

**COMMENT: DESPITE THE CONTROVERSY
SURROUNDING THE HELMS-BURTON ACT ITS
END IS FAR FROM BECOMING A REALITY**

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I. INTRODUCTION

From the moment the Cuban Liberty and Democratic Solidarity Act, popularly known as the Helms-Burton Act,¹ entered the 104th Congress it sparked a great deal of controversy domestically and

* Due to the on going debate over the Helms-Burton Act, it is important to note that this Comment only reflects developments through September 27, 1997.

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1. Cuban Liberty & Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) *codified at* 22 U.S.C.A. §§ 6021-91 (1996) [hereinafter Helms-Burton].

internationally.² Most of the struggle surrounding the Helms-Burton Act centered on the far reaching provisions contained in Title III and the adverse effects such a policy would have on United States trade allies.³ Nonetheless, with a great deal of lobbying,⁴ and a little luck,⁵ this controversial bill was signed into law by President Clinton on March 12, 1996.⁶ However, the struggle did not end there. Since then, the race to pressure the Clinton administration to instill Congress to modify the Act has intensified.⁷ From Europe, miles away, to Mexico and Canada, across United States borders, the debacle continues.⁸ Never before have so many countries united to block the application of a United States anti-trade sanction abroad.

This Comment explores the controversy surrounding the Helms-Burton Act and proposes that despite the stark opposition, its end is far from becoming a reality. The following will be the major points of

2. The degree of the controversy surrounding the Helms-Burton Act is evident from the floor discussions presented in the Conference Report on the Cuban Liberty & Democratic Solidarity (Libertad) Act of 1996. See 142 CONG. REC. H1724, H1727-04 (daily ed. Mar. 6, 1996) [hereinafter Conference Report].

3. The concern that the Helms-Burton Act would adversely effect United States trade allies was made clear by Mr. Moakley, the gentleman from Massachusetts, in the floor debate on House Resolution 370 where he points to the European Union's statement read on the record. *Id.* at H1726. In that statement, the European Union implicitly attacks Title III of the Helms-Burton Act whereby it states: "[T]he EU objects, as a matter of principle, to those provisions that seek to assert extraterritorial jurisdiction of United States Federal courts over disputes between the United States and foreign companies regarding expropriated property located overseas." *Id.* at H1731 (noting that Title III is the section of the Helms-Burton Act that provides the above mentioned jurisdiction over foreign companies *trafficking* in the confiscated properties).

4. *Id.* at H1724-04. The debate in Congress over passing the Helms-Burton Bill was so poignant, that the President of the United States had to intervene to push its enactment. See William J. Clinton, *President Statement on Cuban Liberty Act*, Mar. 12, 1996, available in 1996 WL 107140.

5. Though ironic, the death of three nationals and one resident alien as a result of the Cuban government's downing of two unarmed United States civilian aircrafts prompted the President's signing of the Helms-Burton Act. *Id.*

6. *Id.*

7. *EU Steps Up Reactions to U.S. Cuba Law*, 8 EUROWATCH, US-EU RELATION, No.11, Jul. 22, 1996 (citing European Union's threat of retaliation against the United States if the Helms-Burton Act is implemented)[hereinafter *EU*]. *Some Canadian Investors to be Barred from United States*, CARIBBEAN UPDATE, June 1, 1996 (noting that Canada might retaliate the implementation of the Helms-Burton Act) outrage and threat of retaliation to the implementation of the Helms-Burton Act) [hereinafter *Canadian Investors*]. *Red Herring? Mexico Defies United States over Cuba*, INT'L REP., INC., Jul. 29, 1994, available in Westlaw; News Service, IAC File (noting Mexico's irritation and claim that the Helms-Burton violates international law) [hereinafter *Red Herring?*].

8. *Id.*

discussion: Part I commences with an introduction to the controversy surrounding the Helms-Burton Act; Part II provides a background of the events leading up to and culminating in the Helms-Burton Act's establishment; Part III explains the controversy in light of the Helms-Burton Act's specific provisions and rebuts the numerous attacks posed to the Helms-Burton Act's legality; Part IV delves into the struggle to bring the Helms-Burton Act to an end; Part V discusses the Helms-Burton Act's potential for change in light of Congress' proclaimed impediment; and Part VI concludes with a prediction that the controversy surrounding the Helms-Burton Act is not bound to end anytime soon.

II. HISTORICAL BACKGROUND

On the eve of new year's day of 1959, Fidel Castro took command of Cuba and began a reign of power that has lasted over thirty-eight years.⁹ Before Castro, the United States played an active role in Cuban politics.¹⁰ With the imposition of the Platt amendment, armed with political interference, together with a growing presence in the island, the United States became a significant player in Cuban politics.¹¹ However, that role came to a halt when the Castro regime espoused its allegiance with Marxist-Leninism, and Soviet involvement in the island increased.¹² These events, together with the expropriations of all property belonging to United States citizens and firms in the island,¹³ led to the establishment of a comprehensive boycott against Cuba geared at strangulating its economy by eliminating the island's primary source of currency and reserve.¹⁴

9. See JORGE I. DOMINGUEZ, *TO MAKE A WORLD SAFE FOR REVOLUTION* 8 (1989); See also Trevor R. Jeffries, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUS. J. INT'L L. 75, 76 (Fall 1993).

