429 U.S. at 197-98.
The Helms-Burton Act can be evaluated under equal protection in two ways. First, Helms-Burton implicates equal protection with its creation of a private cause of action for Cuban nationals who have become U.S. citizens.\textsuperscript{153} Section 302 permits Cuban nationals who have since become U.S. citizens to assert a claim under Helms-Burton so long as they acquired ownership of the claim to the confiscated property prior to enactment of the bill.\textsuperscript{154}

Exclusion of U.S. nationals of Cuban origin from Helms-Burton would create a constitutional infirmity in the bill.\textsuperscript{155} 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.\textsuperscript{156} The guarantee of equal protection of the laws demands similar treatment of similarly situated persons.\textsuperscript{157} While legislative classifications enjoy some presumption of validity, a party may rebut this presumption by demonstrating that the classification is devoid of any conceivable "rational relationship" to a legitimate state interest.\textsuperscript{158} In situations where a classification is based upon characteristics such as race, alienage, or national origin, however, the courts have generally recognized that such classifications are rarely relevant to the achievement of any legitimate state interest and have struck down these classifications as violative of equal protection.\textsuperscript{159}

\textsuperscript{154} See id. tit. III, § 302(a)(4)(B), 110 Stat. at 816.
\textsuperscript{155} Sanchez Statement, supra note 137, at 22; see U.S. Const. amend. V.
\textsuperscript{156} Sanchez Statement, supra note 137, at 22; see id. at 816.
\textsuperscript{157} See id.; see also Hernandez v. Texas, 347 U.S. 475, 477 (1954). In Yick Wo v. Hopkins, a San Francisco ordinance barred the operation of hand laundries in wooden buildings, unless permission was granted by the Board of Supervisors. While issuing permits to all but one of the non-Chinese applicants, the Board denied permits to all of the approximately 200 Chinese applicants. The Court found that, although the ordinance was neutral on its face, there was discrimination in its administration, and this discrimination violated the Equal Protection Clause. See id.; see also Hernandez v. Texas, 347 U.S. 475, 477 (1954). In Hernandez v. Texas, the Court treated discrimination against Mexican-Americans with regard to jury service in the same manner it treated discrimination against African-Americans and struck down the law as a violation of equal protection. See id.; see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). Under current equal protection jurisprudence, discrimination against any racial group merits strict scrutiny, even if that group has never been the subject of widespread discrimination. See id. In City of Richmond v. J.A. Croson Co., a majority of the Supreme Court held that in situations where a city discriminates in favor of black contractors at the expense of white contractors, the Court must employ strict scrutiny and the discriminatory act must be invalidated. See id.
\textsuperscript{158} Sanchez Statement, supra note 137, at 23; see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).
\textsuperscript{159} Sanchez Statement, supra note 137, at 23; see id. at 809 (1969).
quently, the courts have presumed classifications based upon race, alienage, or national origin to be invalid and have subjected them to strict scrutiny. In order to overcome strict scrutiny, the suspect classification created by the legislation must promote a compelling governmental interest, and must be narrowly tailored to achieve this interest.

The private cause of action created under Helms-Burton furthers the state interests of protecting U.S. citizens’ property rights and discouraging foreign investment in Cuba as a means of weakening Castro’s totalitarian regime. The exclusion of U.S. citizens of Cuban origin would hinder the achievement of the government’s stated interests. Many U.S. citizens of Cuban origin have resided in the 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.

Second, the Helms-Burton Act can be evaluated under equal protection in that it creates a special right to sue in U.S. courts only for those who have lost property in Cuba. Opponents of Helms-Burton have argued that the bill violates equal protection because those who have lost property in Cuba are not more deserving than those who have lost property in Germany, Eastern Europe, Vietnam, or Russia. This argument, however, does not withstand the applicable constitutional analysis.

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161 Sanchez Statement, supra note 137, at 23; see Plyler, 457 U.S. at 216–17.
162 Sanchez Statement, supra note 137, at 23; see Helms-Burton Act, § 3, 110 Stat. at 788–89. Section 3, which outlines the purposes of the Helms-Burton Act, states that one of the purposes of the bill is “(6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.” Id.
163 Sanchez Statement, supra note 137, at 23; see Helms-Burton Act, § 3, 110 Stat. at 788–89. Another stated purpose of the Helms-Burton Act is “(1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere.” Id.
164 Sanchez Statement, supra note 137, at 23.
165 Id.
166 Id.
167 Id.
169 See id.
As mentioned earlier, the Supreme Court evaluates economic and social welfare legislation under the "mere rationality" standard.\textsuperscript{170} Title III's private cause of action provision clearly falls within this class of legislation since its stated purpose is to redress U.S. property claims.\textsuperscript{171} The Supreme Court will uphold Helms-Burton if it concludes that there is some rational relation between the means selected by Congress and a legitimate legislative objective.\textsuperscript{172}

Although the legislature's "purpose" or "objective" must be "legitimate," the Court has given extreme deference to the legislature's right to define its objectives.\textsuperscript{173} In the case of Helms-Burton, where Congress has specifically stated its purposes, it is unlikely that the Court would strike down the statute unless it finds the statute to be "grossly unfair" or "totally irrational."\textsuperscript{174} Nonetheless, the Court will not find every objective that motivates a legislature to be "legitimate."\textsuperscript{175} In \textit{Metropolitan Life Ins. Co. v. Ward}, the Court invalidated, on equal protection grounds, an Alabama statute that taxed out-of-state insurance companies at a higher rate than in-state companies.\textsuperscript{176} The Court held that "promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, [was] not a legitimate state purpose."\textsuperscript{177} The Helms-Burton Act, in contrast, does not promote its purpose of redressing U.S. property claims in Cuba by discriminating or engaging in any other "grossly unfair" conduct. Hence, the Supreme Court would most likely find that the Helms-Burton Act promotes a legitimate governmental interest.

