

# THE HELMS-BURTON ACT: THE FINAL PIECE TO BRING DOWN THE TYRANT'S REGIME

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In 1960, President Dwight D. Eisenhower began what has become one of the longest standing economic embargoes this country has ever had against another country.<sup>1</sup> In 1964, President John F. Kennedy continued what president Eisenhower started, and strengthened economic sanctions against the Cuban government.<sup>2</sup> The sanctions passed by President Kennedy prohibited almost all direct commerce between the United States and Cuba.<sup>3</sup> In February 1996, a Cuban MiG-29 fighter jet shot down two unarmed United States civilian planes in international airspace, killing all four individuals on board.<sup>4</sup> In response to this unprovoked attack by the Cuban government, President William Jefferson Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996

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1. Digna B. French, Comment, *Economic Sanctions Imposed by the United States Against Cuba: The Thirty-Nine year Old Embargo Culminating with the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 7 U. MIAMI INTER-AM. L. REV. 1 (1998).

2. *Id.*

3. *See id.*

4. Implementation of the LIBERTAD Act, 7 U.S. Dept. of State Dispatch 15 (Apr. 8, 1996). *See also* U.S. and the UN Respond to Cuban Shootdown of Civilian Aircraft, 7 U.S. Dept. of State Dispatch 11 (Mar. 11, 1996) (reacting to the incident and discussing unilateral actions taken).

(Helms-Burton) on March 12, 1996.<sup>5</sup> This piece of legislation is the focus of this article, and is the focus of great debate in the international community. Since its inception the Helms-Burton Act has created a surplus of commentaries, law reviews, and symposia concerning certain titles of the Act, in particular Titles III and IV.<sup>6</sup> The stage is now set for President George W. Bush to inflict the final blow on the Cuban regime, and sign into law Title III of the Helms-Burton Act, which many legal scholars believe would end Castro's tyranny.<sup>7</sup> This article suggests that suspending Title III from the Helms-Burton Act renders the Act as nothing more than political gesturing, and simply a mere extension of the 1959 Trade Embargo currently in place. Indeed, if the current administration wants to see an end to the Castro regime, it must be proactive in its approach towards Castro, and not succumb to the political pressures being applied by their trading partners.

Part I of this article analyzes the four provisions of the Helms-Burton Act, closely scrutinizing Title III, which allows United States nationals to file lawsuits against any foreign investors who traffic<sup>8</sup> in illegally confiscated property within Cuba. Part II of this article examines whether the Helms-Burton Act is in line with international law in light of harsh criticism and non-support from the international community. Finally, part III of this article examines whether United States courts have jurisdiction based upon the "effects" doctrine which grants countries the right to exercise jurisdiction with respect to activity outside of the state, but have or intend to have a substantial effect within the state's territory.<sup>9</sup> This article concludes that the Helms-Burton Act is a legal, effective, but unutilized tool to strengthen the Cuban embargo, bring an end to Castro's hegemonic regime, and be the final piece of a forty-year-old puzzle giving every Cuban-American a country free from tyranny.

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5. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-14, 110 Stat. 785 (1996) (codified 22 U.S.C. § 6021-6091) [hereinafter Helms-Burton Act].

6. See Jorge F. Perez-Lopez and Matias F. Travieso-Diaz, *The Helms-Burton Law and Its Antidotes: A Classical Standoff?*, 7 SW. J. L. & TRADE AM. 95 (2000).

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

8. "Traffic as used in Title III, and except as provided in subparagraph (B), is someone who sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property." 22 U.S.C.A. § 6023(13) (2001).

9. See Antonella Troia, Comment, *The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity Act of 1996 Violates U.S. Obligations Under NAFTA*, 23 BROOK. J. INT'L L. 603, 608 (1997).