10. See Jeffries, *supra* note 9, at 76. From the moment the Spaniards sunk the *Maine*, United States involvement in Cuba transcended mere economics. JULES R. BENJAMIN, *THE UNITED STATES AND THE ORIGINS OF THE CUBAN REVOLUTION* 45 (1990). After the Spanish defeat in 1898, the United States became the sole victor over Spanish colonialism and oppression achieving a preferred status in the island. *Id.* at 61.

11. LOUIS A. PEREZ, JR., *CUBA AND THE UNITED STATES: TIES OF SINGULAR INTIMACY* XV (1990).

12. David S. De Falco, Comment, *The Cuban Liberty & Democratic Solidarity (Libertad) Act of 1996: Is the U.S. Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125, 127 (Winter 1997).

13. In response to United States termination of the Cuban sugar quota, Cuba retaliated by nationalizing the remaining all American-owned industries, agrarian enterprises and banks. See WAYNE S. SMITH, *THE CLOSEST OF ENEMIES* 57 (1987).

14. See Jeffries, *supra* note 9, at 77. For a history of hostilities between the United States and Cuba that culminated in the embargo's creation, see Shari Ellen Bourque, Note, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L. J. 191, 195-99 (1995).

Ironically, instead of causing Castro's demise through economic strain, the United States left a vacuum promptly filled by the Soviet Union.¹⁵

Recently, with the end of the Cold War and the cessation of Soviet aid, Castro turned to a different source for funds--foreign investment.¹⁶ For the past five years, Cuba has actively sought to attract foreign investment in the island by allowing foreign ownership of land.¹⁷ With the modification to the Cuban Constitution and the enactment of the Foreign Investment Act, the Cuban trade market provides fewer restrictions in the area of domestic labor or limits to foreign investment.¹⁸ As a result of the foregoing changes, foreign investment and trade with Cuba have grown significantly.¹⁹ This latest financial strategy by the Castro regime represents yet another challenge to the thirty-seven year old embargo. Thus, support for the Helms-Burton Act resulted from the apparent ineffectiveness of the embargo in light of Castro's increased financial backing.

15. Elliot Abrams, *What are Soviet Intentions in Latin America?*, WALL ST. J., Aug. 18, 1989, at A7 (noting the author's estimation that the Soviet Union contributed \$5-8 billion annually to the Cuban economy).

16. See DeFalco, *supra* note 12, at 130.

17. Octavio Castilla, *Cuba: Progress and Prospects*, (visited Mar. 23, 1998) <<http://www.santafe.edu/~naminet/naminews/insert/castilla.html>> .

18. *Id.*

19. The following excerpt(s) demonstrates the significance of foreign investment to the Cuban economy after Soviet aid to the island ceased:

In 1993 Cuba's GDP had fallen almost 35 percent compared to that of 1989; imports were down 75 percent. By the end of 1994, for the first time in the last five years, the negative tendency in growth was reversed and a modest increase of .07% was obtained. . . . In the first nine months of the present year GDP has grown 2.3% and, for the first time in the last six years, so has GDP per inhabitant. As for Cuban exports in general, they grew 16% in 1994 and a similar is expected for 1995. In 1989, foreign trade was centralized in a few dozen state enterprises. Today almost 150 national entities have export authorities, as well as 200 economic associations of joint capital. More than 630 foreign production and trading companies are registered to conduct activities in Cuba. *Id.* (noting that these figures are pulled from an article written in 1995).

The following excerpt provides a more recent account of the foreign investment in Cuba:

[C]anada's external trade with Cuba has grown since 1992. Imports from Cuba have expanded from a low of around US\$ 130 million in 1993 to a high of US \$237 million in 1995. Also, exports to Cuba have boomed from a low of approximately US\$ 100 million in 1993 to a high of US\$ 203 million in 1995.

See DeFalco, *supra* note 12, at n.37.

III. THE HELMS-BURTON ACT

The goal of the Helms-Burton Act is to promote democracy by closing all viable economic subsistence to Cuba. The Act has three major objectives: to encourage and finance a democratic transition government in Cuba; to block all financial investments filtering through to the Castro regime; and, to ensure that United States nationals receive compensation for the expropriations conducted post-revolution in 1959.²⁰ In addition, the Helms-Burton Act attempts to strengthen the embargo by prohibiting indirect financing to Cuba;²¹ opposing Cuba's participation in international financial institutions;²² and, barring assistance for the purpose of maintaining Cuba's nuclear power plant.²³ Title I of the Helms-Burton Act includes a more extensive list of prohibitions to other countries in their relations with Cuba.²⁴ The following is a detailed analysis of only the most controversial provisions set forth in the Helms-Burton Act, Title's II, III, and IV.

A. *Controversial Provisions*

Title II focuses on the establishment of a democratic transition government in Cuba. This Title allows the United States to resume diplomatic and financial relations with the island.²⁵ It further details that the United States will: reinstate trade, provide assistance, organize international efforts to aid a transition, and lift the embargo, upon the President's report announcing the existence of a transition government in Cuba.²⁶ However, the most controversial section of this Title, section 207(d),²⁷ requires resolution of property claims in Cuba before it can be regarded as having a democratically elect government.²⁸ As a result of this section, Cuba is obligated to compensate United States citizens before it can benefit from renewed diplomatic relations with the United States.²⁹ Thus, the controversy regarding this section centers on the requirement that the United States approve of the new government, and that the new

20. Helms-Burton Act, *supra* note 1, §§ 101-116 (codified at 22 U.S.C.A. §§ 6031-46).

21. *See id.* §§ 104, 106, 108, 109, 111.

22. *See id.* §§ 104, 106, 108, 111.

23. *See id.* § 111.