Although Helms-Burton only addresses the claims of those whose property was confiscated by the Cuban government, this does not per

\textsuperscript{170} See Gunther, supra note 144, at 609.
\textsuperscript{172} See Gunther, supra note 144, at 609.
\textsuperscript{173} See U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 175, 179 (1980). In \textit{U.S. Railroad Retirement Bd. v. Fritz}, a majority of the Court held that lowest-level equal protection review was satisfied where there was a "plausible" reason for the classification scheme created by Congress. \textit{Id.} Consistent with past decisions in which the Court "never insisted that a legislative body articulate its reasons for enacting a statute," it was "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." \textit{Id.}
\textsuperscript{174} See Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949). The fact that the Court thinks that the objective behind the legislation is unwise will not be sufficient to make it illegitimate. See \textit{id.}, "The forum for the correction of ill-considered legislation is a responsive legislature." \textit{Id.;} see Helms-Burton Act, tit. III, § 301, 110 Stat. at 814–15.
\textsuperscript{176} See \textit{id.}
\textsuperscript{177} See \textit{id.} at 880.
se constitute a violation of equal protection. The Court rarely invalidates an under-inclusive law. A key feature of the "mere rationality" standard is that legislation will not be invalidated simply because the legislature only contemplated one part of a problem. In support of this "step-by-step" approach, the Court stated that "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all." Thus, while the Helms-Burton Act only addresses property confiscations in Cuba, it still conforms with equal protection since Congress need not address all U.S. property claims for confiscated property abroad in one fell swoop. Moreover, the Helms-Burton Act pursues the legitimate governmental interest of protecting U.S. property rights and does so through a rationally related means by creating a cause of action against those who are illegally trafficking in U.S. property.

179 See Laurence H. Tribe, American Constitutional Law 1440 & n.4 (2nd ed. 1988).
180 See id.
181 See Railway Express Agency, 336 U.S. at 110. At issue in Railway Express Agency was a New York City traffic regulation banning the placing of advertising on vehicles. The regulation contained an exception, however, permitting the owner of a vehicle to advertise his own products. The purpose of the regulation was to reduce traffic hazards. The petitioner challenged the exception on the theory that a vehicle carrying advertising for the vehicle's owner was no less distracting than a vehicle carrying advertising for others. Nonetheless, the Court found that the regulation was not a violation of equal protection. See id.
182 See id.
183 See Metropolitan Life Ins. Co., 470 U.S. at 876–78; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). In Minnesota v. Clover Leaf Creamery, the Court had to decide the constitutionality of a Minnesota statute that banned the retail sale of milk in plastic non-returnable, non-refillable containers, but allowed the sale of such in other non-returnable, non-refillable containers, such as paperboard cartons. Id. at 458–59. The Court held that "the Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another type, already established in the market, is permitted to continue in use. Id. at 466. "Whether in fact the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature could rationally have decided that its ban on plastic non-returnable milk jugs might foster greater use of environmentally desirable alternatives." Id. Hence, Clover Leaf Creamery stands for the proposition that it is irrelevant whether or not a statute will in fact achieve any of its objectives. See id. Rather, the Court must only address the question of whether the legislature "could rationally have decided" that it would meet these objectives. See id.
B. Validity of the Helms-Burton Act under International Law and the Act of State Doctrine

As mentioned earlier, several governments, such as Canada, Mexico, and members of the EU, have argued that the Helms-Burton Act is an exercise of extraterritorial jurisdiction in violation of customary international law. In espousing this claim, these countries overlook the fact that their corporate citizens are the principal traffickers in property that rightfully belongs to U.S. citizens and corporations. Unfortunately for these countries, however, Helms-Burton is supported by more than just policy arguments and rests firmly upon widely accepted principles of international law.

1. International Law and the Effects Doctrine

The concept of "objective territoriality" in international law is applied to offenses or acts commenced outside the state’s territory, but completed within the state’s territory or causing serious and harmful consequences to the social and economic order within the state’s territory. Applying this basic international law principle, U.S. federal courts and the Restatement (Third) of Foreign Relations Law interpret the objective territoriality principle broadly. Under the “effects doctrine,” a state may exercise jurisdiction on the basis of reprehensible

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184 See Brice M. Clagett, Title III of the Helms-Burton Act is Consistent With International Law, 90 Am. J. Int’l L. 434, 434 (1996) [hereinafter Clagett, Title III].
185 Id.
186 See id. at 434, 440; Ratchik, supra note 11, at 364.
187 See The S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J., (ser. A), No. 10 (Negligence occurring on board a French ship (considered French territory) had the effect of causing injury on a Turkish ship (considered Turkish territory)); see also United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).
188 Restatement (Third) of Foreign Relations Law § 402 (1987). Section 402 of the Restatement, Bases of Jurisdiction to Prescribe, states:

Subject to § 403, a state has jurisdiction to prescribe law with respect to:

1. (a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory;
2. the activities, interests, status, or relations of its nationals outside as well as within its territory;
3. certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. The effects doctrine has been applied in various types of cases, including anti-trust, securities trading, export controls, and environmental protection, with U.S. courts holding that conduct
effects or consequences within the territory of acts committed outside of the territory.\textsuperscript{189} It is important to note, however, that even when one of the bases for jurisdiction under Section 402 of the Restatement exists, 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.\textsuperscript{190} Hence, under international law, a state may prescribe rules of law with respect to conduct outside its territory that has or is intended to have a substantial effect within its territory as long as, in light of the surrounding circumstances, the exercise of jurisdiction is reasonable.\textsuperscript{191} Today, the prevailing international view is that foreign economic activity is reasonable and thus within a state’s prescriptive jurisdiction if it produces discernibly significant economic damage to the state’s interest.\textsuperscript{192}

between foreign companies on foreign soil could nevertheless subject them to U.S. jurisdiction if there are effects in the United States. \textit{See} Timberlane Lumber Co. v. Bank of America Nat’l Trust & Sav. Ass’n, 549 F.2d 597 (9th Cir. 1976); \textit{Aluminum Co.}, 148 F.2d at 444.

\textsuperscript{189} \textit{See} \textit{Aluminum Co.}, 148 F.2d at 444.

\textsuperscript{190} \textit{See} \textit{Restatement (Third) of Foreign Relations Law} § 403. Section 403, Limitations on Jurisdiction to Prescribe, states:

\begin{enumerate}
\item Even when one of the bases for jurisdiction under § 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.
\item Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
\begin{enumerate}
\item the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
\item the connections, such as nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
\item the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
\item the existence of justified expectations that might be protected or hurt by the regulation;
\item the importance of the regulation to the international political, legal, or economic system;
\item the extent to which the regulation is consistent with the traditions of the international system;
\item the extent to which another state may have an interest in regulating the activity; and
\item the likelihood of conflict with regulation by another state.
\end{enumerate}
\end{enumerate}

\textit{Id.}

\textsuperscript{191} \textit{Restatement (Third) of Foreign Relations Law} §§ 402(1)(c), 403.

\textsuperscript{192} \textit{See} \textit{id.}, reporter’s note 2.
Relying on the “substantial effect” provision of this doctrine, Congress has passed numerous laws, most notably the anti-trust laws.\textsuperscript{193} Congress apparently justified passage of the Helms-Burton Act on the substantial effect that Cuba’s uncompensated confiscations had on U.S. nationals. According to the Foreign Claims Settlement Commission, U.S. nationals possess claims to confiscated property exceeding $6 billion.\textsuperscript{194} Since Castro purposefully has been selling this property to foreign investors in order to block the rightful U.S. property owners from receiving compensation, the settlement of these property claims through the Foreign Claims Settlement Commission will be complicated and protracted.\textsuperscript{195} The sizable property claims coupled with this obstacle to obtaining just compensation arguably prejudices the rights and interests of U.S. nationals and has a substantial effect on the United States.\textsuperscript{196}

Nonetheless, under the Restatement’s provisions, international law requires a state that justifies its legislation with the “substantial effects” principle to refrain from applying this legislation when another state’s legitimate and reasonable interests outweigh its own interests.\textsuperscript{197} In evaluating Helms-Burton’s compliance with international law, it is necessary to ascertain whether any other state has an interest greater than that of the United States.\textsuperscript{198} The Restatement, Section 403, provides a useful list of factors which can be employed in conducting this evaluation.\textsuperscript{199}

With respect to Cuba, it is abundantly clear that Cuba has no legitimate interest in confiscating property, denying compensation, and profiting from foreign investment in that property.\textsuperscript{200} These actions, which constitute comprehensive violations of international law, fully justify U.S. countermeasures, such as Title III of the Helms-Burton Act, “even if those measures would otherwise be unlawful.”\textsuperscript{201} Hence, with regard to Cuba, Helms-Burton survives any attack challenging its validity under international law.\textsuperscript{202}

\textsuperscript{193} See Clagett, \textit{Title III}, supra note 184, at 436.
\textsuperscript{194} See \textit{id.} at 435.
\textsuperscript{195} See \textit{id.}
\textsuperscript{196} See \textit{id.}
\textsuperscript{197} See \textit{id.}; \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 403.
\textsuperscript{198} See Clagett, \textit{Title III}, supra note 184, at 436; \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 403.
\textsuperscript{199} See \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 403(2).
\textsuperscript{200} Clagett, \textit{Title III}, supra note 184, at 436.
\textsuperscript{201} Id. at 436 & n.11; See \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 905.
\textsuperscript{202} See Clagett, \textit{Title III}, supra note 184, at 436.
Other states, such as Canada, Mexico, and the EU, have an interest in protecting the ability of their nationals to traffic in confiscated property. It is necessary, then, to balance the competing interests of these states with U.S. interests to determine if extraterritorial jurisdiction under Helms-Burton is reasonable by standards that can be shared by the international community. It is important to note that the list of factors in Section 403 is not exhaustive and that the weight to be given any particular factor or group of factors depends on the circumstances.