## I. HELMS-BURTON ACT OF 1996 ANALYZED

The Helms-Burton Act's explicit purpose is 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,<sup>10</sup> to strengthen international sanctions against the Castro government,<sup>11</sup> and to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft, and political manipulation of the desire of Cubans to escape that results in mass migration to the United States.<sup>12</sup> The Act further seeks to encourage the holding of free and fair democratic elections in Cuba conducted under the supervision of internationally recognized observers,<sup>13</sup> to establish 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.<sup>14</sup> Finally, the Act aims to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.<sup>15</sup>

Title I, "Strengthening International Sanctions Against the Castro Government"<sup>16</sup> calls upon the President of the United States to advocate and instruct the permanent representatives to the United Nations to seek, within the Security Council, a mandatory international embargo against the Cuban Government.<sup>17</sup> Further, Title I combines incentives and consequences to achieve a democratic government in Cuba.<sup>18</sup> Section 101, entitled "Statement of Policy," makes it clear to the international community, and in particular to the Castro government, any threat of national security posed by the operation of any nuclear facility will culminate in a backlash of consequences against the Castro government.<sup>19</sup>

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10. Helms Burton Act, *supra* note 5, § 6022 (1996).

11. *Id.* § 6022(2) (1996).

12. *Id.* § 6022(3) (1996).

13. *Id.* § 6022(4) (1996).

14. *Id.* § 6022(5) (1996).

15. *Helms Burton Act*, *supra* note 5, § 6022 (6) (1996).

16. *Id.* § 6031 (1996).

17. *Id.* § 6031(2) (1996).

18. French, *supra* note 1, at 8.

19. Helms-Burton Act, *supra* note 5, at § 6031 (1996). The President should do all in his power to make it clear to the Cuban Government that (a) the completion and operation of any nuclear power facility, or (b) any further political manipulation of the desire of Cubans to escape that results in mass migration to the United States, will be considered an act of aggression which will be met with an appropriate response in order to maintain the security of the national borders of the United States and the health and safety of the American people. It is beyond the scope of

In essence, the goal of Title I is to apply economic pressure to the Castro government by restricting imports from Cuba into the United States. Further, Title I does not allow any American people or companies to invest, supply loans, credits, or any other form of economic help for the Castro government.<sup>20</sup>

Title II of Helms-Burton Act, "Assistance to a Free and Independent Cuba," calls upon the United States to provide assistance to a transitional government in Cuba.<sup>21</sup> This Section formally states that the United States will form solidarity with the Cuban people, to provide appropriate forms of assistance to a transition government in Cuba, and to facilitate the rapid movement from such a transition government to a democratically elected government in Cuba, that results from an expression of the self determination of the Cuban people.<sup>22</sup> The provisions of this Section will take effect upon a determination by the President of the United States that a transition to democracy is taking place in Cuba.<sup>23</sup> Among aid the United States will provide to Cuba, once a democratically elected government is in place, shall be items such as food, medicine, medical supplies, and equipment to meet emergency needs to protect the basic human rights of the Cuban people.<sup>24</sup>

Keeping the provisions of Title I and Title II in mind, we turn now to the 1959 Trade Embargo, and compare the provisions of that Embargo with the Helms-Burton Act. The 1959 Trade Embargo calls upon the United States to prohibit all direct commerce between the United States and Cuba; block all assets in the United States belonging either to Cuba or to Cuban nationals, including freezing bank accounts; rescind Cuba's "most favored nation" status; and ban aid to any country which provides assistance to Cuba.<sup>25</sup> In comparing Title I and II with the 1959 Trade Embargo, there does not seem to be a great deal of distinction between the two. Quite frankly, the first two titles of the Helms-Burton Act are simply an extension of the 1959 Trade Embargo, because the objectives of both are to isolate Castro's government and prevent countries from supporting

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this article to explore the consequences which will occur if Cuba maintains and operates a nuclear power plant within its country.

20. French, *supra* note 1, at 8.

21. Helms-Burton Act, *supra* note 5, § 6061(11) (1996).

22. *Id.* § 6061(5) (1996).

23. Helms-Burton Act, *supra* note 5, § 6062 (a)(1) (1996). "The President shall develop a plan for providing economic assistance to Cuba at such time as the President determines that a transition government or a democratically elected government in Cuba as determined under section 203(c) is in power." *Id.*

24. *Id.* § 6062(b)(2)(A)(1) (1996).

25. See French, *supra* note 1, at 2-3.

the communist regime. It is not until reading the provisions of Title III and Title IV that a clear distinction is marked between the two statutes.