24. *See id.* §§ 110-111.

25. Helms-Burton Act, *supra* note 1, §§ 201-07 (codified at 22 U.S.C.A. §§ 6061-67).

26. *Id.*

27. *Id.* § 207(d).

28. *Id.*

29. *Id.*

government be ready and able to comply with the pending claims made by United States nationals for diplomatic relations to resume.

Title III of the Helms-Burton Act safeguards property claims in Cuba by providing a civil remedy to United States nationals that possess certified claims to property in Cuba,³⁰ and, grants these claimants a presumption that shifts the burden of proof to the party being sued.³¹ Section 302 of Title III directly affronts foreign investors by shifting the responsibility to pay claims owed, from the Cuban government to the companies *trafficking* in the confiscated property.³² A proper suit under this section requires that the claims for the confiscated properties initially be filed and certified by the Foreign Claims Settlement Commission under the International Claims Settlement Act (ICSA) of 1949.³³ Only if the suing party's property claims are certified can a suit be brought under this section against a person, corporation, agent, or relative in the United States.³⁴ Thus, unlike opponents to the Helms-Burton Act claim, not just any naturalized Cuban can bring a claim for compensation for *trafficking* in the confiscated property.

Incidentally, Title III also includes a loophole allowing the President of the United States to suspend the entire Title if either a national security interest exists or a transition government is in place in Cuba. Section 306 gives the President the power to postpone implementation, initially for six months.³⁵ Additionally, this section allows the President to continue suspending Title III's implementation for six-month intervals indefinitely.³⁶ The only requirement for the suspension is that the President inform Congress in writing at least 15 days prior to the effective date of the additional suspension.³⁷ Suspensions are permitted for either the national security interest of the United States or to expedite a transition government in Cuba.³⁸ While these suspensions are in effect, no property claims can arise.³⁹ However, the suspension shall not disturb pending

30. Helms-Burton Act, *supra* note 1, §§ 201-07.

31. *Id.* § 302(b)(2) (noting that the amount of liability is presumed to be the amount certified in a lawsuit).

32. *Id.*

33. *See generally* Helms-Burton, *supra* note 1, Title II.

34. *Id.*

35. Helms-Burton Act, *supra* note 1 § 306(b)(1)(a).

36. *Id.* § 306(b)(1)(b).

37. *Id.*

38. Helms-Burton, *supra* note 1, §§ 301-06.

39. *Id.*

suits.⁴⁰ The President of the United States has already put this section to good use by suspending Title III's implementation three times since the Helms-Burton Act's enactment.⁴¹

The other controversial provision of the Helms-Burton Act, Title IV, focuses on the exclusion of aliens who traffic in confiscated property from United States territory.⁴² Section 401 of this Title provides grounds for the exclusion of a person who "has confiscated or has directed or overseen confiscation of, . . . property [whose claims are] owned by United States national[s]"; who engage in the *trafficking* of confiscated property; who is a corporate officer, "or shareholder with a controlling interest of an entity involved in such *trafficking*"; or who is a spouse, minor child, or agent of a person excludable under" the preceding categories.⁴³ However, such exclusions may not take effect against a person who enters the country for a medical reason or for the purpose of transferring title to the tainted property.⁴⁴ Thus, Title IV excludes the families of the *traffickers* as well as any person even marginally involved with the transaction from entering the United States.

B. Questionable Legality of the Helms-Burton Act

The legality of the Helms-Burton Act has been under attack since its inception by those advocating to end a bad law. But, is the Helms-Burton Act really a bad law, or just a highly criticized piece of legislation that is fully justified from the United States standpoint? The arguments posed against the Helms-Burton Act rest on two grounds: 1) its inconsistency with United States domestic law and 2) its violation of international law.⁴⁵ The argument under the first ground is that the Helms-Burton Act runs counter to certain agreements entered into by the United

40. *Id.* § 306(c)(3).

41. President Clinton continues to suspend Title III of the Helms-Burton Act to appease United States trade allies. Carol Giacomo, *Caught in Vise on Cuba, Clinton Pleases No One*, REUTERS N. AM. WIRE, Jul. 16, 1996, available in LEXIS, News Library, World File (noting the first suspension of Title III); see also *Urgent Clinton Announces Decision to Prolong Helms-Burton Freeze*, AGENCE FRANCE PRESSE, Jan. 3, 1997, available in LEXIS, News Library, World File (noting Clinton's second suspension of Title III); and see Edwin D. Williamson, *Protecting Everyone's Right to Property*, THE WASH. TIMES, July 11, 1997, at A21 (noting the third suspension of Title III of the Helms-Burton Act as a result of the United States and the European Union's agreement on April 11th to protect investment and inhibit future acquisition of expropriated property).

42. Helms-Burton, *supra* note 1, § 401 (codified at 22 U.S.C.A. § 6091).

43. *Id.* § 401(a)(1)-(4).

44. *Id.* § 401(c).

45. See Bourque, *supra* note 14, at 207-11.

States to promote free trade.⁴⁶ The arguments under the second ground are that the application of the Helms-Burton Act infringes on international law because it impedes state sovereignty, represents a secondary boycott, and is wholly unjustified.⁴⁷ These arguments, though justly made, fail to account for the United States' justifications.⁴⁸ The following paragraphs question the validity of the arguments advanced above in light of those justifications.