Under Section 403, one factor that is particularly relevant to evaluating Helms-Burton's extraterritorial jurisdiction is "the link of the activity to the territory of the regulating state (i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory)." The claims of U.S. nationals, as certified by the Foreign Claims Settlement Commission, including interest, now total more than $6 billion. Since just monetary compensation to all claimants was far beyond Cuba's resources, Castro implemented the strategy of involving foreign companies in confiscated properties in order to place significant roadblocks in the path of claims resolution. The clouds on titles created by these purported valid transfers to traffickers of other nationalities would, at the very least, delay and complicate the task of settling the valid property claims of U.S. nationals through the Foreign Claims Settlement Commission. To the extent that the rights and interests of U.S. victims are prejudiced, these invalid title transfers have a substantial effect on the United States. It is arguable that the interest of other nations is, at most, no greater than the U.S. interest in protecting the ability of U.S. nationals, the rightful owners, to prevent further inter-

203 See id.
204 See Restatement (Third) of Foreign Relations Law § 403; Andreas F. Lowenfeld, International Litigation and the Quest for Reasonableness 20 (1996); see also Hartford Fire Insurance, Co. v. California, 509 U.S. 764, 818 (1993). "In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence." Id.
205 See Restatement (Third) of Foreign Relations Law § 403 cmt. b.
206 See id. § 403(2)(a).
207 See Clagett, Title III, supra note 184, at 435.
208 Id.
209 See id.
210 Id.
ference with their property and perhaps ultimately to recover the
property or obtain monetary compensation.\textsuperscript{211}

Similarly, the United States' interest is arguably more legitimate than
any other state's interest in allowing its nationals to continue reaping
profits from illegally-seized property in a foreign nation.\textsuperscript{212} It is widely
recognized that Castro's confiscations were made without compensa-
tion and involved discrimination against U.S. nationals and Cuban
opponents of the Castro regime.\textsuperscript{213} Traffickers arguably are aware that
they are dealing in tainted property and have assumed the risk that
the dispossessed owners or aggrieved states might take action against
them.\textsuperscript{214} It is widely accepted that confiscations in violation of interna-
tional law are ineffective in passing valid title to property and that states
are not required to recognize title obtained in this manner.\textsuperscript{215} Thus,
while both the interests of the United States and challenging states are
equally "extraterritorial," the United States should prevail since its
interests outweigh those of its challengers with respect to the con-
fiscated property in Cuba.\textsuperscript{216} Moreover, if U.S. trading partners are aiding
and abetting trafficking by their nationals, they are subject to U.S.
countermeasures.\textsuperscript{217}

Another relevant factor under Section 403 is "the importance of the
regulation to the international political, legal, or economic system."\textsuperscript{218}
Since the collapse of the Soviet Union and the resulting termination
of Soviet aid, Cuba has encountered severe economic problems, with
its average citizens bearing the brunt of the hardship.\textsuperscript{219} The United
States, as well as the rest of the world, has a strong interest in "facili-
tating the rapid economic development of post-Castro Cuba without
the rancor, litigation, and clouds on title that Castro's foreign-invest-
ment strategy [of entangling foreign investors] will inevitably cause
when he is gone."\textsuperscript{220} Furthermore, Cuba's geographical proximity, its
history of hostile relations with the United States, its persistence in
suppressing democracy, violating human rights, and refusing to satisfy

\textsuperscript{211} See id. at 436.
\textsuperscript{212} See Clagett, \textit{Title III, supra} note 184, at 436.
\textsuperscript{213} Id. at 437.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 438.
\textsuperscript{216} Id. at 437.
\textsuperscript{217} Clagett, \textit{Agora, supra} note 110, at 641.
\textsuperscript{218} See \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} \textsection{} 403(2)(e).
\textsuperscript{219} Clagett, \textit{Title III, supra} note 184, at 435.
\textsuperscript{220} Id.
international law claims against it arguably have a substantial impact on the United States.\textsuperscript{221} Since the United States has a legitimate interest in eradicating these problems and Congress has concluded that "discouraging foreign investment in tainted Cuban property is an appropriate and proportionate means" for accomplishing this task, Helms-Burton arguably should be accorded great weight in the balancing of interests under Section 403.\textsuperscript{222}

Lastly, under Section 403(d), the "existence of justified expectations that might be protected or hurt by the regulation" should be taken into account when weighing the competing interests of states.\textsuperscript{223} As mentioned above, claims of U.S. nationals alone exceed $6 billion.\textsuperscript{224} Castro has embarked on the systematic plan of using foreign investors to erect barriers to U.S. recovery or compensation for the confiscated property.\textsuperscript{225} Although other nations have an interest in protecting their nationals from being hurt by lawsuits filed under Helms-Burton, their interest is weakened by the fact that the U.S. Department of State has repeatedly warned these nations of the repercussions of dealing in confiscated property.\textsuperscript{226} In a message entitled "Buyer Beware: Cuba May Be Selling American Property," Secretary of State Warren Christopher instructed State Department officials to put their host governments on notice by stating:

We hope that the government of Cuba will ultimately decide to return expropriated properties to their original owners. If the properties are purchased by foreign investors before this occurs, restitution will prove far more difficult . . . . Care should be taken by prospective investors to ensure that property the Cuban government attempts to sell or otherwise dispose of is not the subject of a claim by a U.S. national.\textsuperscript{227}

\textsuperscript{221}Id. at 435–36. For example, the United States has a legitimate interest in stemming the tide of refugees seeking asylum from communist Cuba. Id.

\textsuperscript{222}Id. at 436; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(c).

\textsuperscript{223}See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(d).

\textsuperscript{224}See id. Clagett, Title III, supra note 184, at 435.