Title III has received the harshest criticism from the international community.<sup>26</sup> Title III of the Act, entitled "Protection of Property Rights of United States Nationals" states that

any person that traffics in confiscated property for which liability is incurred under paragraph (1) shall, if a United States national owns a claim with respect to that property which was certified by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949, be liable for damages computed in accordance with subparagraph (C).<sup>27</sup>

In essence, this title protects United States property that has been wrongfully confiscated by the Cuban government and resold in an effort to stir economic re-growth for the Castro regime. However, the re-growth comes at the expense of the rightful owners who are United States nationals, or have become United States nationals as a consequence of fleeing the communist country. It is this title that gives the Helms-Burton Act not only distinction from the 1959 Trade Embargo, but clearly places a strain on the Castro government by making any and all individuals or corporations trafficking confiscated property in Cuba, subject to a lawsuit by the rightful owners of that property.

This article is not opposition to Section 306, granting the President power to suspend the effective date of Title III for a period of six months, provided that the President states in writing that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.<sup>28</sup> This article, however, is in opposition to the manner in which Section 306 has been used to appease countries engaging in the very acts that Helms-Burton opposes. This presidential power has been used consecutively since the signing of the Helms-Burton Act,<sup>29</sup> first by President William Jefferson Clinton and more recently by President George W. Bush.<sup>30</sup> President Bush stated that he hopes by

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26. See Jonathon Ratchik, *The Cuban Liberty and Democratic Solidarity Act of 1996*, 11 AM. U. J. INT'L L. & POL'Y 343 (1996).

27. Helms-Burton Act, *supra* note 5, § 6082(a)(3) (1996).

28. *Id.* § 6085(b)(2) (1996).

29. See Associated Press, *Bush Suspends Law on Cuba Lawsuits* (July 16, 2001), available at AOL: APO/Bush-Cuba/. See also Peter Morton & John Geddes, *Ottawa Spurns Clinton Move: Suspension of Helms-Burton Lawsuits Dismissed by Eggleton*, FIN. POST, Jan. 4, 1997; Robert S. Greenberger, *U.S. Hold Up Cuba Suits, Pleasing Few*, WALL ST. J., Jan. 6, 1997.

30. *Id.*

suspending Title III it will encourage a movement toward democracy on the island.<sup>31</sup> However, President Bush fails to state what events or steps the Castro government has taken that would support such a statement.

Since Fidel Castro seized power in Cuba in 1959 he has trampled on the fundamental rights of the Cuban people, and through his personal despotism, has confiscated the property of millions of his own citizens, thousands of United States nationals; and thousands more Cubans who claimed asylum in the United States as refugees because of persecution and later became naturalized citizens of the United States.<sup>32</sup>

The Castro government has not given any indication it is willing to change its form of government,<sup>33</sup> and has openly referred to democratic pluralism as "pluralistic garbage."<sup>34</sup> President Clinton and President Bush have consequently suspended more than 6511 lawsuits that have been filed under Title III of the Helms-Burton Act.<sup>35</sup> There is no question the President has the authority, pursuant to Section 306, to suspend the right to bring a lawsuit under the title. However, there has been strong criticism against both President Clinton and now against President Bush by the Cuban American leaders and supporters.<sup>36</sup> By suspending Title III the Helms-Burton Act, we are left with a mere extension of the 1959 Trade Embargo, the rest of the Act becomes superfluous.

Finally, Title IV of the Act, "Exclusion of Certain Aliens," gives the Secretary of State the power to deny a visa, and the Attorney General the power to exclude from the United States, any alien who has confiscated property of United States nationals or who traffic in such property.<sup>37</sup> Opposition to Title IV is also based on the notion that denial of visas to executives of corporations, as well as denying visas to their families, is an over extension of United States law, because the denial is solely based on the executives trafficking in property outside of the United States.<sup>38</sup> Further, countries such as Canada and Mexico argue that Title IV is a

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31. *Id.*

32. Helms-Burton Act, *supra* note 5, § 6081(3) (1996).

33. *Id.* § 6021(3) (1996).

34. *Id.* § 6021(16) (1996).

35. *See* Troia, *supra* note 9, at 605.