1. Inconsistency with Domestic Law?

The Helms-Burton Act ostensibly violates certain multilateral agreements to which the United States is a party; geared at promoting free trade in the international sphere. Among the most notable of these agreements are: the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT).⁴⁹ Both of these agreements are often used by opponents of anti-trade legislation to point out the United States' incapacity in creating laws such as the Helms-Burton Act.⁵⁰ However, these can only provide a cause of action domestically if they are self-executing or have implementing legislation.⁵¹ Here, both Agreements have been implemented through Fast Track,⁵² though not entirely.⁵³ Thus, both Agreements provide viable avenues through which member countries can attack the legality of the Helms-Burton Act.

NAFTA or World Trade Organization member countries could, in dispute settlement resolution proceedings, argue that the Helms-Burton Act violates some of the provisions in either NAFTA or GATT.⁵⁴ The

46. *See generally infra* note 49 (citing GATT & NAFTA as possible avenues to further a domestic attack against the Helms-Burton Act).

47. U.N. CHARTER art. 2, para 7.

48. *See infra* Part III B(2)(c).

49. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, 297-456 & 605-800 [hereinafter NAFTA], General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

50. Anthony M. Solis, Comment, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709, 732-36 (Apr. 1997).

51. RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES § 111 (1985) [hereinafter THIRD § 111].

52. *See* 19 U.S.C. §§ 2101, 2111-12, 2191-93 (1988), *reprinted in* Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, n.121 (Oct. 1995) (noting that Fast Track is utilized to implement international agreements as needed).

53. *Id.*

54. NAFTA, *supra* note 49 art. 1105(I); *see also* Kenneth L. Bachman, *Anti-Cuban Sanctions May Violate NAFTA, GATT*, NAT'L L. J. C3 (Mar. 11, 1996)[hereinafter Bachman].

following are just some of the arguments advanced under either trade agreement.⁵⁵ First, a NAFTA member country can argue that Title III of the Helms-Burton Act contradicts NAFTA article 1105, which requires that a NAFTA country abide by international law when dealing with the investment of a NAFTA country national.⁵⁶ Additionally, a NAFTA member country could also argue that Title III of the Helms-Burton Act infringes article 1105 because it lacks the justification to exercise jurisdiction over foreign activity wholly unconnected to the United States.⁵⁷ Likewise, under GATT, a World Trade Organization member can argue that the Helms-Burton Act impermissibly burdens freedom of trade.⁵⁸ Thus, the above mentioned provisions provide viable arguments against the Helms-Burton Act.

The problem with these arguments is that the agreements from which they were taken provide exceptions to their application. These agreements allow member countries to withdraw a dispute or simply not abide by the agreement in the interest of national security, and in the interest of preserving sovereignty.⁵⁹ That is, the United States need not uphold its commitment to either document, where a national security interest in not doing so exists. Though many would disagree,⁶⁰ the United States continues to brand the Cuban government as a threat to national security.⁶¹ The United States justifies its claim of national security against

55. There are other avenues for attack under NAFTA and/or GATT which have been recently explored. The following is a brief recapitulation of those arguments: first, under NAFTA, a member country can argue that the Act maintains a prohibition or restriction on the importation of a foreign good that touched Cuban soil in violation of article 309(1); second, under GATT, a member country can argue that the Act violates Articles I, III, V, XI, and XII because it interferes with a foreign company's sourcing of raw materials; but more specifically, under GATT, a member country can argue that the Helms-Burton discriminates against 'like products' in violation of article I (1). See Brian J. Welke, Comment, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361, 366-9 (Spring 1997).

56. See Bachman, *supra* note 54, at C3.

57. *Id.*

58. *Id.*

59. The so called national security exception for NAFTA is located in Chapter 21, Article 2102 which states that: "[n]othing in this Agreement shall be construed . . . to prevent any party from taking any actions that it considers necessary for the protection of its essential security interests . . . taken [for an] emergency in international relations" See Welke, *supra* note 55, at n. 99. NAFTA's counterpart, GATT, has a similar provision in Article XXI. *Id.* at 376.

60. See ADOLFO LEYVA DE VARONA, Ph.D., PROPAGANDA AND REALITY: A LOOK AT THE U.S. EMBARGO AGAINST CASTRO'S CUBA (Canf 1994) [hereinafter PROPAGANDA] (noting the author's response to the argument that Cuba fails to present a national security threat to the United States).

61. *Id.*

Cuba on the following: 1) their antagonistic history; 2) their geographic proximity; and 3) their pending economic interests.⁶² Since the above mentioned agreements do not define national security, the use of this exception leaves the door wide open for its continual use to evade their provisions.⁶³ Thus, the United States application of the Helms-Burton Act is not inconsistent with domestic law.

2. Invalidity Internationally?

International criticism against the Helms-Burton Act revolves around the following three arguments: first, that the Helms-Burton Act interferes with state sovereignty; second, that the Helms-Burton Act represents an impermissible secondary boycott against United States trade allies; and third, that the United States has no justification to implement the Helms-Burton Act to actions occurring outside its borders.⁶⁴ Although the above arguments seem compelling at first glance, they are fundamentally flawed because they insist on disregarding the United States' position on Cuba from its analysis. For that reason, the following paragraphs will explicate the validity of the above mentioned arguments in light of the United States' justifications in pursuing implementation of the Helms-Burton Act.

a. Interference with State Sovereignty

The first argument against the international invalidity of the Helms-Burton Act rests on its alleged interference on state sovereignty. The concept of sovereignty is memorialized under article 2(4) of the United Nations Charter which states that: "All Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."⁶⁵ Other than a 'threat' or a 'use of force,' a state victim of a violation of an international obligation by another state may use unilateral measures, though unlawful, only where: necessary to end the violation or the injury, or to remedy the

62. CARLOS ALZUGARAY TRETO, PROBLEMS OF NATIONAL SECURITY IN THE CUBAN-U.S. HISTORIC BREACH, IN U.S.-CUBAN RELATIONS IN THE 1990'S, 90-93 (Westview Press 1989) (citing to the numerous national security themes that shaped the United States and Cuban conflict); see also PROPAGANDA, *supra* note 60 (noting the current United States national security concerns in Cuba).