\textsuperscript{225}See id.

\textsuperscript{226}See id.

\textsuperscript{227}Id. at 435 (quoting Secretary Warren Christopher, Circular to all diplomatic and consular posts, Sept. 1993, reprinted in Cuban Liberty and Democratic Solidarity Act: Hearings Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations, 104th Cong., 1st Sess. 192–93 (1995)).
In light of these facts, the United States arguably has a stronger interest in protecting and fostering the ability of its nationals to recover or receive compensation for their confiscated property than do other nations in protecting their nationals from lawsuits.228

In summary, the United States may exercise jurisdiction under the "effects doctrine" in seeking restitution from foreign nationals currently trafficking in confiscated U.S. property.229 Pursuant to Section 402 of the Restatement, the United States has jurisdiction to prescribe law with respect to foreign trafficking in confiscated U.S. property because this conduct has and was intended to have a substantial effect within the United States.230 In addition, U.S. jurisdiction with respect to this matter is reasonable in light of the most relevant factors under Section 403 of the Restatement.231

2. The Act of State Doctrine

Historically, the "act of state doctrine," a domestic court-made concept, precluded U.S. federal courts from questioning the validity of the acts of foreign nations.232 Created in order to avoid the adjudication of delicate international political issues, the doctrine calls for judicial deference to public acts of a foreign state conducted within that state's territory.233 In essence, the act of state doctrine functions like a choice-of-law rule by which courts defer to a foreign state's prescriptive authority within its own territory.234

Although the act of state doctrine apparently precludes federal district courts from hearing property claims of U.S. citizens brought under Title III, Congress possesses the discretionary power to enjoin courts from invoking the doctrine.235 With the enactment of the Second Hickenlooper Amendment to the Foreign Assistance Act of 1961,

228 See id.
229 See Restatement (Third) of Foreign Relations Law §§ 402-03.
230 See id. § 402(1)(c); Clagett, Title III, supra note 184, at 435–36.
231 See Restatement (Third) of Foreign Relations Law § 403.
232 See Ratchik, supra note 11, at 365; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–23 (1964). In Sabbatino, the Supreme Court indicated unequivocally that the act of state doctrine is required neither by international law nor by the Constitution. See id.
234 See id.
235 See Ratchik, supra note 11, at 366 & n. 132 (citing Banco Nacional de Cuba v. Farr, 383 F.2d 166, 182 (2d Cir. 1967) (acknowledging Congress's decision to enjoin courts from applying the act of state doctrine as a permissible exercise of its power pursuant to the Commerce and the Necessary and Proper Clauses of the U.S. Constitution).
Congress stated that courts were required to adjudicate claims to property taken in violation of international law.\textsuperscript{236}

Title III of the Helms-Burton Act appropriately includes a provision that precludes application of the act of state doctrine to any lawsuit brought under its authority.\textsuperscript{237} This preclusion is appropriate since the Supreme Court indicated unequivocally in \textit{Banco Nacional de Cuba v. Sabbatino} that the act of state doctrine is required neither by international law nor by the Constitution.\textsuperscript{238} Thus, in the absence of a presidential order instructing federal courts to apply the act of state doctrine, U.S. nationals may pursue their property claims against the Cuban government.\textsuperscript{239}

In summary, Title III of the Helms-Burton Act not only complies with international law, but also fosters the development of common sense enforcement mechanisms in the troublesome area of expropriation where "rogue states" often trample on the human rights of their own citizens and foreign nationals with "impunity."\textsuperscript{240} Title III's creation of a cause of action represents a firm stand against the trafficking in stolen property that has provided Castro with the necessary funds to perpetuate his rule and constitutes a crucial step toward redressing and protecting the property rights of U.S. nationals abroad.\textsuperscript{241} Thus, Cuba and other nations who tolerate and encourage the trafficking in confiscated property by their nationals have little, if any, legal basis under international law upon which to mount an effective attack on the Helms-Burton Act.\textsuperscript{242}

C. The Helms-Burton Act and U.S. Obligations under International Agreements

Opponents of the Helms-Burton Act contend that the bill forces the United States to violate its obligations under international agreements such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA).\textsuperscript{243} It is arguable, however, that Helms-Burton is consistent with both of these agree-

\textsuperscript{236} See \textit{id.} at 366.
\textsuperscript{238} See \textit{Sabbatino}, 376 U.S. at 421–23, Clagett, \textit{Title III, supra} note 184, at 440.
\textsuperscript{239} Ratchik, \textit{supra} note 11, at 366.
\textsuperscript{240} Clagett, \textit{Title III, supra} note 184, at 440.
\textsuperscript{241} See \textit{id.}
\textsuperscript{242} See \textit{id.}
\textsuperscript{243} See Ratchik, \textit{supra} note 11, at 351–57; Lowenfeld, \textit{Congress and Cuba, supra} note 74, at 492.
ments. The following sections demonstrate the manner in which Helms-Burton complies with both the GATT and NAFTA.