36. Associated Press, *supra* note 29.

37. Helms-Burton Act, *supra* note 5, § 6091 (a) (1996).

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

violation of the North American Free Trade Agreement (NAFTA) to which the United States is a party.<sup>39</sup> Both Canada and Mexico have been very vocal about their opposition to the Helms-Burton Act, and argue that the Act violates Chapter Eleven of NAFTA which requires that each NAFTA signatory treat investors of other NAFTA signatories with the "most favored nation" principle.<sup>40</sup>

In light of these harsh criticisms by the international community, it is essential to understand that Congress did not zealously draft this controversial piece of legislation without first finding sufficient reason to do so. Consequently, it is essential now to look at some of the findings that led to the drafting of the Helms-Burton Act of 1996. Congress makes the following finding:

(3) The Castro regime has made it abundantly clear that it will not engage in any substantive political reforms that would lead to democracy, a market economy, or an economic recovery. (4) The repression of the Cuban people, including a ban on free and fair democratic elections, and continuing violations of fundamental human rights, have isolated the Cuban regime as the only completely non-democratic government in the Western Hemisphere. (5) As long as free elections are not held in Cuba, the economic condition of the country and the welfare of the Cuban people will not improve in any significant way. (6) The totalitarian nature of the Castro regime has deprived the Cuban people of any peaceful means to improve their condition and has led thousands of Cuban citizens to risk or lose their lives in dangerous attempts to escape from Cuba to freedom.<sup>41</sup>

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39. North American Free Trade Agreement, Dec. 17, 1992, art. 2022, 107 Stat. 2057, 32 I.L.M. 296, 32 I.L.M. 605 [hereinafter NAFTA].

40. See Troia *supra* note 9, at 607 n. 26. The "most favored nation" is a term that requires "each party shall accord to another party treatment no less favorable than that it accords, in like circumstances to any other Part of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." NAFTA, *supra* note 39, at 639.

41. Helms-Burton Act, *supra* note 5, § 6021 (1996). There are several other findings Congress made prior to the drafting of this Act which further solidify the foundation upon which the Helms-Burton Act is not only justified, but necessary. Among those omitted from the body of the text are (1) The economy of Cuba has experienced a decline of at least 60 percent in the last 5 years as a result of (A) the end of its subsidization by the former Soviet Union of between 5 billion and 6 billion dollars annually, (B) 36 years of communist tyranny and economic mismanagement by the Castro government; (C) the extreme decline in trade between Cuba and

These and several other findings are the basis upon which the Helms-Burton Act is not only justified, but required.

In spite of such findings, opponents of the Helms-Burton Act are still overly critical of both Title III and Title IV.<sup>42</sup> In Section 301 of Title III of the Helms-Burton Act, Congress has found "it is in the interest of the Cuban people that the Cuban Government respect equally the property right of Cuban nationals and nationals of other countries."<sup>43</sup> Congress further finds that

individuals enjoy a fundamental right to own property which is enshrined in the United States Constitution.<sup>44</sup> (2) The wrongful confiscation or taking of property belonging to the United States nationals by the Cuban Government, and subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development.<sup>45</sup>

The Cuban Government has unlawfully confiscated property that rightfully belongs to United States nationals, and has turned around and offered that property to foreign investors in an effort to stimulate economic growth within the country.<sup>46</sup> The Helms-Burton Act merely affords those individuals who have been deprived of their property the right to redress their loss in the just courts of law. Yet, because of politics and economics, countries continue to oppose the Helms-Burton Act, and have sufficiently manipulated our leaders to suspend Title III.

## II. HELMS-BURTON ACT IS IN LINE WITH INTERNATIONAL LAW

Chief trading partners with the United States have vehemently opposed the Helms-Burton Act, and argue that Helms-Burton does not fall in line with international law.<sup>47</sup> Consequently, many countries have adopted several "antidotes" to counter the effects of the Helms-Burton Act in an effort to make it clear to the international community that acts by the

the countries of the former Soviet bloc; and (D) the stated policy of the Russian Government and the countries of the former Soviet bloc to conduct economic relations with Cuba on strictly commercial terms.

42. See, e.g., Bruce W. Nelan, *Taking on the World*, TIME, Aug 26, 1996, at 26. See also Troia, *supra* note 9.

43. See Perez-Lopez & Travieso-Diaz, *supra* note 6, at 102.

44. Helms Burton Act, *supra* note 5, § 6081(1) (1996).

45. *Id.* § 6081(2) (1996).

