

**WHO'S ISOLATING WHOM?:
TITLE III OF THE HELMS-BURTON ACT AND
COMPLIANCE WITH
INTERNATIONAL LAW**

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I. INTRODUCTION

James Osborne's heirs want the White House back;¹ and because they are Canadians, they cannot run for president. But fortunately, Canadian Members of Parliament Peter Milliken and John Godfrey have introduced legislation that would allow the descendants of some 80,000 British loyalists to claim compensation for property expropriated during the American Revolutionary War.²

Has Parliament lost its bearings? Did the authors consider the legislation's implications under international law? Did they consider Canada's obligations under the U.N. Charter, the North American Free Trade Agreement (NAFTA), or the World Trade Organization? In fact, the apparent lack of concern for these issues reflects Parliament's anger towards Congress³ for failing to recognize U.S. international obligations in passing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.⁴

The Helms-Burton Act, which seeks to deter foreign investment in Cuba,⁵ has four Titles. Title I aims to strengthen the economic embargo over Cuba.⁶ Title II promises generous aid to the free and independent Cuban

1. The land upon which the White House stands was owned by James Osborne, a captain in the British Army during the American Revolutionary War. See Gord McIntosh, *MPs Demand White House in Helms-Burton Spoof Bill*, EDMONTON J., Oct. 23, 1996, at A1.

2. See *No Joke: Canadian Lawmakers Pointedly Parody Helms-Burton Law*, CHI. TRIB., Oct. 23, 1996, at 16. "More than 100 Canadians have contacted the lawmakers to inquire about claiming compensation." *Id.* Godfrey and Milliken plan to seek compensation for land in Virginia and New York, respectively, that was taken from their British-loyalist ancestors after the American Revolutionary War. See *id.*

3. See *id.* "The bill 'is one expression of growing resentment toward the U.S. and its view of itself as the 'moral conscience' for all nations.'" *Id.* (quoting cosponsors John Godfrey and Peter Milliken).

4. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (to be codified at 22 U.S.C. §§ 6021-6091). The Act is also known as the Helms-Burton Act, named after its authors, Senator Jesse Helms and Representative Dan Burton. See Cecil Johnson, *Not Too Much Could Be Sillier Than Helms-Burton*, FORT WORTH STAR-TELEGRAM, Oct. 24, 1996, at 9.

5. See *No Joke: Canadian Lawmakers Pointedly Parody Helms-Burton Law*, *supra* note 2. U.S. efforts to curb foreign investment in Cuba are at least one reason Canadians are so upset over the Helms-Burton Act. See *id.* Canada is Cuba's largest trading partner. See *id.*

6. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 102, 110 Stat. at 792.

government.⁷ Title III, the most controversial and the inspiration for the Godfrey-Milliken bill,⁸ allows U.S. nationals to sue individuals who “traffic”⁹ in expropriated property in Cuba.¹⁰ Lastly, Title IV denies admission into U.S. territory for all “traffickers”¹¹ and their families.¹²

This Comment focuses on Title III’s consistency with U.S. obligations to its neighbors in the Western Hemisphere. The discussion begins with the history and development of the Helms-Burton Act. Next, this Comment examines international reactions to Helms-Burton, especially the reactions of Mexico and Canada. This Comment then evaluates Title III’s compliance with international standards regarding the extraterritorial application of domestic law. The final part of this Comment examines U.S. obligations under the NAFTA, the U.N. Charter, and the Charter of the Organization of American States (OAS) and questions Title III’s compliance with those obligations.

II. THE ORIGINS OF HELMS-BURTON AND TITLE III

The Helms-Burton Act is the most recent development in the U.S. boycott of Cuba. President John F. Kennedy started the embargo under the authority of the Foreign Assistance Act of 1961¹³ and the Trading with the Enemy Act of 1917.¹⁴ In 1992 anti-Castro groups pressured the United States to

7. See *id.* § 201, 110 Stat. at 805.

8. See Johnson, *supra* note 4.

9. The Helms-Burton Act defines “traffic” broadly. See Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT’L L. 434, 434 n.2 (1996). Section 4(13)(A) of the Helms-Burton Act states that a person traffics if he or she “knowingly and intentionally” sells, deals in, or possesses expropriated U.S. property. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4(13)(A), 110 Stat. at 790–91. Trafficking also includes engaging in “commercial activity using or otherwise benefiting from confiscated property,” as well as *causing or directing* another to traffic. *Id.* § 4(13)(A), 110 Stat. at 822.

10. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302, 110 Stat. at 815.

11. See *id.* § 401, 110 Stat. at 822. The Act also denies entry to a “corporate officer, principal, or shareholder with a controlling interest” of a company that traffics in confiscated property. *Id.* § 401(a)(3), 110 Stat. at 822.

12. See *id.* § 401(a)(4), 110 Stat. at 822.

13. 22 U.S.C. § 2370(a) (1994) (providing the President with the power to completely ban all trade with Cuba); see Proclamation No. 3447, 27 Fed. Reg. 1085 (1962).

14. 50 U.S.C. app. § 5(b) (1994).

enact the Cuban Democracy Act of 1992,¹⁵ which restricted trade between Cuba and foreign subsidiaries of U.S. corporations.¹⁶ The legislation sparked a quick, negative response from the international community, which felt the law was an impermissible extraterritorial extension of U.S. jurisdiction.¹⁷ The U.N. General Assembly voted to denounce the Cuban Democracy Act of 1992 on three separate occasions: November 24, 1992, November 3, 1993, and October 26, 1994.¹⁸

While the United Nations was denouncing the Cuban Democracy Act of 1992, the Foreign Relations Committee in the U.S. Congress was drafting and debating what would become Helms-Burton.¹⁹ The seeds of Helms-Burton lay in the collapse of communism in the former Soviet Union.²⁰ Prior to 1989, the Soviet Union provided between US\$4–6 billion in subsidies each year for the Cuban economy.²¹ But in the years following the cessation of the subsidies, Cuba fell into severe economic decline.²² U.S. legislators feared that the Castro regime would seek to cure its capital crunch by selling properties expropriated from U.S. nationals.²³ Thus, Congress wrote Helms-Burton in part to “discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the

15. 22 U.S.C. §§ 6001–6010 (1994); see Cuban Assets Control Regulations, 31 C.F.R. § 515.559 (1997); Peter J. Sampson, *Cuban Exiles Applaud Torricelli and Guarini*, RECORD (N.J.), Feb. 11, 1992, at A3. Prior to the passage of the Cuban Democracy Act of 1992, “most commercial and private dealings with Cuba were controlled by the licensing provisions of the Cuban Asset[s] Control Regulations.” Harold G. Maier, *Extraterritorial Jurisdiction and the Cuban Democracy Act*, 8 FLA. J. INT’L L. 391, 391 (1993).