63. See Welke, *supra* note 59, at 376.

64. W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1312-21 (Apr. 1997).

65. U.N. CHARTER art. 2(4).

violation; and proportional to the violation and the injury suffered.⁶⁶ Since, the Helms-Burton Act represents neither a 'threat' nor a 'use of force,' the international validity of its application rests solely on the necessity and proportionality of said measure to the injury.⁶⁷ Thus, whether the Helms-Burton Act's interference on state sovereignty violates international law depends on the magnitude of the injury suffered by the United States.

United States nationals suffered serious financial loss as a result of the Cuban nationalizations in 1960.⁶⁸ Under international law, a state is responsible for any injury resulting from a taking of property owned by a national of another state, unless: it is taken for a public purpose; is not discriminatory; or is accompanied by just compensation.⁶⁹ Cuba arbitrarily confiscated property owned by United States nationals without providing just compensation in violation of international law.⁷⁰ Although the confiscations provided for payment to the aggrieved parties, the terms of payment have never been fulfilled by the Castro regime.⁷¹ Moreover, the properties were not taken for a public purpose because the record shows Castro's intent to expropriate was to affront the United States.⁷² Since Cuba continues to owe an international obligation to United States nationals, unilateral measures from the United States are permissible to remedy the injury or violation.⁷³ Thus, in light of the facts, the minimal interference with state sovereignty, if any, caused by the Helms-Burton Act is permissible under international law.

66. RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES §905 (1)(a-b), (2), cmt. a (1987).

67. *Id.*

68. "When Castro nationalized Cuba in 1960, several U.S. companies were forced out. At the time, the United States was doing more than \$500 million in business with Cuba (about \$2.5 billion in 1994 dollars)." *Cuba Scouting for Investors*, USA TODAY, Dec. 27, 1994, at 6B. The following United States' companies lost millions: International Telephone and Telegraph \$131, Moa Bay Mining \$88.3, American Sugar \$71.6, Texaco \$51.0, Bangor Punta \$39.2, Nicaro Nickel \$33.0, Coca-Cola \$27.5, Lone Star Cement \$24.8, Colgate-Palmolive \$14.4, etc. *Id.* The value of the claims registered with the United States Foreign Claims Settlement Commission is \$1,851,057,358 (at a present compensable value of \$13,051,845,500). John Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C.J. INT'L & COM. REG. 66, 68 (Fall 1995).

69. RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES §712 (1987) [hereinafter THIRD § 712].

70. See Smagula, *supra* note 68, at 72-74.

71. *Id.* at note 55 (noting that the Castro regime's actions at the time demonstrated its lack of intent toward providing compensation for the expropriated properties).

72. *Id.*

73. *Id.*

b. A Secondary Boycott on U.S. Trade Allies

The second argument against the Helms-Burton Act internationally is that it simulates an impermissible secondary boycott on United States trade allies. To determine the validity of this argument, the query turns to the strict definition of a secondary boycott taken from federal labor law. "A secondary boycott is any combination [of acts] if its purpose and effect are to coerce customers or patrons, or through fear or loss . . . to withhold or withdraw their business relations from [an] employer under attack."⁷⁴ In comparing the above definition to the Helms-Burton Act, there is merit to the argument that said Act 'in intent and probably in effect' is a classical secondary boycott.⁷⁵ The validity of said argument stems from the Helms-Burton Act's stated purpose aimed at discouraging foreign investment in Cuba by threatening to subject investors to litigation in the United States.⁷⁶ However, by virtue of the above mentioned definition, the Helms-Burton Act does not operate as a secondary boycott because it does not directly coerce foreign investors outright from doing business with Cuba.⁷⁷ Since the Title III merely discourages foreign investment in the island, the argument that the Helms-Burton Act is a secondary boycott on United States trade allies is likewise unconvincing.

c. Lack of Jurisdiction and Reasonableness

The last argument against the Helms-Burton Act, discussed here, is that its extraterritorial jurisdiction is wholly unjustified and, in the alternative, unreasonable under international law. Title III of the Helms-Burton Act is United States law geared at proscribing foreign investment in Cuba. In order for the United States to exercise jurisdiction over acts of non-nationals outside its territory, it must first be justified to do so under international law.⁷⁸ Since the conduct proscribed by the Helms-Burton Act

74. *Wright v. Teamsters' Union Local No.690*, 33 Wash. 2d 905, 207 P.2d 662, 665 (1949). The term refers to refusal to work for, purchase from or handle products of an employer with whom the union has no dispute with object of forcing that employer to stop doing business with another employer with whom union does have a dispute. *C. Comella, Inc. v. United Farm Workers Organizing Committee*, 33 Ohio App. 2d 61, 292 N.E.2d 647, 656 (1976).

75. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 429 (July 1996).

76. See generally Helms-Burton, *supra* note 1, Title III.

77. See Lowenfeld, *supra* note 75, at 430. But, even if Title III of the Helms-Burton Act represented a secondary boycott on United States Trade allies, such would not be a per se violation of international law. See Fairey, *supra* note 64, at 1314.