46. *Id.* § 6081(5) (1996).

47. See generally Shamberger, *supra* note 7.

United States government will not go unopposed.<sup>48</sup> However, the Helms-Burton Act is in full compliance with international law, and the United States has the proper right to enact such laws that protecting the national security of the United States as this Act does.<sup>49</sup>

Critics of the Helms-Burton Act argue that it violates provisions of the General Assembly on Tariffs and Trade (GATT).<sup>50</sup> In particular, the very purpose of the GATT agreement is to encourage its contracting parties 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."<sup>51</sup> On its face it would seem that Helms-Burton is in violation of the GATT agreement, however, within the GATT agreement itself, there is a provision providing an exception when the security interests of the country are at stake.<sup>52</sup> The security exception to GATT which reads as follows:

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 interest; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essentials security interests.<sup>53</sup>

The United States, and frankly the international world, has a strong national security interest in being free of the cronyism of the Castro government. It is part (b) of the GATT exception which the United States can use to justify whatever violation of international law may be claimed by the European Union under the GATT agreement. The national security interest that the United States would claim is a product of the atrocious act by the Cuban government of shooting down the two civilian United States planes in international airspace, which killed four people.<sup>54</sup>

However, it is clear that opponents to the Helms-Burton Act do not share this view of national security interest. In fact, the European Union has been the chief advocate against the Helms-Burton Act, and has encouraged investors to blatantly ignore the Helms-Burton Act and invest

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48. See Perez-Lopez, *supra* note 6.

49. See The General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXI [hereinafter GATT].

50. See Ratchik, *supra* note 26.

51. See Shamberger, *supra* note 7, at 528.

52. *Id.* at 508.

53. *Id.* at 537 n. 84.

54. See Implementation of the LIBERTAD Act, *supra* note 4.

in any properties in Cuba.<sup>55</sup> In essence the European Union is telling its investors to outright ignore the interests of the United States, ignore the fact that Castro has taken properties that rightfully belong to United States nationals, and invest in those properties. Further, the European Union investors shall ignore the continual Human Rights violations that occur in Cuba; and justify their actions by passing resolutions posturing a political stance, which in actuality are nothing more than political jargon.<sup>56</sup>

The European Union has been quite vocal in its opposition to the Helms-Burton Act because it would affect the pocket of many of its investing companies. However, it is not quite as vocal in its opposition to the continual human rights violations that occur within Cuba, "while the [European Union] called for a peaceful transition to a pluralistic democracy, respect for human rights, and fundamental freedoms in Cuba," it never indicated that trade and investment with Cuba would be conditioned upon advancements in these areas.<sup>57</sup> The European Union, along with countries such as Canada and Mexico, are concerned with the Helms-Burton Act not because of the "unhealthy precedent"<sup>58</sup> that it will set, but rather because it will affect them economically.

Opponents to the Helms-Burton Act argue that to permit Helms-Burton is a direct violation of the obligation the United States has under the NAFTA to treat all members with "most-favored-nation" status.<sup>59</sup> In pertinent part, NAFTA states, "each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."<sup>60</sup> Further, Canada and Mexico argue that Helms-Burton violates Chapter Sixteen of NAFTA, explicitly requiring all parties to NAFTA accord temporary entry of business persons to the respective countries.<sup>61</sup> Canadian and Mexican investors argue that Title III, which allows lawsuits to be brought against those investors who deal in confiscated property in Cuba, and Title IV, which denies entry to the United States for those investors and their family, frustrates the very purpose of Chapter Eleven and Chapter sixteen

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55. Shamberger, *supra* note 7, at 509.

56. *Id.*

57. *Id.* at 509.

58. *Id.* at 508.

59. NAFTA, *supra* note 39, at 639.

60. *Id.*

61. *Id.*

of NAFTA.<sup>62</sup> However, the United States has several arguments that would not only allow but justify the United States enacting Title III, and maintaining Title IV of Helms-Burton, without violating any provision of the NAFTA agreement.