16. The Cuban Democracy Act of 1992 and the accompanying Cuban Assets Control Regulations effectively closed many loopholes exploited by U.S. companies abroad. See Clara David, *Trading with Cuba: The Cuban Democracy Act and Export Rules*, 8 FLA. J. INT’L L. 385, 386–87 (1993).

17. See Maier, *supra* note 15, at 396.

18. See G.A. Res. 50/10, 35 I.L.M. 483, 484 (1996).

19. See H.R. REP. NO. 104-253, at 1 (1995).

20. See *United States Policy Toward Cuba: Testimony Before the Western Hemisphere Subcomm. of the House Comm. on Int’l Rel.*, 104th Cong. (1995) (testimony of Peter Tarnoff, Under Secretary of State), available in 1995 WL 306730 [hereinafter Tarnoff].

21. See *id.*

22. See *id.* Some unofficial sources estimate that the Cuban economy has shrunk by 50% since 1989, to a gross national product of approximately US\$10 billion. See *id.*

23. See H.R. CONF. REP. NO. 104-468, at 58 (1996), reprinted in 1996 U.S.C.C.A.N. 558, 573.

Cuban regime of Fidel Castro the capital generated by such ventures.”²⁴

Before March 1996, the Clinton Administration had mixed feelings about Helms-Burton. The President worried that the bill constrained his authority to conduct foreign affairs.²⁵ Further, Under Secretary of State Peter Tarnoff told the congressional Western Hemisphere Subcommittee of the House International Relations Committee that the President was “concerned that a number of the bill’s provisions could conflict with other important U.S. interests, including our compliance with major international trade and investment agreements, including GATT, NAFTA and Treaties of Friendship, Commerce and Navigation.”²⁶ The Administration also worried that a ban on the importation of sugar products against countries that import Cuban sugar would be “viewed by others as a secondary boycott, similar to the Arab League boycott on Israel that the U.S. has vigorously opposed.”²⁷ Ultimately, the State Department feared that “[i]f enacted, these provisions could prompt retaliatory measures [by trade allies] that would severely disrupt essential U.S. trade relationships.”²⁸

Given external opposition from the international community and opposition from the State Department,²⁹ the Helms-Burton Act’s future seemed dim. But on February 24, 1996, Cuban Air Force MiGs shot down two Cessna light civilian aircraft over international waters.³⁰ Four Cuban

24. *Id.*

25. *See* Tarnoff, *supra* note 20.

26. *Id.*

27. *Id.* The United States actually criminalizes compliance with the Arab League boycott. *See* 50 U.S.C. § 2407 (1994); 15 C.F.R. §§ 769.1–769.8 (1996). Any citizen who knowingly, “with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States” is subject to civil and criminal penalty. 50 U.S.C. § 2407(a)(1).

28. Tarnoff, *supra* note 20.

29. *See* discussion *infra* Part III for international reactions. In September 1995 Secretary of State Warren Christopher sent a letter to House Speaker Newt Gingrich stating that he believed Helms-Burton “would jeopardize a number of key U.S. interests around the globe,” and that he would advise the President to veto the bill if passed. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L L. 419, 419 n.3 (1996).

30. *See* Rene Sanchez & Catharine Skipp, *Two Exile Planes Shot Down Near Cuba*, WASH. POST, Feb. 25, 1996, at A1.

Americans were killed.³¹ Presidential outrage was swift,³² and Congress hastened to prepare Helms-Burton for the President's signature.³³ Senator Jesse Helms, cosponsor of the bill, bragged the "legislation will be on the [P]resident's desk before the blood dries on Castro's hands."³⁴ Seventeen days after the two planes were shot down, President Bill Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 into law.³⁵ The President made clear that he did not interpret the Act as "derogating from the President's authority to conduct foreign policy."³⁶ President Clinton did not mention his prior misgivings about the possible international backlash,³⁷ nor did the President state the reasons for his change of heart.³⁸

III. INTERNATIONAL REACTIONS

The international community immediately denounced the passage of Helms-Burton.³⁹ While this controversial legislation sparked negative reaction from around the world, the sharpest criticism came from U.S. neighbors in the Western Hemisphere.

A. Canada

In addition to the satirical Godfrey-Milliken bill, the Canadian Parliament offered amendments to Canada's Foreign Extraterritorial Measures Act (FEMA) that could

31. See William Branigin, *From Miami's Cuban Exiles, Calls for a Tough Response; Rally Speakers Demand Blockade, Military Action*, WASH. POST, Feb. 26, 1996, at A9.

32. The night of the shooting, President Clinton stated: "I condemn this action in the strongest possible terms." Sanchez & Skipp, *supra* note 30.

33. The Conference Committee promptly met and produced the Conference Report by March 1, 1996. See H.R. CONF. REP. NO. 104-468, at 1 (1996), reprinted in 1996 U.S.C.C.A.N. 527.

34. Ann Devroy, *Clinton to Tighten Sanctions on Cuba; Charter Flights Halted; Legislation Backed*, WASH. POST, Feb. 27, 1996, at A1.

35. See Statement on Signing the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD), 32 WEEKLY COMP. PRES. DOC. 479 (Mar. 12, 1996).

36. *Id.*

37. See *id.*

38. Some suggest that President Clinton signed Helms-Burton to curry favor with the Cuban community in Florida, a key electoral state. See Johnson, *supra* note 4. Others assert that the legislation was signed merely to assuage the anger arising from the downing of the two planes. See *Repeal Helms-Burton Act*, AUSTIN AM.-STATESMAN, Oct. 25, 1996, at A14.

39. See Johnson, *supra* note 4.

effectively counteract Helms-Burton.⁴⁰ The amendments, called Bill C-54, have three purposes. First, Bill C-54 gives the Canadian Attorney-General the power to identify foreign laws that infringe upon Canadian sovereignty and grants the power to deny nationals and governments of the targeted countries access to Canadian records that may be used in litigation or criminal prosecution.⁴¹ Second, Bill C-54 blocks the enforcement of judgments rendered by courts of targeted countries and allows Canadians to recover court costs.⁴² Finally, the amendments provide stiff fines, some as high as US\$1.5 million, for Canadian companies that comply with the boycott laws of targeted countries.⁴³

Canadian investment in Cuba continues to grow.⁴⁴ Canada is Cuba's largest trading partner with commerce totaling about US\$500 million.⁴⁵ While Canadian private industry prospers by investing in Cuban pharmaceuticals, nickel mines, and tourism,⁴⁶ the Canadian Government refuses to be left out, agreeing to finance the construction of a new terminal at Havana International Airport.⁴⁷

B. Mexico

Helms-Burton has created the most ill will in Mexico, whose largest trading partner is the United States. Mexico's attitude towards the legislation is best exemplified by

40. See Randall J. Horley & Elliott Stikeman, *Canada's Legislation to Block "Helms-Burton" Tabled*, N. AM. FREE TRADE & INVESTMENT REP., Oct. 15, 1996, available in 1996 WL 10175715 (stating that "Bill C-54 is expected to meet little opposition in the Canadian Parliament and thus become law by early 1997"). Bill C-54 allows the Attorney-General of Canada to block access to Canadian records for the prosecution of any case under the Helms-Burton Act, or even to refuse to recognize a judgment under that act. See *id.*

41. See *id.*

42. See *id.*

43. See *id.* The amendments define compliance much the same way as the U.S. antiboycott laws do in that a change in market position or terminating business in the boycotted country can create criminal liability. See *id.*; see also 15 C.F.R. § 769.2 (1996); *supra* note 27 and accompanying text.

