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THE HELMS-BURTON CONTROVERSY: AN EXAMINATION OF ARGUMENTS THAT THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996 VIOLATES U.S. OBLIGATIONS UNDER NAFTA

I. INTRODUCTION

On March 12, 1996, U.S. President William Jefferson Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton)[1] shortly after a Cuban MiG-29 fighter jet (MiG) shot down two unarmed U.S. civilian planes in international airspace in February, 1996.[2] All four individuals on board the plane were killed.[3] Helms-Burton derived its name from Senator Jesse Helms and Representative Dan Burton who co-sponsored the legislation in February of 1995[4] in order to strengthen the economic embargo the United States has maintained against Cuba since 1959.[5] President Clinton signed Helms-Burton into law after the Cuban MiG attack, despite his earlier proclamations that he would veto the bill when it reached his desk.[6]

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1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104, 114, 110 Stat. 785 (1996) (to be codified at 22 U.S.C. §§ 6021-6091).

2. *See Fact Sheet: Implementation of the LIBERTAD Act*, *in* 7 U.S. DEP'T OF STATE DISPATCH 188 (Apr. 8, 1996). *See also* William J. Clinton, *U.S. and the UN Respond to Cuban Shootdown of Civilian Aircraft*, *in* 7 U.S. DEP'T OF STATE DISPATCH 101 (Mar. 11, 1996) (reacting to the incident and discussing unilateral actions taken).

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

4. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, S. 381, 104th Cong., 1st Sess. (1995); H.R. 927, 104th Cong., 1st Sess. (1995) (enacted).

5. *See* 22 U.S.C.A. § 6022(2) (West Supp. 1997).

6. *See* Jefferson Morley, *Shoot Down*, WASH. POST, May 25, 1997, at W8; *see also* Juanita Darling & Craig Turner, *Tightened U.S. Sanctions on Trade With Cuba Begin to Have Impact*, L.A. TIMES, July 13, 1996, at A8; Thomas W. Lippman & Douglas Farah, *Incident Prompts New Calls for Harder American Line*, WASH. POST, Feb. 25, 1996, at A16. U.S. White House officials said that President Clinton was opposed to Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton), which "would allow Cuban Americans

Helms-Burton maintains economic pressure on the Cuban government by discouraging foreign investment in Cuban properties that were confiscated from U.S. nationals.[7] Title III of the act allows U.S. nationals, including Cuban-Americans, to file lawsuits in U.S. federal courts against foreign investors who "traffic" in confiscated property located in Cuba.[8] Title IV of the Act requires the exclusion from the United States of foreign investors participating in the "trafficking."[9] The individuals which can be excluded from the United States under Title IV include corporate officers, principals, and shareholders having "a controlling interest of an entity which has been involved in . . . trafficking in confiscated property."[10] Title IV also excludes these individuals' spouses and minor children.[11] Helms-Burton gives the President authority to suspend the effective date of Title III for six months if he determines that the "suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."[12] President Clinton has already suspended much of Helms-Burton.[13] In fact, as recently as January 3, 1997, President Clinton announced that he would suspend the right to sue under Title III for a second six-month period.[14]

Despite President Clinton's decisions to suspend most of

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and others to sue in U.S. courts for compensation from foreign companies that buy property that Castro had confiscated over the past three decades." Devroy, *supra* note 3; *see also* 22 U.S.C.A. §§ 6081-6085.

7. Congress found that foreign investment in "confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States." 22 U.S.C.A. § 6081(6).

8. *Id.* §§ 6081-6084.

9. *Id.* §§ 6023(13), 6091. "Traffics" is defined broadly and encompasses, among others, individuals who knowingly broker, improve, invest in, or who "begins after March 12, 1996, to manage, lease, possess, use, or hold an interest in confiscated property." *Id.* § 6091(b)(2).

10. *Id.* § 6091(a)(3).

11. *Id.* § 6091(a)(4).

12. *Id.* § 6085(b)(1).

13. *See* Bruce W. Nelan, *Taking on the World*, TIME, Aug. 26, 1996, at 26, 27.

14. *See* Peter Morton & John Geddes, *Ottawa Spurns Clinton Move: Suspension of Helms-Burton Lawsuits Dismissed by Eggleton*, FIN. POST, Jan. 4, 1997, at 3. Title III was to initially take effect on August 1, 1996, 22 U.S.C.A. § 6085(a), when President Clinton suspended it until February 1, 1997. On January 3, 1997, President Clinton announced another suspension of Helms-Burton until July, 1997. *See* Robert S. Greenberger, *U.S. Holds Up Cuba Suits, Pleasing Few*, WALL ST. J., Jan. 6, 1997, at A9.