The United States can rightfully claim, under Article 1110 of Chapter Eleven of the NAFTA agreement, one of the member countries can prohibit other country members from taking measures that directly or indirectly expropriate an investment of a NAFTA country.<sup>63</sup> Clearly, the Canadian or Mexican investor who traffics in confiscated United States property is in direct violation of Article 1110, and it is therefore justified for the United States to take measures that would prohibit these investors from profiting from confiscated property. The very purpose of Article 1110 is to allow other member countries from being handcuffed in situations such as this. The Canadian or Mexican investor is willfully and knowingly trafficking in properties that were wrongfully confiscated by the Cuban government. The United States has no other recourse but to exercise its right under Article 1110.<sup>64</sup>

Next, the United States can rightfully deny Chapter Eleven benefits to any of the member countries, if it finds that Canadian or Mexican investors maintain investments that are owned or controlled by investors of a non-NAFTA country with which the United States maintains no diplomatic relations, or against which it maintains economic sanctions.<sup>65</sup> The government of Cuba is not a member of the NAFTA agreement, and the United States, which is denying benefits to the Canadian and Mexican investors, maintains economic sanctions against the Cuban government. It does not matter that the investment comes from Canada or Mexico, because the investment is administrated or run in Cuba, and therefore the rules and laws of the Cuban government control what occurs with the investment.<sup>66</sup>

Finally, the United States can use Article 2102, which allows any one of the NAFTA member countries to take a contrary position to the agreement if it feels that national security interests are being threatened.<sup>67</sup>

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62. See Troia, *supra* note 9, at 606-07.

63. See NAFTA, *supra* note 39, at 641 (governing payment of compensation when an investment is appropriated).

64. See Troia, *supra* note 9, at 616.

65. See NAFTA *supra* note 39, at 642 (authorizing denial of chapter eleven benefits).

66. See Troia, *supra* note 9, at 616.

67. See Troia, *supra* note 9, at 616-17.

As described earlier in relation to the GATT agreement,<sup>68</sup> the United States has a national security interest in protecting its citizens from ruthless attacks on the part of the Cuban government. The Cuban government can only thrive and continue if countries such as Canada and Mexico continue to openly invest in the country, providing the Cuban government with the hard currency necessary to maintain the government running.<sup>69</sup> It is contrary to the national security of the United States to have a country, which is only ninety miles away and is hostile to the United States, continue to receive economic support by the very countries with which the United States is suppose to have strong trading ties.<sup>70</sup> Therefore, it is in the interest of United States national security to implement legislation such as the Helms-Burton Act that will dismantle the Cuban regime which has shown time and again its dislike for the United States.<sup>71</sup> Clearly the United States has ample justification for the implementation of Title III of the Helms-Burton Act and the maintenance of Title IV, without dealing with the issue of whether or not the GATT agreement or the NAFTA agreement are violated. The United States has an obligation first and foremost to the citizens of the United States, irrespective of whether the Mexican and Canadian investors are in agreement with the manner in which that obligation is carried out.

### III. THE EFFECTS DOCTRINE PERMITS THE UNITED STATES TO IMPLEMENT EXTRATERRITORIAL LEGISLATION

It is argued that the Helms-Burton Act violates international law because it is an unjustified extraterritorial application of United States law against foreign countries.<sup>72</sup> Opponents to Helms-Burton argue that it is an extraterritorial legislation because it seeks to require foreign countries and their nationals to comply with the United States embargo against Cuba, or

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68. See GATT, *supra* note 49.

69. See Troia, *supra* note 9, at 616.

70. See NAFTA, *supra* note 39 at 639.

71. Helms-Burton Act, *supra* note 5, § 6031 (1996). It is the sense of the Congress that (4) in view of the threat to the national security posed by the operation of any nuclear facility, and the Castro government's continuing blackmail to unleash another wave of Cuban refugees fleeing from Castro's oppression, most of whom find their way to the United States shores, further depleting limited humanitarian and other resources of the United States, the President should do all in his power to make it clear to the Cuban Government that (a) the completion and operation of any nuclear power facility or (b) any further political manipulation of the desire of Cubans to escape that results in mass migration to the United States, will be considered an act of aggression which will be met with an appropriate response in order to maintain the security of the national borders of the United States and the health and safety of the American people.