44. See Howard Schneider, *More Than Great Cigars—Canada Knows a Good Deal When It Sees One, and It Sees One in Cuba—Forget the U.S. Trade Embargo and the Helms-Burton Act, Canada and Cuba Are Busy Forging a Mutually Beneficial Economic Partnership*, STAR TRIB. (Minneapolis-St. Paul), Oct. 23, 1996, at 15A. Perhaps the sense of security provided by Bill C-54 has inspired Canadian investors to continue to do business in Cuba.

45. See *id.*

46. See *id.*

47. See Bernard Simon & Pascal Fletcher, *Canada to Fund Cuban Airport Growth*, FIN. TIMES (London), Sept. 21-22, 1996, at 3.

Mexico's reception of Under Secretary for International Trade Stuart B. Eizenstat, whom President Clinton sent on a worldwide mission to discuss Helms-Burton with trade allies.⁴⁸ When Under Secretary Eizenstat arrived in Mexico, he was pelted with eggs.⁴⁹

Mexico chose to resolve the matter locally rather than on an international level. In a vote of 317 to 1, Mexico's Chamber of Deputies adopted an "Antidote Law" to counter Helms-Burton.⁵⁰ The "Law for the Protection of Business and Investment from Foreign Regulatory Provisions that Contradict International Law"⁵¹ applies to all people or legal entities that (1) are located in Mexico, (2) take actions which have effect in Mexico, and (3) submit to Mexican Law.⁵² The law prohibits two types of activities. First, it forbids "acts that affect trade or investment, when those acts are a consequence of the extraterritorial effects of foreign laws."⁵³ Second, the Antidote Law prohibits individuals and companies from providing information to foreign governments or foreign courts if the information relates to proceedings under the extraterritorial foreign law.⁵⁴ Violators of the Antidote Law incur fines of approximately US\$290,000 for

48. See Steven Lee Myers, *Cuban Trade Regulations Still Raise Ire*, ROCKY MTN. NEWS, Nov. 3, 1996, at 4A, available in 1996 WL 12354579; *Repeal Helms-Burton Act*, *supra* note 38.

49. See Myers, *supra* note 48; *Repeal Helms-Burton Act*, *supra* note 38.

50. See *Mexico to Enforce Law Against Helms-Burton Act*, XINHUA ENG. NEWSWIRE, Oct. 23, 1996, available in 1996 WL 13766674. The law became effective on Thursday, October 24, 1996. See *id.*

51. "Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional," D.O., 23 de octubre de 1996, translated in InterAm Database <<http://www.natlaw.com/trans/tnstcu3.html>> [hereinafter *Ley de Protección*].

52. See *id.* art. 1.

53. *Id.* A law has extraterritorial effects if it has any of the following objectives:

- I. To try to impose an economic blockade or even to limit investment toward a country to instigate a change in its form of government.
- II. To permit payments to private parties to be claimed with the purpose of making expropriations in the country to which the blockade is applied.
- III. To anticipate restricting entry to the country that issues the law as one of the means to reach the above-cited objectives.

Id. art. 1(I)-(III). The subarticles relate, respectively, to Titles II, III, and IV of the Helms-Burton Act. See *supra* notes 7-12 and accompanying text.

54. See *Ley de Protección*, art. 2. Similarly, U.S. antiboycott laws prohibit citizens from disclosing information about business relationships with boycotted countries or blacklisted persons. See 15 C.F.R. § 769.2(d) (1996).

actions in compliance with the invalid foreign law and fines of approximately US\$145,000 for providing information to foreign courts.⁵⁵ The Antidote Law empowers as well as penalizes, having both a “blocking effect” and a “mirror effect.”⁵⁶ Article 4 states that “National courts shall refuse the acknowledgment and enforcement of judgments, judicial requirements or arbitral awards issued on the basis of the foreign laws.”⁵⁷ Article 5 contains the mirror effect. The Article awards damages in Mexican courts to those who have been affected by the foreign laws.⁵⁸ The statute awards the aggrieved individual a sum equal to the foreign judgment (hence the term “mirror effect”) as well as other damages, economic losses, and court costs.⁵⁹ While the damages awarded under the Antidote Law are considerable, it is unclear whether this Mexican law will ever be implemented.⁶⁰

C. *The Latin American Economic System*

The Latin American Economic System (SELA) issued a report disputing the legality of Helms-Burton under international law.⁶¹ The 159 page report declares that the legislation “not only negatively affects Cuba’s interests and its development, but also damages the interests of Latin America and the Caribbean and the international community[] by interfering in its sovereign decisions and the management of its foreign relations.”⁶² The report denounces the United States for attempting to create a secondary

55. See Enrique Ramirez Ramirez & Shaun F. Downey, *Mexico: Mexico’s Reaction to the Helms-Burton Act*, N. AM. FREE TRADE & INVESTMENT REP., Nov. 30, 1996, available in 1996 WL 13938864. The dollar amounts are based on the current minimum wage in Mexico City and the current exchange rate. See *id.* The statute defines penalties as 100,000 or 50,000 days of the minimum wage in the Federal District. See *Ley de Protección*, art. 9(I)–(II).

56. See Ramirez & Downey, *supra* note 55.

57. *Ley de Protección*, art. 4.

58. See *id.* art. 5.

59. See *id.* art. 5(I)–(II).

60. See Ramirez & Downey, *supra* note 55 (asserting that the ambiguity of the law might render its application problematic). Ramirez and Downey also exhort that the solutions to extraterritorial problems lie in the international arena, rather than in unilateral retaliation. See *id.*

61. See Raul Ronzoni, *SELA Probes Legality of Helms-Burton Law*, INTER PRESS SERVICE, Oct. 23, 1996, available in 1996 WL 13588666.

62. *Id.*

boycott around Cuba, and questions the validity of the primary boycott.⁶³

IV. TITLE III AND GENERAL CUSTOMARY INTERNATIONAL LAW

While international law is commonly established by treaty, international custom can sometimes rise to the level of international law.⁶⁴ American courts have adopted three customary doctrines that govern the extraterritorial application of U.S. laws: the Effects Doctrine, the principle of comity, and the Act of State Doctrine. Each may bar Title III's legality under international law.