1. The Helms-Burton Act's Compliance with the GATT

In essence, the GATT is the heart of the multilateral world trading regime. In its preamble, the GATT commits its contracting parties (Contracting Parties), including Cuba, to enter into “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” Nations opposing the implementation of Helms-Burton will most likely bring their claims under Articles I and XI of GATT. Article I, the basic non-discrimination clause in GATT, requires Contracting Parties to treat “like products” with equal preference. In strengthening the economic embargo against Cuba, Title I, Section 110 of Helms-Burton treats products purchased from Cuba differently than products purchased from other nations. For example, by prohibiting the importation and dealings in any sugar product that originates in Cuba, was located or

244 See GATT art. XX; NAFTA, supra note 112, ch. 16, art. 1603 & annex 1603, 32 I.L.M. 296.
245 TREBILCOCK & HOWSE, supra note 80, at 25.
246 GATT pmbl.
247 See GATT arts. I, XI; Ratchik, supra note 11, at 351–57.
248 Ratchik, supra note 11, at 353; see GATT art. I.

SEC. 110. IMPORTATION SAFEGUARD AGAINST CERTAIN CUBAN PRODUCTS.
(a) PROHIBITION ON IMPORT OF AND DEALINGS IN CUBAN PRODUCTS. The Congress notes that section 515.204 of Title 31, Code of Federal Regulations, prohibits the entry of, and dealings outside the United States in, merchandise that:
(1) is of Cuban origin;
(2) is or has been located in or transported from or through Cuba; or
(3) is made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.
(b) . . . .
(c) RESTRICTION OF SUGAR IMPORTS. The Congress notes that section 902(c) of the Food Security Act of 1985 (Public Law 99–198) requires the President not to allocate any of the sugar import quota to a country that is a net importer of sugar unless appropriate officials of that country verify to the President that the country does not import for reexport to the United States any sugar produced in Cuba.
(d) ASSURANCES REGARDING SUGAR PRODUCTS. Protection of essential security interests of the United States requires assurances that sugar products that are entered, or withdrawn from warehouse for consumption, into the customs territory of the United States are not products of Cuba.

Id.
transported through Cuba, or was derived in whole or in part from Cuban sugar, Helms-Burton clearly raises the possibility of a U.S. violation of the Most-Favored-Nation (MFN) obligations under GATT.250

Typically, the origin of products determines whether the United States must afford MFN treatment to the sugar products of countries that purchase Cuban sugar.251 Essentially, there are two methods of determining the origin of a product: the "substantial transformation" method and the "value-added" method.252 Under the substantial transformation method, a product is considered to originate in the "most recent exporting country only if within that country there has been a 'substantial transformation' of the input goods obtained from another country."253 There is no consensus, however, as to what constitutes a substantial transformation.254 In the value-added method, the origin of a product is considered to be "the last country of export if that country has added a certain percentage of value" to the good.255

Under Section 110 of Helms-Burton, however, the origin of sugar products is disregarded.256 Section 110 does not take into account the origin of the product being exported to the United States, but rather prohibits the importation of sugar products from any country that purchases sugar from Cuba.257 While opponents of Helms-Burton argue that this prohibition is a violation of GATT, they fail to take note of Article XX, which brings this U.S. prohibition within the GATT's framework.258 Under Article XX of the GATT, Contracting Parties are permitted to avoid their obligations under the agreement by invoking numerous exceptions.259 One of the most relevant exceptions for purposes of justifying Helms-Burton under GATT is that which allows Contracting Parties to implement measures necessary to protect public

250 Ratchik, supra note 11, at 353; see GATT art. I.
251 Ratchik, supra note 11, at 354; see GATT art. I (affording MFN treatment to like products "originating in . . . the territories of all other contracting parties.").
253 Id.
254 Ratchik, supra note 11, at 354 n.70; see JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 467 (1969) [hereinafter JACKSON, LAW OF GATT].
255 See JACKSON, WORLD TRADING SYSTEM, supra note 252, at 143; Ratchik, supra note 11, at 354 n.71.
257 Ratchik, supra note 11, at 354; see Helms-Burton Act, tit. I, § 110, 110 Stat. at 800.
258 Ratchik, supra note 11, at 355; see GATT art. XX.
259 See Ratchik, supra note 11, at 355; GATT art. XX.
morals and to condemn products of prison labor. In refusing to accept sugar products from countries that import Cuban sugar, the United States not only expresses its disapproval with the continued violation of human and worker rights in Cuba, but also indirectly alleviates these abuses by contributing to the economic troubles facing the Castro regime. In light of these exceptions and the U.S. rationale for its prohibitions, Section 110 of Helms-Burton does not violate the GATT.

Opponents of Helms-Burton also argue that Title I's prohibition of indirect importation of Cuban sugar, syrups, or molasses into the United States represents a violation of the GATT Article XI's prohibition of the use of "other measures" to restrict the import or export of any product. Again, Article XX's public morals exception is applica-

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260 See Ratchik, *supra* note 11, at 555; GATT art. XX, paras. (a), (e). Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) . . .

(d) necessary to secure compliance with laws or regulations which are not consistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labor.

*Id.* According to Otto J. Reich, President of the U.S.-Cuba Business Council, the Cuban government’s well-documented record of human rights abuses that directly impact trade and investment activity include violations of International Labor Organization conventions on the use of forced labor, the denial of freedom of association and the right to organize, and employment discrimination. In addition, Cuban workers have no voice in their working conditions, are allocated by the government as any other piece of equipment, and are jailed up to eight years just for trying to organize a labor union. See Supporting Democracy in Cuba, 1995: *Hearings on S.381 Before the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Otto J. Reich, President of U.S.-Cuba Business Council), available in 1995 WL 364642.