72. See Troia, *supra* note 9, at 637.

face the possibility of a lawsuit in a United States court.<sup>73</sup> The United States recognizes in international law five basis for jurisdiction prescribed by international law. The five bases that the United States recognizes for jurisdiction are as follows:

1. **Territoriality:** Entails the notion that countries are free to regulate and exercise jurisdiction over conduct that, wholly or in substantial part, takes place within its territory.
2. **Nationality:** Permits a country to exercise jurisdiction over the status of persons, or interests in things, present within its territory.
3. **Protective:** Recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems.
4. **Passive Personality:** Asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.<sup>74</sup>

The fifth basis, the effects doctrine, is discussed within this article. The United States can rightfully claim that under the “effects doctrine” of the Restatement, legislation such as the Helms-Burton Act is in compliance with international law because the foreign investments in Cuba have a substantial effect within the United States.<sup>75</sup> The effects doctrine reads in pertinent part:

[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

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73. *Id.* at 637.

74. *Id.* at 640.

75. See Troia, *supra* note 9, at 640-42 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3)(d) (1986)).

outside its territory that has or is intended to have a substantial effect within its territory.<sup>76</sup>

The effects doctrine has on prior occasions been used to address cases dealing in anti-trust, securities, and environmental protection. In such cases, United States courts have held that conduct between foreign companies on foreign soil could nevertheless subject them to United States jurisdiction if there are effects in the United States.<sup>77</sup> Knowing that the effects doctrine is a vehicle by which the United States can get around violating international law, it is important to note that under Section 403 of the Restatement, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.<sup>78</sup> Clearly the question then turns to what exactly the legislature means by reasonable. In Section 403(2) the legislature provides a non-exhaustive list which describes the several factors that must be considered when trying to determine if a particular piece of legislature is reasonable.<sup>79</sup> The United States should

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76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

77. See Shamberger, *supra* note 7; *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F. 2d 597 (9th Cir. 1976); *United States v. Aluminum Co.*, 148 F. 2d at 444 (2d Cir. 1945).

78. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

79. The Restatement (Third) states:

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) 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;

(b) 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;

(c) 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.

(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

argue that subsection (a) of Section 403(2) is a good example of why it is reasonable to implement Helms-Burton. Under subsection (a) the regulating state, i.e., the United States, has to demonstrate that there is a link between the activity and the territory wanting to regulate the activity.<sup>80</sup>

The United States is trying to regulate the activity of countries that are trafficking in illegally confiscated property. The justification for doing so is that there will be a substantial, direct, and foreseeable effect upon the United States if it continues to allow countries to traffic in United States properties illegally confiscated by the Cuban government.<sup>81</sup> To continue to allow the Castro government to taint the titles of properties that rightfully belong to the United States nationals, would create an insurmountable problem for the United States down the line in the claims resolutions.<sup>82</sup> "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 United States nationals through the Foreign Claims Settlement Commission."<sup>83</sup> This purported action by the Castro government would create a substantial effect on the United States, and would thus justify the provisions of Helms-Burton, in particular Title III. This is not to say that based on subsection (a), and it alone, would the United States reach the reasonable standard that was discussed earlier in Section 403 of the Restatement. It is clear that there is some form of a totality of the circumstances approach by the legislature to reach the reasonable standard.

We turn now to the question of whether or not the interests of other countries such as Canada, Mexico, or the European Union, outweigh the interests of the United States when addressing the issue of whether legislation which has extraterritorial effects are reasonable. We first can compare, and quickly dismiss, the notion that the interests of the Cuba outweigh those of the United States. The only interest Cuba has is in profiting from property that has been illegally confiscated from the United States.<sup>84</sup> Such interests, compared with those of the United States, are not legitimate. The United States and its nationals have a compelling interest

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(h) The likelihood of conflict with regulation by another state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

80. *Id.*

81. See Brice M. Clagett, *Title III of the Helms Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996).

82. See Shamberger, *supra* note 7, at 522.

83. *Id.* at 523.

84. *Id.* at 522.

in getting back property that rightfully belongs to them.<sup>85</sup> This interest substantially outweighs any kind of interest that the Cuban government might have in trying to continue its illegal trafficking of confiscated property.