A. *The Effects Doctrine*

Before the turn of the century, U.S. law abided by the principle that a nation could not exercise jurisdiction over a person outside its borders.⁶⁵ By 1909, in *American Banana Co. v. United Fruit Co.*,⁶⁶ the Supreme Court hesitantly agreed that in some circumstances, conduct outside the United States could be attacked under a U.S. statute.⁶⁷ By 1945 Judge Learned Hand declared it "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."⁶⁸

Judge Hand's rule is now called the Effects Doctrine and is embodied in section 402 of the Restatement (Third) of the

63. *See id.* The report found that the inefficiency of the embargo against Cuba led the United States to implement even broader measures to boost its effects. *See id.*

64. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 57 (4th ed. 1997).

65. *See* *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877). Of course, this statement related to the jurisdiction of courts and the enforcement of judgments rather than the jurisdiction of legislatures and the enforcement of statutory laws; however, the opinion's reasoning was based upon 19th century principles of sovereignty. *See id.*

66. 213 U.S. 347 (1909) (Holmes, J.).

67. *See* Philip R. Wolf, *International Securities Fraud: Extraterritorial Subject Matter Jurisdiction*, 8 N.Y. INT'L L. REV. 1, 5 (1995) (citing *American Banana*, 213 U.S. at 356). The Court wrote, "In cases immediately affecting national interests they may go further still and may make, and . . . execute similar threats as to acts done within another recognized jurisdiction." 213 U.S. at 356. However, the Court still relied on the presumption that Congress only intended its statutes to apply to acts committed within its territorial jurisdiction. *See id.* at 357.

68. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

Foreign Relations Law of the United States, which provides that “a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.”⁶⁹ The effects test is tempered by a reasonability requirement, equivalent to the concept of comity.⁷⁰ Section 403(2) sets out a laundry list of factors to consider in determining the reasonableness of action taken under section 402.⁷¹

The effects test is accepted in some jurisdictions outside the United States, particularly in Europe. Germany expressly adopted the effects test in section 98 of the Law Against Restraints on Competition (GWB).⁷² Additionally, Austria, Canada, Denmark, Finland, France, Greece, Japan, Norway, Portugal, Spain, Sweden, and Switzerland use the Effects Doctrine as the basis for extraterritorial applications of their competition laws.⁷³ The European Court of Justice also fashioned an effects test, first in *Imperial Chemical Industries v. Commission*⁷⁴ and more recently in the *Wood Pulp* case.⁷⁵

69. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) [hereinafter RESTATEMENT].

70. See *id.* § 403 cmt. a (stating comity is “understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states”).

71. See *id.* § 403(2). These factors include:

- (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 person principally responsible for the activity to be regulated . . . ;
- (c) the character of the activity to be regulated, . . . 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.

Id. § 403(2)(a)–(f).

72. See *id.* § 402 reporters’ note 2.

73. See *id.* § 403 reporters’ note 3.

74. See Case 48/69, 18 E.C.R. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 (1972).

75. See Thomas C. Fischer, *Extraterritorial Application of United States Law Against United States and Alien Defendants (Sherman Act)*, 29 NEW ENG. L. REV. 577, 578 (1995) (citing Cases 89/85, 104/85, 114/85, 116-117/85, 125-129/85, *Ahlström v. Commission*, (Wood Pulp) 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988)).

B. Direct Effects and Comity

Does Helms-Burton pass the effects test? Section 301(9) copies verbatim the language of Restatement section 402.⁷⁶ Noticeably absent from the statute are the additional reasonability requirements set out in Restatement section 403. A mechanical application of section 403's requirements suggests why the drafters left the language out. For the Helms-Burton Act to be legal under international law standards, the legislation must be reasonable. The first criterion in determining reasonability is establishing a link between the United States and the proscribed conduct in Cuba.⁷⁷ When a foreign citizen purchases expropriated property in Cuba, the sale has an effect upon the former owner.⁷⁸ The intermediary sale of the property may cloud title and make claim settlement for the U.S. national difficult.⁷⁹ However, the passing of thirty years may attenuate the sale's effect on the claimant.

Second, there must be some connection—nationality, residence, or economic activity—between the United States and the purchasing entity.⁸⁰ An entity needs only minimum contacts with the United States to create liability under Title III of Helms-Burton.⁸¹ Such a connection might be considered tenuous.

Third, Helms-Burton must be a type of law that is generally accepted, or is generally considered desirable.⁸² Given the international community's negative response to the U.S. legislation, Helms-Burton is not generally accepted.⁸³

76. Compare Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 301(9), 110 Stat. 785, 815 ("International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory."), with RESTATEMENT, *supra* note 69, § 402 (1)(C).

77. See RESTATEMENT, *supra* note 69, § 403(2)(a); *supra* note 71 and accompanying text.

78. See Clagett, *supra* note 9, at 435.

79. See *id.*

80. See RESTATEMENT, *supra* note 69, § 403(2)(b).

81. The statute creates federal subject matter jurisdiction over suits between U.S. nationals and "any person that . . . traffics in property which was confiscated by the Cuban Government." Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 302(a)(1)(A), 110 Stat. at 815. Therefore the limit of the statute's reach is the court's personal jurisdiction, which requires minimum contacts. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

82. See RESTATEMENT, *supra* note 69, § 403(2)(c).

83. See *supra* text accompanying notes 37-63.

Fourth, U.S. citizens must “have justified expectations that might be protected” by Helms-Burton.⁸⁴ Title III finds its firmest footing in the protection of property rights.⁸⁵ The United States could take the position that Cuba does not have proper title to the properties in issue because the former owners have not been compensated in accordance with international law.⁸⁶ Without compensation “a good case can certainly be made for an international legal *duty* of non-recognition of Castro’s titles.”⁸⁷ And while the courts of some countries have declined to recognize title in foreign confiscations,⁸⁸ the United States is powerless to force another country’s court not to ratify such transactions. Nor can former owners turn to the international tribunals because the jurisdiction of the tribunals is consensual.⁸⁹ Thus, Title III is the only way the United States can protect its citizens’ interests in Cuban property.

It is also important to consider the extent to which Title III is consistent with the traditions of the international system.⁹⁰ International law contemplates the use of unilateral remedies such as Helms-Burton.⁹¹ Section 905 of the Restatement (Third) of the Foreign Relations Law of the United States provides that when a state is the victim of a violation of an international obligation by another state, the state may use unilateral countermeasures if they “(a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered.”⁹² Here, the violation is Castro’s illegal expropriation of property owned by U.S. nationals and citizens.⁹³ Further, as previously discussed, Helms-Burton is necessary because

84. RESTATEMENT, *supra* note 69, § 403(2)(d).

85. *See* Clagett, *supra* note 9, at 439 (arguing “that the duty of a state not to confiscate its citizens’ property without compensation is a ‘general principle[] of law common to the major legal systems of the world’”).