Helms-Burton's provisions, as well as the 6,511 lawsuits filed under Title III of Helms-Burton,[15] Canada, Mexico, and members of the European Union (EU) have exhibited resentment towards the United States for enacting Helms-Burton and for threatening to enforce it.[16] The impact of Title IV of Helms-Burton became apparent in Canada when the U.S. Department of State sent Sherritt International (Sherritt), a Canadian company investing in a Cuban nickel mine, a notice that its executives may be denied access into the United States if Sherritt's investment activities in Cuba were not discontinued.[17]

Two members of the Canadian Parliament expressed their distaste for Helms-Burton by introducing a bill which would allow Canadian citizens whose ancestors lost property in the United States during the American Revolution to file suit.[18] Canada's international trade minister, Arthur Eggleton, proclaimed that Canada would consider taking action against the United States under the alternative dispute resolution provisions contained in the North American Free Trade Agreement (NAFTA),[19] should international discussions regarding Helms-Burton prove fruitless.[20] Canada also planned to join the EU

15. *See* Morton & Geddes, *supra* note 14.

16. *See* Greenberger, *supra* note 14. The European Union (EU), in fact, delivered a formal protest to the U.S. Department of State. *See* Nelan, *supra* note 13, at 27. Even prior to the passage of Helms-Burton, Canada and the EU had threatened retaliation and lodged diplomatic protests. *See* Steven Greenhouse, *Allies of U.S. Seek to Block Bill on Cuba*, N.Y. TIMES, Apr. 13, 1995, at A9.

17. *See* Darling & Turner, *supra* note 6. A State Department spokesperson stated that two Canadian executives left Sherritt International (Sherritt) "for fear of American reprisals" under Title IV, although the executives claimed that they left for other reasons. *See* Charles Bremner & Martin Fletcher, *EU Threatens Retaliation over Cuba Trade Embargo*, TIMES (London), July 13, 1996, *available in* 1996 WL 6506704. While Title III of Helms-Burton provides that the President may suspend Title III's lawsuit provision for six months; Title IV does not explicitly authorize the President to suspend its provisions denying visas. *See* 22 U.S.C.A § 6085(b)(1) Instead, Title IV merely provides that the U.S. Secretary of State "shall deny a visa to, and the Attorney General shall exclude, any alien who the Secretary of State determines . . . traffics in confiscated property" after Helms-Burton's enactment." *Id.* § 6091(a). President Clinton has therefore suspended lawsuits under Title III, while the Secretary of State has issued warnings under Title IV.

18. *See* Robert Russo, *2 Canadian MPs Inject Levity into Dour Cuba Bill Debate*, EDMONTON J., Feb. 12, 1997, at A7.

19. North American Free Trade Agreement, *done* Dec. 17, 1992, Can.-Mex.-U.S., art. 2022, 32 I.L.M. 296, 32 I.L.M. 605, 698 (1993) [hereinafter NAFTA].

20. Eggleton told reporters, "I've still got the NAFTA challenge in my back

in challenging Helms-Burton before the World Trade Organization (WTO). However, the EU suspended its WTO action[21] after the Clinton administration agreed to seek amendments to Helms-Burton which would give the President authority to suspend Title IV.[22]

Mexico has declared that it will join Canada, its other NAFTA trading partner, in requesting a dispute resolution under NAFTA.[23] Mexico's President, Ernesto Zedillo, has already met with Canadian Prime Minister Jean Chretien to discuss the implications of Helms-Burton on Canadian and Mexican activities in Cuba.[24]

This Note will argue that Canada and Mexico, both U.S. trading partners under NAFTA, stand to win a dispute resolution proceeding on the issue of whether Helms-Burton violates NAFTA. Although President Clinton has suspended most of Helms-Burton's provisions, opponents of the legislation have argued that the suspensions do not alleviate their distaste for Helms-Burton, and have expressed the view that a dispute resolution brought under NAFTA is a viable means for forcing the United States to dispense with Helms-Burton altogether.[25]

Helms-Burton clearly violates NAFTA in several respects. First, Helms-Burton violates Chapter Eleven of NAFTA which

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pocket," and that "[i]f things break down and don't proceed, then I can always use that." Andrew Flynn, *Canada Pushes for Green Treaty Deal Sought on Environmental Technology*, TORONTO STAR, May 2, 1997, at E2. As one author observed, "[o]n June 18, 1996, Canada requested a formal meeting of the [NAFTA Trade] Commission regarding the Helms-Burton Act. The meeting, a conference call between the deputy trade ministers of the three NAFTA countries, took place on June 28, 1996, but did not resolve the dispute." David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 171 (1997). On July 29, 1996, Canada and Mexico did become entitled to request the formation of a Chapter 20 arbitral panel; however, neither country did so as of December 1996. *See id.*

21. *See United States—The Cuban Liberty and Democratic Solidarity Act*, GATT Doc. WT/DS38/5 (April 25, 1997) (communication from the chairman of the panel).