The more interesting situation arises when comparing the interests of the United States with those of the European Union, Mexico, and Canada. There is a closer argument that the interests of the European Union, Mexico, and Canada outweigh those of the United States. However, there is no mistaking the fact that the United States has an interest in not allowing foreign nations to continue to profit at the expense of the United States.<sup>86</sup> These foreign nations that are profiting from United States confiscated property are fully aware that the Castro government seized those properties without compensating the United States nationals for the property.<sup>87</sup> These foreign nations argue that their interests lie in their ability to continue to conduct trade and business with Cuba free from the laws of the United States.<sup>88</sup> Yet, what these nations do not seem to understand is first, that the Helms-Burton Act is not a complete ban upon countries that want to do business with the Cuban government. Rather it is a measure taken to protect the interests of United States nationals who have lost their ownership rights to property in Cuba, simply because of the desperado tactics of the Castro government.

These nations that argue that their rights to freely deal with the Cuban government are hindered by Helms-Burton are only partially correct, because Helms-Burton is called into effect when these foreign nations begin to traffic in property which was illegally confiscated from United States nationals.<sup>89</sup> There is not one provision within the Helms-Burton Act which bans any and all trades with Cuba. It only bans those trades and dealings which implicate directly properties that were confiscated from United States nationals.<sup>90</sup> To further illustrate the substantial interest the United States has in passing such legislation, the Foreign Claims Settlement Commission recently announced that the United States nationals possess claims to confiscated property that exceeds six billion dollars.<sup>91</sup> Clearly that number will continue to rise as long as the Castro government is allowed to profit from those illegal activities.

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85. See Clagett, *supra* note 81, at 436.

86. See Shamberger, *supra* note 7, at 524.

87. *Id.* at 524.

88. *Id.* at 523.

89. See generally Helms-Burton Act, *supra* note 5.

90. See generally *id.*

91. See Shamberger, *supra* note 7, at 522.

Lastly, it is a well recognized principle in international law that confiscations in violation of international law are ineffective in passing valid title to the property. Therefore, the countries do not have an obligation to recognize the passing of the title to the subsequent purchaser of title.<sup>92</sup> Therefore, the United States can claim that its interests substantially outweigh those of these other competing countries, inasmuch as these competing companies do not have free and clear title to confiscated property. In the event these countries continue to traffic in those properties, they are assuming the risk of purchasing property that they know is confiscated illegally.<sup>93</sup>

#### IV. CONCLUSION

The Helms-Burton Act, as it is in place right now, is a great piece of legislation which quite frankly is being misused, or rather unused. While Title III continues to be suspended by the President, the Helms-Burton Act is nothing more than political posturing by the current administration, and an extension of the 1959 Trade Embargo. It would be shameful to think that Congress drafted a piece of legislation which does nothing more than address an issue which has already been addressed. Indeed, it seems an improbability to think that Congress intended to make Helms-Burton a mere extension. Rather, it is clear from the language within the Helms-Burton Act itself that it was intended to be the final blow to the Cuban regime. Our leaders have an obligation to the citizens of this country. The obligations the country owes its people are promulgated by the United States Constitution, which states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.<sup>94</sup>

The obligation to provide for the common defense, and establishment of Justice, is for the citizens of this country and not for the benefit of trading partners.

The Helms-Burton Act is the vehicle by which a final period can be placed on the Castro regime. However, it is up to our great leaders to step

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92. *See id.* at 525.

93. *See Claget, supra* note 81, at 437.

94. U.S. CONST. pmb1.

to the forefront and ensure that such a result will occur. This great nation was founded upon an ideology of non-compliance with tyranny and oppression. The Castro government has time and again proven that tyranny and oppression shall be the standards by which they shall be measured, and defiantly dare the United States government to act. The legislature has acted and now it is up to the President of the United States to put the final nail in the Castro government, and bring an end to the tyrant's regime. Great leaders are measured by what great things they did in their time of ruling. President Truman during World War II saw an end to the Adolf Hitler rule. President George Bush saw the mighty fall of the Communist Soviet Union and an influx of democracy to that region. The fall of the Castro regime would have the same if not greater historical accolades, and it is now the time for the current administration to do everything within their power to bring the tyrant's regime to an end.