86. *See id.* at 437 & n.15, 438.

87. *Id.* at 438 (quoting Ignaz Seidl-Hohenveldern, *Title to Confiscated Foreign Property and Public International Law*, 56 AM. J. INT’L L. 507, 509 (1962)).

88. *See id.* (naming Austria, France, Germany, the Netherlands, and Switzerland as such countries).

89. *See id.* at 436–37.

90. *See* RESTATEMENT, *supra* note 69, § 403(2)(f).

91. *See id.* § 905.

92. *Id.* § 905(1).

93. *See supra* text accompanying note 87.

there are no other means to protect the former owners' interests.⁹⁴

Finally, Helms-Burton is not out of proportion to the violation.⁹⁵ The statute's proportionality is called into question, however, by the fact that the statute awards treble damages in some instances.⁹⁶ Treble damages are typically punitive,⁹⁷ and may be outside the scope of section 905.⁹⁸

Some detractors of Helms-Burton also claim that Title III acts as a secondary boycott on Cuba,⁹⁹ and that such a boycott, even by the United States' admission, violates international norms.¹⁰⁰ Proponents are quick to respond that nothing in the Helms-Burton Act forbids foreign nationals or foreign governments from investing in Cuba.¹⁰¹ But the possibility of treble damages makes the argument ring hollow.¹⁰² Investing in certain Cuban properties is a "Hobson's choice"¹⁰³ at best and may deter some investors from buying on the island.¹⁰⁴

One can make an argument for Title III's legitimacy under each one of the Restatement's reasonability factors in

94. See *supra* text accompanying note 89.

95. The statute awards the greater of (1) the amount certified by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest; (2) an amount declared by a court-appointed "special master" that appraises the value of the claim, plus interest; or (3) "the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater." Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 302(a)(1)(A)(i), 110 Stat. 785, 815. The statute also awards court costs and reasonable attorneys' fees. See *id.* § 302(a)(1)(A)(ii), 110 Stat. at 815.

96. See *id.* § 302(a)(3)(C), 110 Stat. at 816. The statute requires that potential claimants under Title III give defendants written notice of impending litigation 30 days before initiating the action. See *id.* § 302(a)(3)(B), 110 Stat. at 816. If, 30 days after receiving notice, the person continues to traffic in the property that is the subject of the action, the person is liable for 3 times the value of the property, plus attorneys' fees and court costs. See *id.* § 302(a)(3)(B)-(C), 110 Stat. at 816.

97. See, e.g., *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 427 (1955).

98. The Restatement contemplates countermeasures such as the suspension of treaty relations, the freezing of assets, or the "imposition of other economic sanctions." RESTATEMENT, *supra* note 69, § 905 cmt. b.

99. See Lowenfeld, *supra* note 29, at 429.

100. See *supra* text accompanying note 27.

101. See Lowenfeld, *supra* note 29, at 430.

102. See *id.*

103. The investor is caught between the Scylla of U.S. civil liability and the Charybdis of forgoing potentially lucrative investment opportunities in Cuba.

104. See Lowenfeld, *supra* note 29, at 430.

section 403. However, the current U.S. Supreme Court may no longer require a comity (reasonability) analysis when deciding whether to adjudicate cases arising under extraterritorial applications of U.S. law.¹⁰⁵ In the recent *Hartford Fire Insurance Co.* case, a five justice majority declined to use a reasonability analysis when determining the extraterritorial reach of the Sherman Act.¹⁰⁶ The case arose when nineteen states brought antitrust suits against a group of domestic and London-based insurers, in part, for collusive agreements made in England.¹⁰⁷ The district court dismissed the action against all defendants, and declined to exercise jurisdiction over the foreign defendants explicitly on the basis of international comity.¹⁰⁸ The Ninth Circuit Court of Appeals overturned the lower court and granted jurisdiction.¹⁰⁹ The court admitted that jurisdiction over the foreign defendants would clash with English law and policy, but the substantial nature of the effect produced in the United States weighed in favor of exercising jurisdiction.¹¹⁰ The defendants appealed and the Supreme Court granted certiorari to “address the application of the Sherman Act to the foreign conduct at issue.”¹¹¹

The plaintiff-respondents, realizing the implications of a favorable ruling, expressly requested the Court to abandon the comity requirement.¹¹² The plaintiffs argued that the reasonability requirement was vague and anachronistic.¹¹³

The Court did not abandon the comity requirement, but rather stepped around the issue.¹¹⁴ Justice Souter chose not to determine if the application of the Sherman Act was reasonable.¹¹⁵ Justice Souter stated that “Congress expressed

105. See Aubry D. Smith, Note, *Bringing Down Private Trade Barriers—An Assessment of the United States’ Unilateral Options: Section 301 of the 1974 Trade Act and Extraterritorial Application of U.S. Antitrust Law*, 16 MICH. J. INT’L L. 241, 253–56 (1994) (discussing the majority opinion in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)). Smith states that the majority did not address issues of comity and reasonableness because it did not see a “true conflict” in the case. See *id.*

106. See *Hartford Fire Ins. Co.*, 509 U.S. at 769–70, 798–99.

107. See *id.* at 769–70, 794–95.

108. See *In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 490–91 (N.D. Cal. 1989).

109. See *In re Insurance Antitrust Litig.*, 938 F.2d 919, 934 (9th Cir. 1991).

110. See *id.* at 933–34.

111. *Hartford Fire Ins. Co.*, 509 U.S. at 779.

112. See Smith, *supra* note 105, at 254.

113. See *id.*

114. See *id.*

115. See *Hartford Fire Ins. Co.*, 509 U.S. at 798.

no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.”¹¹⁶ And in the absence of such a legislative mandate, the Court did not decide if jurisdiction over foreign defendants could ever violate international comity.¹¹⁷

Justice Scalia, writing for the dissent, argued in favor of using reasonableness standards to limit the extraterritorial application of U.S. law.¹¹⁸ He provided a long list of lower court opinions that have limited the reach of the Sherman Act because of international comity.¹¹⁹ The dissent analyzed the reasonability of jurisdiction over the defendants using the list of factors in section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States.¹²⁰ Justice Scalia concluded that “[r]arely would these factors point more clearly against application of United States law.”¹²¹

How does the *Hartford Insurance* case affect the analysis of Title III? Arguably, the case prohibits district judges from dismissing cases brought under Helms-Burton on the basis of international comity—the rationale being that international comity is a political question that was answered by the legislature when it drafted the legislation.¹²² If this is the proper interpretation of *Hartford*, then there are no governmental mechanisms that can prevent enforcement of Title III actions.¹²³ Given the veracity of the above

116. *Id.*

117. *See id.*

118. *See id.* at 800, 814–15.