261 See Ratchik, *supra* note 11, at 555.

262 See GATT art. XX; Helms-Burton Act, tit. I, § 110, 110 Stat. at 800.

263 See GATT art. XI; Ratchik, *supra* note 11, at 351–52. Specifically, Article XI states:

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

GATT art. XI.
ble, allowing the United States to prohibit the indirect importation of Cuban sugar products into the United States. Furthermore, Article XX of GATT permits Contracting Parties to adopt measures in order to accommodate other laws and regulations promulgated by the legislatures of those Contracting Parties.

Under this exception, however, the measure adopted to accommodate other laws or regulations must be necessary to ensure compliance with these laws or regulations and must not be inconsistent with other GATT provisions. Helms-Burton does not violate GATT since the United States can justify the Act's "importation ban on sugar, syrups, and molasses from countries that import such products from Cuba as a necessary means of securing compliance with the Foreign Assistance Act of 1961," which prohibits any U.S. assistance to Cuba, including:

any quota authorizing the importation of Cuban sugar into the United States or to receive any other benefit under any law of the United States, until the President determines that [Cuba] has taken appropriate steps ... to return to United States citizens, and to U.S. [corporations] ... or to provide equitable compensation to such citizens and entities for prop-

264 See GATT art. XX, para. (a).
265 Ratchik, supra note 11, at 356; see GATT art. XX, para. (d). GATT art. XX, para. (d) states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

Id.

266 Ratchik, supra note 11, at 356; see GATT INDEX, supra note 84, at 533–34 (quoting United States—Measures Affecting Alcoholic and Malt Beverages: Report of the Panel, GATT Doc. DS23, paras. 5.40–5.43 (June 19, 1992) (examining U.S. regulation requiring beer importers to distribute their products through in-state wholesalers). The United States argued that the regulation was "necessary to ensure compliance" with state excise tax laws. The Panel concluded that the regulation was not necessary for purposes of Article XX(d) because the United States possessed and could have utilized alternative measures that were not inconsistent with GATT. Id.

267 Ratchik, supra note 11, at 356; see GATT art. XX, para. (d).
property taken from such citizens and entities on or after January 1, 1959, by the Government of Cuba. 268

Since Cuba has failed to return confiscated property or provide compensation to any U.S. nationals, Helms-Burton qualifies under Article XX's "other measures" exception because its importation ban is necessary to carry out the ban on U.S. assistance to Cuba. 269 While opponents of Helms-Burton raise valid objections under GATT, the Act arguably fits within the exceptions contained in that agreement. 270

2. The Helms-Burton Act's Compliance with the North American Free Trade Agreement (NAFTA)

On January 1, 1994, the United States, Canada, and Mexico entered NAFTA, establishing a single trade zone comprising nearly 360 million people. 271 Although NAFTA does not create a full-fledged common market, it does create a free trade zone in goods and significantly liberalizes the treatment of investment, intellectual property, and services across the continent. 272 In this respect, NAFTA creates opportuni-

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270 See GATT art. XX.
271 See NAFTA, supra note 112, 32 I.L.M. at 297; BARRY APPLETON, NAVIGATING NAFTA 1 (1994).
272 APPLETON, supra note 271, at 1. As stated in Article 102 of NAFTA:

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
   (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
   (b) promote conditions of fair competition in the free trade area;
   (c) increase substantially investment opportunities in the territories of the Parties;
   (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
   (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
   (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.
2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

NAFTA, supra note 112, ch. 1, art. 102, 32 I.L.M. at 297.
ties and challenges to nearly every business operating within the United States, Canada, and Mexico.  

Opponents of Helms-Burton have argued that the Act violates U.S. obligations under NAFTA. Specifically, Canada and Mexico have argued that Title IV’s immigration provisions violate the liberalized regime for business immigration under Chapter 16 of NAFTA. Article 1603(1) of NAFTA states:

Each party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603.

In order to avoid violating U.S. obligations under NAFTA, the United States must justify its exclusion of Canadian or Mexican business people under Title IV of Helms-Burton by demonstrating that these business people are not “otherwise qualified.” Pursuant to NAFTA, Annex 1603, each party must grant temporary entry to a business person seeking to engage in a business activity provided that the business person otherwise complies with “existing immigration measures.” For the United States, “existing immigration measures” is defined as the Immigration and Nationality Act (INA) of 1952.

For the most part, Canadian or Mexican business people who fall within the Title IV exclusion category do not present risks to public health. Under the INA, such risks include communicable diseases of public health significance, physical or mental disorders, and drug addictions. It is also unlikely that such business people would pose a

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276 NAFTA, supra note 112, ch. 16, art. 1603, 32 I.L.M. at 664–65.
277 See id.
278 See id. ch. 16, annex 1603.
279 Id. ch. 16, app. 1603A.3., 32 I.L.M. at 668.
threat to public safety. 284 Under INA, an alien would constitute a public safety risk if he was convicted of a crime of moral turpitude, such as murder, rape, arson, blackmail, fraud, or counterfeiting. 285

By implementing Helms-Burton, the United States can avoid violating NAFTA only if the exclusion of Canadian or Mexican nationals under Title IV can be justified on national security grounds. 286 At best, the United States can only show that Canadian or Mexican nationals represent an indirect threat to national security. Under INA, the United States may prohibit foreign nationals from entering the country for national security grounds, such as espionage, sabotage or illegal activity, 287 terrorism, 288 or other foreign policy grounds. 289 It is improbable that Canadian or Mexican business people excludable under Title IV, Section 401(a)(1), (2), or (3) would present such national security threats. 290 It is also improbable that spouses, minor children, or agents of persons excludable under sub-paragraphs (1), (2), or (3) would pose such serious threats to the United States. 291