78. International law recognizes five basis for prescriptive jurisdiction: nationality, territoriality, universality, protective principle and passive personality. RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES §402, cmt. a (1987).

occurs outside United States territory by non-nationals, neither the territoriality, nor the nationality principles can provide a valid justification.⁷⁹ However, section 402 of the Restatement (Third) of Foreign Relations provides one justification that allows prescription of conduct of non-nationals outside United States borders, where said conduct has direct effects inside the United States--the direct effects doctrine.⁸⁰ With regards to the Helms-Burton Act, the fact that non-nationals are *trafficking* in the confiscated properties has intentional and substantial effects on United States nationals who possess claims to those properties within the United States.⁸¹ Thus, the prescriptive jurisdiction of the Helms-Burton Act is justified.

However, "[e]ven when one of the bases for jurisdiction under §402 is present, a state may not exercise jurisdiction to prescribe law . . . when the exercise of such jurisdiction is unreasonable."⁸² Although critics argue that the Helms-Burton Act will not meet any of the reasonableness factors, the following arguments demonstrate the contrary.⁸³ First, there are substantial economic connections between the United States and the *traffickers*, to wit--the tainted property.⁸⁴ Second, implementation of the Helms-Burton Act to stop foreign investment in the island is necessary to protect U.S. nationals' property claims.⁸⁵ Third, the Helms-Burton Act is important to the international system in that it aids in terminating the last

79. *Id.* at cmt(s) c & e.

80. *Id.* at cmt. d.

81. *See* DeFalco, *supra* note 12.

82. RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES § 403(1) (1987). The factors used to determine reasonableness of prescriptive jurisdiction are:

- a. the link of the activity to the territory of the regulating state;
- b. the connections, such as nationality, residence, or economic activity between the regulating state and the individuals regulated;
- c. the character of the activity to be regulated;
- d. the existence of justified expectations that might be protected or hurt by the regulation;
- e. the importance of the regulation to the international political, legal, or economic system;
- f. the extent to which the regulation is consistent with the traditions of the international system;
- g. the extent to which another state may have an interest in regulating the activity; and
- h. the likelihood of conflict with regulation by another state.

Id. at (2)(a-h) , cmt b. (noting that not all factors are given the same importance in all situations).

83. *See* Fairey, *supra* note, 64 at 1318.

84. RESTATEMENT, *supra* note 82, § 403 (2)(b).

85. *Id.* § (2)(c).

bastion of communism in the Western world.⁸⁶ Fourth, implementation of the Helms-Burton Act is consistent with the international tradition, which permit unilateral measures to counteract the breach of an international obligation.⁸⁷ Lastly, no other state is interested in regulating foreign investment in Cuba other than the United States.⁸⁸ Thus, the Helms-Burton Act does not inhere international requirements for the valid exercise of jurisdiction abroad.

IV. TRADE WAR LOOMING?

Vestiges of the controversy that would befall the Helms-Burton Act were evident since the Helms-Burton Act's presentment in Congress.⁸⁹ However, the best record of the stark opposition to the Helms-Burton Act appears in the Congressional Record of the floor debates on House Resolution 370.⁹⁰ The arguments posed against the Helms-Burton Act therein include, but are not limited to, the following: (1) Castro will not be hurt by this legislation; (2) the Helms-Burton Act weakens the United States ability to encourage democracy in Cuba; (3) the economic embargo against Cuba will not hasten the end of the Castro regime; (4) there is no indication that the Cuban economy is on the brink of collapse; (5) the Helms-Burton Act denies the President the flexibility to respond to a democratic transition in Cuba; (6) the Helms-Burton Act coerces United States trade allies to join in the Cuban embargo at the risk of retaliation; and (7) the Helms-Burton Act subverts United States national interest for a select few.⁹¹ While these arguments failed to block the Helms-Burton Act's enactment, they set the stage for the struggle to end the Helms-Burton Act in a different forum--the international arena.

A. *Waging an International Trade War*

Scholars predict that a different threat, not involving the military or saving human lives, grows near: an international trade war. The cause of this new form of engagement is not oppression, communism, or freedom; but, rather a United States law sought to proscribe the conduct of

86. *Id.* § (2)(e).

87. *Id.* § (2)(f).

88. *Id.* § (2)(g).

89. See Bill Tracking, H.R. 927, Oct. 16, 1996, available in LEXIS, Nexis Library.

90. See Conference Report, *supra* note 2, at H1725.

91. *Id.*

non-nationals outside United States borders called the Helms-Burton Act.⁹² Although application of said law to conduct outside United States territory is not inconsistent with international law,⁹³ the affected countries are likewise permitted to use unilateral measures to counteract the Helms-Burton Act's unruly provisions.⁹⁴ These measures, if taken, could have numerous repercussions on trade relations between the United States and up to seventeen countries in the world (including Canada and Mexico).⁹⁵ One aspect of the potential repercussions involving the seven most industrialized countries in the world as a result of the Helms-Burton Act, has already taken hold by virtue of the threats announced by Canada, the European Union and Mexico.⁹⁶ Thus, it is to the effectiveness of these threats that this paper turns to next.