119. *See id.* at 817 (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294–98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 608–15 (9th Cir. 1976)). However, authority exists for the proposition that courts rarely decline to exercise jurisdiction under the Sherman Act due to unreasonable jurisdiction. *See* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a “Choice-of-Law” Approach*, 70 TEX. L. REV. 1799, 1810–12 (1992).

120. *See Hartford Fire Ins. Co.*, 509 U.S. at 818–19; *see also supra* note 71.

121. *Hartford Fire Ins. Co.*, 509 U.S. at 819.

122. *See* Fischer, *supra* note 75, at 584.

123. Assuming, of course, President Clinton does not suspend enforcement of Title III for another six months. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(b)(1), 110 Stat. 785, 821 (“The President may suspend the effective date [of Title III] for additional periods of not more than 6 months each . . . if the President determines . . . that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.”). This also assumes that the new members of the Supreme Court will side with the majority opinion of *Hartford*, rather than Scalia’s dissenting opinion. *See* Smith, *supra* note 105, at 256. Smith comments:

proposition, one may conclude that the only barriers to the enforcement of Helms-Burton are other countries' antidote laws and U.S. obligations under international treaties.

C. *The Act of State Doctrine*

If the judiciary does not decline to adjudicate Title III claims because of international comity, they may decline to do so because of the Act of State Doctrine. The Doctrine stands for the proposition that "courts of one nation [cannot] sit in judgment of the acts of a foreign sovereign which occurred in the foreign state."¹²⁴ The Act of State Doctrine does not deprive a court of jurisdiction.¹²⁵ Rather, "it operates as an issue preclusion device."¹²⁶ U.S. courts first adopted the doctrine in *Underhill v. Hernandez*.¹²⁷ The Supreme Court stated, "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."¹²⁸

The modern rule was announced in *Banco Nacional de Cuba v. Sabbatino*.¹²⁹ The case arose out of disputes resulting from the Cuban government's expropriation of a U.S. resident's property in 1960.¹³⁰ The Court refused to hear defendant-respondents' contentions against the application of the Act of State Doctrine, stating: "[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign . . . even if the complaint alleges that the taking violates customary international law."¹³¹ While nothing in the Constitution demands the court

The broader message of [Hartford Insurance] is suggested by the fact that five of nine Supreme Court justices were inclined not to engage in interest-balancing However, with new justices on the Court, it is probably premature to draw any conclusions about the fate of interest-balancing as a means of controlling the extraterritorial reach of the antitrust laws.

Id.

124. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS § 24.31 (3d ed. 1995).

125. *See id.*

126. National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp 622, 640 (S.D.N.Y. 1978), *aff'd* 597 F.2d 314 (2d Cir. 1979).

127. 168 U.S. 250 (1897).

128. *Id.* at 252.

129. 376 U.S. 398 (1964).

130. *See id.* at 400-01, 403.

131. *Id.* at 420, 428.

abide by the Act of State Doctrine, it does have “constitutional underpinnings.”¹³² The Act of State Doctrine arises out of the separation of powers, and maintains control over foreign affairs in the hands of the President and out of the hands of the judiciary.¹³³ In a later Supreme Court decision, Justice Brennan surmised in a dissent that “[i]n short, . . . the validity of a foreign act of state in certain circumstances is a ‘political question’ not cognizable in our courts.”¹³⁴

But because the Act of State Doctrine is not constitutionally required, Congress has the power to force courts not to take the doctrine into consideration.¹³⁵ Therefore, Congress promptly enacted the “Sabbatino” or “Second Hickenlooper” Amendment to circumvent the Supreme Court’s decision.¹³⁶ The amendment read:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted . . . based upon . . . a confiscation or other taking¹³⁷

Detractors of the Act of State Doctrine applauded the amendment, arguing the doctrine only resulted in “(a) frustrating the application of international law . . . ; (b) denying litigants their day in court . . . ; and (c) frustrating the effective application of other U.S. laws.”¹³⁸ Subsequent decisions have narrowly construed the Sabbatino Amendment, giving it effect only when confiscated property has been brought to the United States.¹³⁹ Because Title III claims deal with properties in Cuba, the Sabbatino Amendment, as presently construed, may not apply.¹⁴⁰

132. *Id.* at 423 (quotations omitted).

133. *See id.*

134. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787–88 (1972) (Brennan, J., dissenting).

135. *See Clagett*, *supra* note 9, at 439–40.

136. *See id.* at 439.

137. 22 U.S.C. § 2370(e)(2) (1994).

138. Monroe Leigh, *Sabbatino’s Silver Anniversary and the Restatement: No Cause for Celebration*, 24 INT’L LAW. 1, 3 (1990).

139. *See Banco Nacional de Cuba v. First Nat’l City Bank of New York*, 431 F.2d 394, 399–402 (2d Cir. 1970).

140. *See Lowenfeld*, *supra* note 29, at 427.

The drafters of Helms-Burton wisely added their own version of the Sabbatino Amendment.¹⁴¹ Section 6082(a)(6) states: “No court of the United States shall decline, based upon the act of state doctrine, to make a determination on the merits in an action brought under [this statute].”¹⁴² This sentence may be the most important part of the statute¹⁴³ and, after the Supreme Court’s holding in *Hartford*, eliminates the last barrier to judicial enforcement of Title III in the United States.

V. TITLE III AND INTERNATIONAL TREATY OBLIGATIONS

Title III may not violate the U.S. interpretation of general customary international law; however, it may violate U.S. treaty obligations. Helms-Burton implicates three different treaties between the United States and other nations. They are the NAFTA, the U.N. Charter, and the OAS Charter.

A. *The North American Free Trade Agreement*

There are certainly some portions of the Helms-Burton Act that seem to violate the NAFTA.¹⁴⁴ For example, Title IV’s exclusion of traffickers from the United States may violate U.S. obligations under the NAFTA Chapter 16, which requires Parties to “grant temporary entry to business persons.”¹⁴⁵ This discussion will keep its focus on Title III.

If a Canadian or Mexican individual or corporation is subject to an unfavorable judgment pursuant to Title III of the Helms-Burton Act, they could challenge the award through the NAFTA.¹⁴⁶ Two arguments are available. First, an

141. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 302(a)(6), 110 Stat. 785, 817.

142. *Id.*

143. See Lowenfeld, *supra* note 29, at 427 (noting Brice M. Clagett’s position during a debate between the two commentators before the American Society of International Law).

144. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 [hereinafter NAFTA].

145. *Id.* art. 1603(1), 32 I.L.M. at 664; see Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 401, 110 Stat. at 822; see also Jonathan R. Ratchik, Comment, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT’L L. & POLY 343, 367 (1996) (“Although Chapter Sixteen establishes criteria by which a NAFTA member can refuse entry to an otherwise qualified business person, trafficking or benefiting from confiscated American property is not one of them.”).