Under INA's exclusion for "other foreign policy grounds," however, an alien is excludable if the Secretary of State has reasonable grounds to believe that his entry or proposed activity in the United States "would have potentially serious adverse foreign policy consequences for the U.S." 292 The United States could use this exclusionary provision to make a strained argument that Helms-Burton does not violate NAFTA. If the United States were to permit Canadian and Mexican business people to ignore Helms-Burton's restrictions pertaining to business entry, while strictly applying it to business people from other countries, the governments of these other countries would vehemently protest this inequitable treatment of their nationals. These governments would also implement retaliatory measures aimed at hurting the interests of U.S. businesses abroad and would take other actions seriously adverse to U.S. foreign policy interests. For this reason, the

286 See NAFTA, supra note 112, ch. 16, art. 1603(1), 32 I.L.M. at 664.
292 See INA, § 212(a)(3)(C), 8 U.S.C. § 1182(a)(3)(C). Section 212(a)(3)(C) states: "An alien is excludable if the Secretary of State has reasonable grounds to believe that his entry or proposed activity in the U.S. would have potentially serious adverse foreign policy consequences for the United States." Id.
United States can exclude Canadian and Mexican business people who fall under Title IV of Helms-Burton while adhering to NAFTA. This exclusion based on foreign policy grounds is arguably permissible under NAFTA, Article 1603, which allows parties to deny temporary entry to business people if such people are not otherwise qualified for entry. If allowing entry to Canadian and Mexican business people would create serious adverse foreign policy problems with other countries, these business people would be unqualified for entry.

Rather than making such strained arguments, the United States could take one of two possible actions to address the Act's apparent violation of U.S. obligations under NAFTA: either repeal Title IV's exclusion provision or amend the INA to include theft or conversion of stolen property abroad among its national security exclusions. Congress should avoid repealing Title IV since this would signal a retreat from the resolve and purpose behind Helms-Burton. It would be more consistent with U.S. policy to add a "theft or conversion of stolen property" national security exclusion to INA. In this manner, the United States could bring the class of business people sought to be excluded by Title IV within the permissible exclusion of Article 1603(1) of NAFTA.

CONCLUSION

Since 1960, U.S. nationals, including Cubans who have since become U.S. citizens, have possessed valid property claims against the Cuban government. The U.S. government, however, never directly addressed the Cuban government's uncompensated expropriation of U.S. property within Cuba. With the enactment of the Helms-Burton Act, the United States has created the means for taking direct action to redress the extensive property claims of its citizens. While opponents of the
bill have levied a wide array of challenges against the Act, Helms-Burton arguably overcomes all of these challenges.

Under the U.S. Constitution, Helms-Burton withstands equal protection challenges since it does not exclude any class of U.S. citizens from invoking its provisions. While the Act only addresses property confiscations in Cuba, it still comports with equal protection since Congress need not address all U.S. property claims for confiscated property at once. Thus, Helms-Burton is constitutional.

The Helms-Burton act also complies with international law. First, Helms-Burton is consistent with the concept of “objective territoriality” since Cuba’s confiscation of U.S. property had a “substantial effect” within the United States and exercise of jurisdiction by the United States over the claims to this property is reasonable under international standards. Second, the “act of state” doctrine does not apply to the Helms-Burton Act since the Act explicitly precludes application of the doctrine and because the Supreme Court has indicated that the “act of state” doctrine is neither required by international law nor by the Constitution.

Lastly, the Helms-Burton Act is consistent with U.S. obligations under both GATT and NAFTA. Although Helms-Burton strengthens the economic embargo against Cuba by prohibiting the importation or dealings in any Cuban sugar product, GATT Article XX’s exceptions permit the United States to implement this strengthened embargo without violating GATT. Article XX permits its members to avoid obligations under GATT if that member’s actions are necessary to protect public morals, discourage products of prison labor, or accommodate that member’s own laws and regulations. Helms-Burton qualifies under all three exceptions.

The Helms-Burton Act also comports with NAFTA, although it is an admittedly closer case. NAFTA, similar to GATT, allows its members to avoid their obligations in certain circumstances. While Canada and Mexico charge that Title IV’s immigration provisions violate NAFTA’s liberalized regime for business immigration, Helms-Burton’s immigration restrictions are permissible under NAFTA Chapter 16. Under this chapter, Helms-Burton may deny entry to business persons if these business people are not “otherwise qualified” under the Immigration and Nationality Act (INA) of 1952. Since the INA allows the United States to exclude those seeking entry for national security grounds, the United States could justify Helms-Burton’s immigration restrictions along those lines. Rather than following this course, the United States
should amend the INA specifically to include theft or conversion of stolen property among its national security exclusions.

Congressional enactment of the Helms-Burton Act is a crucial step in redressing extensive U.S. property claims. More importantly, the Helms-Burton Act will be instrumental in accelerating the fall of Castro's regime. By discouraging foreign investment in Cuba, the Act will deprive Castro of the hard currency he needs to sustain his regime and will pressure him into respecting fundamental human rights. In the end, the Helms-Burton Act represents a significant step toward promoting democracy in Cuba and will ensure Cuba's long-term prosperity as a democratic nation after the demise of the Castro regime.

David M. Shamberger