B. Threatened Sanctions from Canada, EU, and Mexico

Enactment of the controversial Helms-Burton Act sparked serious criticism. Chief among the protesters are Canada, Mexico, and the European Union, whose corporate citizens, incidentally, are the major *traffickers* in the tainted property.⁹⁷ These governments have denounced the Helms-Burton Act as being an invalid use of extraterritorial jurisdiction and as launching a direct attack at their nations' sovereignty.⁹⁸ Consequently, these countries have launched a concerted attack against the Helms-Burton Act to prevent its implementation.⁹⁹ The question here becomes, whether the pressure from these countries, in and of itself, is sufficient to compel the United States to modify and/or amend the Helms-Burton Act to exclude the controversial provisions delineated in Part III above. In answering the above query, however; a threshold analysis into each country's plan of attack against the Helms-Burton Act is merited.

92. Antonio Paneque Brizuelas, *¿Se aboca el mundo hacia una guerra comercial?*, GRANMA INT'L (visited July 25, 1995) <<http://www.cubanet.cu/granma/junio/4jun1e.html>> .

93. See *supra* Part III(B)(2)(c).

94. See *supra* Part III(B)(2)(a) (noting the same analysis applies to the retaliating countries since the Helms-Burton Act, if implemented, will injure their respective citizens alike).

95. See Brizuelas, *supra* note 92.

96. See generally EU, *supra* note 7; see *Canadian Investors*, *supra* note 7; and also, *Red Herring?*, *supra* note 7.

97. See generally Conference Report, *supra* note 2 at H1724-04.

98. *Id.* at H1730.

99. See generally EU, *supra* note 7; see *Canadian Investors*, *supra* note 7; *Red Herring?*, *supra* note 7.

1. Canada

Canada, Cuba's largest foreign investor, vigorously opposed the Helms-Burton Act from its inception.¹⁰⁰ In the interest of protecting its corporate citizens, Canada drafted and introduced a bill to counteract the Helms-Burton Act's implementation.¹⁰¹ Canada's Trade Minister, Art Eggleton, described the Canadian bill as 'antidote legislation.'¹⁰² The Canadian bill strikes back at the United States anti-trade legislation by providing the following measures: refusing to recognize the Helms-Burton; ignoring any court rulings issued in accordance with the Helms-Burton Act; allowing Canadian firms to countersue Canadian subsidiaries of American firms; and allowing the Canadian government to fine Canadian firms that succumb to the Helms-Burton Act's provisions.¹⁰³ As Mr. Eggleton repeats the threat he advises: "If the President of the United States does not proceed with the implementation of the Helms-Burton Act, then our companies won't need this. . . ." ¹⁰⁴ Thus, at this venture, Canada's threats do not seem at all vain.

2. European Union

The European Union, on the other hand, has encountered more difficulty in moving up to speed in introducing an 'antidote' to the Helms-Burton Act like their Canadian counterparts. The only draft for an anti-boycott measure against United States extraterritorial sanctions, such as the Helms-Burton Act, failed to pass the Council of Ministers last October.¹⁰⁵ The regulation was unable to procure a unanimous approval from the member states.¹⁰⁶ The most recent measure taken by the European Union, in conjunction with Canada and Mexico, is to file a complaint in the World Trade Organization to set up a dispute settlement panel to discuss violations to GATT and NAFTA by the Helms-Burton Act.¹⁰⁷ After a previous rejection, the United States accepted the creation of a panel to

100. *Canada Introduces Anti Helms-Burton Legislation*, REUTERS FIN. SERV. (Sept. 16, 1996) [hereinafter *Canadian Bill*]; *Bill Would Protect Firms From Helms-Burton Law*, THE RECORD, Sept. 17, 1996, at B08.

101. *Canadian Bill*, *supra* note 100.

102. *Id.*

103. *Id.*

104. *Id.*

105. *EU/US: Commission Plays Down Danish Snag on Anti Helms-Burton Move*, EUR. INFO. SERV. (Oct. 27, 1996).

106. *Id.*

107. *See infra* note 114.

investigate the legality of the Helms-Burton Act.¹⁰⁸ Thus, the European Union is also a strong contender to the Helms-Burton Act and any sanction implemented by the Council of Ministers will not be taken lightly.

3. Mexico

Of the three opponents to Helms-Burton Act, Mexico is the weakest and least involved. The most Mexico has done, besides making several denunciations, is to participate in the complaint to the World Trade Organization with Canada and the European Union.¹⁰⁹ Although Mexico has not been actively involved in creating an 'antidote' to the Helms-Burton Act, it is an avid supporter of the Cuban theme in the Organization of American States (OAS).¹¹⁰ In the last OAS convention on June 5, 1996, every member, except the United States, voted on a resolution to submit the Helms-Burton Act to a judicial committee to determine its validity in international law.¹¹¹ Other than Mexico's participation in the latter two events, the Mexican government has done nothing more than ride on the coattails of Canada and the European Union.¹¹² Furthermore, Mexico has never directly attacked the United States or threatened to retaliate, other than protest the illegality of the Helms-Burton Act.¹¹³ Thus, Mexico remains the 'jack in the box' as to precisely what measures, if any, it will employ against the Helms-Burton Act.

V. DUBIOUS U.S. COMPROMISE TO CHANGE THE ACT

The magnitude of the controversy surrounding the Helms-Burton Act does not end with each of the foregoing countries' individual plan(s) for retaliation. As discussed *supra* Part III(B)(1), there are other concerted measures that can achieve more effective results such as instituting a World Trade Organization (WTO) complaint against the Helms-Burton Act.¹¹⁴ Both Canada and the European Union have actively sought to attack the

108. See Solis, *supra* note 50, at 734.

109. William Willits, *Mexico's Zedillo Denounces U.S. Anti-Cuban Sanctions*, LATINO LINK (June 11, 1996); David Perez, *Mexico, Canada Prep to Defy Helms-Burton*, WORKERS WORLD NEWS SERV. (Jun. 27, 1996).