146. The dispute settlement mechanism under Chapter 11 of the NAFTA is unique in that it allows individual investors to submit a claim to arbitration against a member nation when they feel the nation has breached an obligation

investor could argue that Title III of Helms-Burton violates Article 1102 of the NAFTA.¹⁴⁷ Article 1102 provides that “[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors”¹⁴⁸ By its terms, Helms-Burton cannot apply to U.S. citizens since they are prohibited from investing in Cuba by the primary boycott under the Cuban Democracy Act of 1992.¹⁴⁹ Therefore, Helms-Burton discriminates against investors of Mexico and Canada by threatening those investors with litigation in which a U.S. citizen could never be a defendant.

The United States may respond by pointing out the language of Helms-Burton which clearly states that “any person that . . . traffics in property which was confiscated by the Cuban Government” is liable.¹⁵⁰ The statute does not limit its application to foreign nationals. Furthermore, U.S. investors and foreign investors are not “in like circumstances.”¹⁵¹ Foreign investors have the ability to invest in Cuba, whereas U.S. investors do not. Therefore, the two sets of investors are in differing sets of circumstances.

The United States used this line of reasoning in the *Dolphin Tuna Cases* argued before a General Agreement on Tariffs and Trade (GATT) dispute resolution panel.¹⁵² The

under Chapter 11, which covers investment. See NAFTA, *supra* note 144, art. 1116, 32 I.L.M. at 642-43.

147. The NAFTA Chapter 11 creates freedom of investment among member nations, specifically granting investors and their investments National Treatment and Most-Favored-Nation Treatment. See *id.* arts. 1102, 1103, 32 I.L.M. at 639.

148. *Id.* art. 1102(1).

149. See 22 U.S.C. § 6005(a) (1994).

Until early 1992, most commercial and private dealings with Cuba were controlled by the licensing provisions of the Cuban Asset[s] Control Regulations Some provisions in those Regulations defined the parameters within which the foreign subsidiaries of U.S. corporations could carry on trade with Cuba.

[The Cuban Democracy Act of 1992] generally prohibits foreign firms that are owned or controlled by U.S. nationals from entering into any trade or financial transactions with Cuba, without regard to the strategic importance of the goods traded. That legislation wiped out the existing licensing criteria under the old Assets Control Regulations.

Maier, *supra* note 15, at 391-92.

150. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(a)(1)(A), 110 Stat. at 815.

151. NAFTA, *supra* note 144, art. 1102(1), 32 I.L.M. at 639.

152. See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1610 (1991) [hereinafter Panel

case arose after Mexico complained that the United States was using the Marine Mammal Protection Act of 1972 (MMPA)¹⁵³ as an unfair restriction on trade.¹⁵⁴ The United States defended on several grounds, particularly by arguing that the MMPA did not violate the National Treatment requirement,¹⁵⁵ and, therefore, was not inconsistent with Article III of the GATT.¹⁵⁶ The United States reasoned that tuna caught using nets that protect marine mammals was not a “like product” when compared to tuna harvested without such safeguards.¹⁵⁷ The Panel rejected the argument and decided that MMPA regulations “could not possibly affect tuna as a product.”¹⁵⁸

Similarly, a foreign investor would argue that the U.S. embargo on Cuba could not possibly affect nationals as investors inside the territory. The fact that U.S. residents may not trade with Cuba does not limit their right “to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”¹⁵⁹ Therefore, investors of all parties are “in like circumstances.”¹⁶⁰

Second, a foreign investor could argue that actions brought under section 6082(a) of the Helms-Burton Act deny foreign investors the minimum standard of treatment required by the NAFTA. The NAFTA Article 1105 states: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”¹⁶¹ Investors may argue that when plaintiffs in Title III actions seek to enforce a court award, the foreign investor’s **interest** becomes subject to attachment. At

Report]. The case is relevant to NAFTA disputes inasmuch as “GATT and its interpretative notes . . . are incorporated into and made part of this Agreement.” NAFTA, *supra* note 144, art. 301, 32 I.L.M. at 299.

153. 16 U.S.C. §§ 1371–1421 (1994).

154. *See* Panel Report, *supra* note 152, at 1603.

155. *See id.*

156. Article III(4) of the GATT states: “[P]roducts of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to *like products* of national origin.” General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. III(4).

157. *See* Panel Report, *supra* note 152, at 1603.

158. *Id.* at 1618.

159. NAFTA, *supra* note 144, art. 1102(1), 32 I.L.M. at 639.

160. *Id.*

161. *Id.* art. 1105(1), 32 I.L.M. at 639.

that point, the foreign national's investment is treated unfairly under international law.¹⁶²

Title III arguably discriminates against investors from Mexico and Canada in violation of Chapter 11 of the NAFTA. Violation of this part of the NAFTA gives injured investors two avenues of recourse. First, investors have relief available to them via domestic blocking statutes.¹⁶³ Second, investors have the right to seek redress before dispute settlement panels under Chapter 11, section B of the NAFTA.¹⁶⁴

B. *The United Nations*

The Helms-Burton Act violates U.S. obligations to the United Nations. The U.N. Charter states that the "Organization is based on the principle of the sovereign equality of all its Members."¹⁶⁵ Sovereignty is the principle that a nation is the absolute authority within its jurisdiction.¹⁶⁶ From the concepts of sovereignty and state equality flows the principle that nations should refrain from interfering with the domestic affairs of fellow nations.¹⁶⁷

The United Nations has previously condemned the United States for violating the sovereignty of other nations with extraterritorial legislation.¹⁶⁸ Here the United States is clearly interfering in the domestic affairs of both Cuba and its trading partners. The conduct that Title III intends to deter involves the sale of property in Cuba, by the Cuban Government, to individuals who are not U.S. citizens. While the property being sold once belonged to U.S. citizens, it is the U.S. government that bore the responsibility, under domestic and international laws, of settling the claims.¹⁶⁹ In

162. *See id.*

163. *See supra* text accompanying notes 40–60.

164. *See* NAFTA, *supra* note 144, arts. 1115–1138, 32 I.L.M. at 642–47. Section B of Chapter 11 is unique in that the provision gives an individual investor the opportunity to raise a dispute with a member nation. *See id.* Typically, dispute settlement panels resolve controversies between nations, precluding individuals from challenging another nation's actions directly.

165. U.N. CHARTER art. 2, para. 1.

166. *See* EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 55–57 (1920).

167. *See* F. V. Garcia-Amador, *Latin American Law*, in SOVEREIGNTY WITHIN THE LAW 123, 125 (Arthur Larson & C. Wilfred Jenks eds., 1965).

168. *See supra* text accompanying note 18.

169. *See generally* Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995). However, the United States has attempted to resolve strained relations with Cuba. For example, the settlement of U.S.

fact, Cuba has settled expropriation claims with many other countries, including Canada, France, Spain, and Switzerland.¹⁷⁰

Even the Cuban Democracy Act of 1972, which the United Nations so firmly denounced, limited its scope to targeting the conduct of U.S. corporations.¹⁷¹ The Helms-Burton Act goes much further, not only by creating liability for non-citizens,¹⁷² but also by trying to destroy an entire government through monetary asphyxiation.¹⁷³ Because the United States is attempting to deter conduct taking place in another nation, the United States is violating the U.N. Charter.

C. *The Organization of American States*

No speculation is necessary to determine if Helms-Burton and Title III are consistent with the OAS Charter. The General Assembly of the OAS has already announced that the two cannot be reconciled.¹⁷⁴ The OAS Charter¹⁷⁵ states that “[e]very American State has the duty to respect the rights enjoyed by every other State in accordance with international law.”¹⁷⁶ Because the terms of the Helms-Burton Act implicate a violation of the Charter, the General Assembly passed a resolution in June 1996 directing the Inter-American Juridical Committee “to examine and decide upon the validity under international law” of the Helms-Burton

property claims against Cuba is a prerequisite to the normalization of trade relations. *See id.* at 222 & n.20. The President has broad power to settle those claims. *See id.* at 225. Cuba violated international law by expropriating the property of U.S. citizens without making timely compensation. *See id.* at 222 & n.19. Generally, unless some other law or agreement provides otherwise, those aggregate settlements are a claimant’s sole remedy. *See id.* at 225–26. But under Helms-Burton, U.S. nationals may pursue their claims in U.S. courts if the expropriated property is trafficked. *See supra* text accompanying note 10.

170. *See* Travieso-Diaz, *supra* note 169, at 220–21.

171. *See supra* text accompanying notes 15–18.

172. *See supra* text accompanying note 149.

173. *See supra* text accompanying notes 5–6.

174. *See* Seymour J. Rubin, *Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act, Introductory Note*, 35 I.L.M. 1322, 1334 (1996). The United States was the only dissenter of the General Assembly Resolution, which directed the Inter-American Juridical Committee to determine the validity of the Helms-Burton Act under international law. *See id.* at 1322.

175. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

176. *Id.* art. 7, 2 U.S.T. at 2419, 119 U.N.T.S. at 54.

Act.¹⁷⁷ The Committee reported in August that Helms-Burton failed to comply with both the Charter and general international law.¹⁷⁸ The opinion complained that a “State may not exercise its power in any form in the territory of another State,”¹⁷⁹ and that “domestic courts of a claimant State are not the appropriate forum for the resolution of State-to-State claims.”¹⁸⁰ The Committee did acknowledge the existence of the Effects Doctrine, but stipulated that the effects need be “direct, substantial and foreseeable.”¹⁸¹ However, the Committee found “no apparent connection between [sales of expropriated property] and the protection of [the United States] essential sovereign interests.”¹⁸² The Juridical Committee unanimously adopted the opinion the day it was published.¹⁸³

VI. CONCLUSION

Jesse Helms and Dan Burton carefully constructed their statute. The congressmen anticipated potential problems with the effects test and the Act of State Doctrine. Thus, they included clear language indicating that the former justified the law, and that the latter simply would not apply.

The drafters also saw considerations of comity looming in the background. So, they left out any wording attempting to justify the legislation as a reasonable extension of U.S. legislation. Perhaps Senator Helms and Representative Burton chose to rely on the increasing willingness of U.S. federal courts to apply the Sherman Act to conduct well outside U.S. borders.

The Act’s authors either did not know, or did not care, that Title III violated U.S. obligations as a member of the United Nations or the OAS. While both organizations

177. Rubin, *supra* note 174, at 1322 & n.1.

178. Opinion of the Inter-American Juridical Committee in Response to Resolution AG/DOC.3375/96 of the General Assembly of the Organization, Entitled “Freedom of Trade and Investment in the Hemisphere,” Aug. 23, 1996, 35 I.L.M. 1329, 1334 (1996).

179. *Id.* at 1333.

180. *Id.* at 1332.

181. *Id.* at 1333.

182. *Id.*

183. *See id.* at 1334. It is interesting to note that the Committee was careful to avoid a violation of international law themselves. The Committee carefully stated that the opinion was merely advisory and that it did not grant the OAS power to censure the United States, nor was the opinion binding. *See id.* at 1329–30.

denounce the entire piece of legislation, the United Nations and the OAS can do little more than voice their collective dissatisfaction and frustration with the law.

Canada's and Mexico's blocking statutes were foreseeable as well. After all, the United States invented the mechanism, and other nations followed suit, including Australia,¹⁸⁴ Japan,¹⁸⁵ Korea,¹⁸⁶ the Philippines,¹⁸⁷ and the United Kingdom.¹⁸⁸ These laws not only rendered U.S. citizens unable to enforce their Title III judgments, but also created liability for the claimants abroad.

The President also told Congress that Title III would implicate the NAFTA. And, in fact, the NAFTA not only gives Mexican and Canadian investors another channel to collect damages, but may actually hold the United States liable under the Chapter 11 dispute settlement mechanism.

But no one could anticipate having to give the Rose Garden back to those the United States expropriated it from over two hundred years ago. Maybe if someone had told Congress and the President what Helms-Burton really implicated, they never would have passed the law.

While Helms-Burton is successful at angering allies, so far the law is not successful at stopping investment in Cuba. In fact, foreign investment in Cuba is estimated to total US\$2.1 billion.¹⁸⁹ Since March 12, 1996, the date President Clinton signed Helms-Burton, Cuba inked 25 new joint ventures and another 143 are in negotiation.¹⁹⁰

Bill Clinton need not lose any sleep over James Osborne's claim to the White House. But U.S. citizens' and nationals' claims under Title III stand about the same chance of being satisfied. Other nations' antidote laws and blocking statutes may stymie efforts at judgment collection, as well as deter potential litigants with the possibility of liability abroad. Moreover, the U.S. government's economic liability under the NAFTA may compel the United States to repeal the law. If for no other reason, the United States should repeal the law to

184. Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Austl.).

185. MINPŌ, art. 203, NO. 547 (1960) (Japan).

186. Korean Civil Procedure Act, art. 203, no. 61 (Korea).

187. Blocking Decree, Presidential Decree No. 1718 (Aug. 21, 1980) (Phil.).

188. Protection of Trading Interests Act, C.11, *reprinted in* 959 Antitrust Trade Reg. Rep. (BNA) F02 (Apr. 10, 1980).

189. *See Cuba: Saying Boo to Helms-Burton*, ECONOMIST, Oct. 19-25, 1996, at 49, 49.

190. *See id.*

maintain credibility as a leader in the United Nations and in the OAS.

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