110. Fernando Martinez, *Reves en la OEA a la Helms-Burton*, LA JORNADA, June 5, 1996.

111. *OAS Condemns Helms-Burton*, LATIN AM. LAW AND BUS. REP. (June 30, 1996) (noting 32 out of 34 votes in favor--only the United States voted against the resolution, the Dominican Republic was not present in the vote).

112. See Willits, *supra* note 109.

113. *Id.*

114. *Canada To Support EU in WTO Panel on Helms-Burton*, REUTERS FIN. SERV. (Nov. 21, 1996).

validity of the Helms-Burton Act beyond its territorial boundaries in dispute settlement proceedings before the WTO.¹¹⁵ This latter measure has already proven its effectiveness in light of recent pronouncements made by the United States in lieu of the proceedings.¹¹⁶ However, those pronouncements are suspect, at best, in light of Congress' impediment to changing the controversial provisions of the Helms-Burton Act.¹¹⁷ Thus, to assess the validity of the United States commitment to the European Union, a look into the legislation currently proposed in Congress to the Helms-Burton Act is essential.

Irrespective of the agreement between the European Union and the United States to suspend the WTO hearings, the Foreign Affairs Committee of the House of Representatives of the United States Congress continues to support legislation aimed at reinforcing the blockade against Cuba.¹¹⁸ Most of the bills Congress passed this past legislative session are additions and/or modifications to the Helms-Burton Act, aimed at preempting renewed efforts at debilitating the Act.¹¹⁹ The subversive nature of the Committee's actions in passing these bills is evident in the secrecy with which they were carried out; their continued imposition on

115. *Id.*

116. *EU and U.S. Reach Deal on Helms-Burton*, WORLD NEWS DIG. (Apr. 17, 1997) (noting the Clinton administration's promise to seek a change in Helms-Burton that allows the President to waive Title IV, in return for the suspension of the WTO hearing and the European Union's commitment to deter European companies from dealing in the tainted properties).

117. *Id.* As Congresswoman Ileana Ros-Lehtinen (R-Florida) clearly stated, in reaction to the April 11 accord between the European Union and the United States, "any attempt to change Helms-Burton 'would be met with stiff resistance in Congress.'" *Id.*

118. The following legislation passed the Foreign Affairs Committee of the House of Representatives on May 6, 1997 amending the Foreign Policy Reform Act to include:

1. Sec. 308: Withholding U.S. assistance to countries that aid the government of Cuba
2. Sec. 506: Availability of funds for the Cuban Liberty and Democratic Solidarity (Liberty) Act of 1996 and the Cuban Democracy Act of 1992
3. Sec. 513: Requirements for assistance to the Russian Federation
4. Sec. 577: Withholding of assistance to countries that provide nuclear fuel to Cuba
5. Sec. 705: Assistance to human rights groups in Cuba
6. Sec. 1106: United States Informational, Educational and Cultural Programs
7. Sec. 1261 Reports to Congress concerning Cuban immigration policies
8. Sec. 1412: Authorities of the Broadcasting Board of Governors
9. Sec. 1705: Reports on determinations under Title IV of the Liberty Act
10. Sec. 1709: Programs or projects of the International Atomic Energy Agency in Cuba

Denunciation of new actions against Cuba in the United States Congress, GRANMA INT'L, Aug. 21, 1997.

119. *Id.*

the administration to submit periodic reports on its policy toward Cuba; the obvious contradiction to the United States' promise to the European Union to relax the Helms-Burton Act; and the obvious impediment posed by supporters of the Helms-Burton Act to change.¹²⁰ The ulterior motive behind the passage of these bills is to heighten Washington's offensive toward Cuba by granting Congress increased decision-making over United States foreign policy with Cuba.¹²¹ If successful, these actions will undercut any effort by the Clinton administration to relax the controversial provisions of the Helms-Burton Act.¹²² Thus, in light of Congress' impediment to change, it is unlikely that the United States will be capable of keeping its promise to the European Union.

VI. CONCLUSION

In sum, the outcome of the foregoing analysis is that despite the controversy surrounding the Helms-Burton Act, its end is far from becoming a reality. While the Clinton administration's promise to the European Union in lieu of the WTO hearings seemed hopeful, it did not account for the strong forces in Congress that viciously seek an end to the Castro regime at all cost. More than likely, when the détente between the European Union and the United States comes due, the Clinton administration will arrive empty-handed to the bargaining table. And then what? Will Title III of the Helms-Burton Act ever get implemented? Will the European Union go forward with its WTO complaint? Will there be a trade war?

These are questions to which only time can provide answers. However, the record as presented here strongly suggests that all but the last question will be answered in the negative. As long as the President possesses the power to suspend Title III every six months indefinitely, it is unlikely that the Helms-Burton Act will ever go into effect. Furthermore, with regards to the European Union and its WTO complaint, there is little chance that such a measure will succeed in bringing an end to the Helms-Burton Act's controversial provisions. Moreover, the chances of the European Union, and the border nations of Mexico and Canada, instigating a commercial trade war against the United States, is slim at best considering that the American people consume a large part of these nations' exports; and a trade war against the United States would certainly backfire on the instigators (considering that said measures would hurt them

120. *Id.*

121. *Id.*

122. *Id.*

more). In closing, however, one thing is clear, there is no telling what will happen to the Helms-Burton Act next.