22. The World Trade Organization (WTO) action was suspended on April 25, 1997. *See* Lawrence Herman, *Canada Should Sit Tight as Helms-Burton Saga Unfolds: U.S. and EU May Agree on a Face-Saving Deal*, FIN. POST, Apr. 23, 1997, at 17; *see also Brittan Berates Canadians*, FIN. TIMES, May 2, 1997, at 4.

23. *See* Julia Preston, *U.S. Finds Mexico is Adamant on Cuba Trade*, N.Y. TIMES, Aug. 29, 1996, at A5.

24. *See The NewsHour with Jim Lehrer* (PBS television broadcast, July 11, 1996), *available in* LEXIS, News Library, Macleh File.

25. *See* Morton & Geddes, *supra* note 14. Canada in particular has adopted this position. *See id.*

requires that each NAFTA signatory treat investors of other NAFTA signatories in accordance with the Most Favored Nation (MFN) principle[26] and international law.[27] Helms-Burton not only works to deny Mexican and Canadian investors dealing with Cuba entry into the United States, but also provides that these foreign investors may be sued in federal courts.[28] The U.S. denial of entry to Canadian and Mexican investors dealing with Cuba, along with the authorization of U.S. federal courts to hear lawsuits brought against these investors, operates to undermine the MFN treatment provision in Chapter Eleven of NAFTA.[29] Second, Helms-Burton violates Chapter Sixteen of NAFTA, under which "[e]ach party shall grant temporary entry to business persons" from any of the signatory nations.[30] Title IV of Helms-Burton, which denies foreign business persons investing in Cuba entry into the United States, will have the effect of denying access to the same category of business persons who are guaranteed entry into the United States under Chapter Sixteen of NAFTA.[31] Finally, the aforementioned provisions of Helms-Burton frustrate NAFTA's general objectives by interfering with the free flow of commerce and trade between Canada, Mexico, and the United States.

Helms-Burton also violates international law because it is an unjustified extraterritorial extension of U.S. law,[32] because it violates the international principle of continuity[33] and be-

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26. NAFTA, *supra* note 19, art. 1103, 32 I.L.M. at 639. The Most Favored Nation (MFN) principle, as set forth in NAFTA, requires that "[e]ach Party shall accord to . . . another Party treatment no less favorable than that it accords, in like circumstances, to . . . any other Party or . . . a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." *Id.*

27. *See id.* art. 1105, 32 I.L.M. at 639-40 (requiring that NAFTA parties "shall accord to investments of investors of another Party treatment in accordance with international law"); *see also infra* Part V.

28. *See* 22 U.S.C.A. §§ 6082, 6091 (West Supp. 1997).

29. *See* Kenneth L. Bachman et al., *Anti-Cuba Sanctions May Violate NAFTA, GATT*, NAT'L L.J., Mar. 11, 1996, at C3.

30. *Id.* art. 1603, 32 I.L.M. at 664-65.

31. *See* Bachman et al., *supra* note 29.

32. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1986) [hereinafter RESTATEMENT]. NAFTA reinforces the obligations of the parties to treat each other in accordance with international law. NAFTA, *supra* note 19, art. 1105, 32 I.L.M. at 639-40.

33. *See* Bachman et al., *supra* note 29.

cause it constitutes a secondary boycott. First, Helms-Burton is an unjustifiable extension of U.S. extraterritorial jurisdiction because it lacks a valid basis under international law (*i.e.*, the effects principle).[34] Second, Helms-Burton violates the principle of continuity,[35] which requires that private claims to confiscated property be held *continuously* by nationals of the country asserting claims to the confiscated property. "Continuously" refers to a period measured from the time the property is confiscated (the time the claim arises) to the time a claim is espoused.[36] Helms-Burton violates the principle of continuity because it allows for the espousal of claims by persons who were not U.S. nationals at the time the Castro regime confiscated their property. Third, Helms-Burton constitutes a secondary boycott imposed against foreign nationals who deal or invest in Cuba because it extends United States jurisdiction beyond U.S. boundaries to restrict the business activities of foreign nationals.[37] The fact that the United States has long opposed secondary boycotts undermines the credibility of arguments advanced in favor of the validity of Helms-Burton under international law.[38]

Part II of this Note delineates the history of the U.S. embargo against Cuba. Part III explains Helms-Burton's most controversial provisions and gives a general discussion of the jurisdictional bases under international law. Part IV analyzes the arguments supporting and opposing the proposition that Helms-Burton violates NAFTA, as well as Canada's and Mexico's reactions to the enactment of Helms-Burton. Part V analyzes the arguments in support of and in opposition to the claim that Helms-Burton violates international law. Finally, Part VI examines alternatives to the U.S. embargo against Cuba and argues that the United States, in employing an extreme measure like Helms-Burton, may be paving the way for an unwanted customary rule of international law.

34. *See infra* Part V.A.1.

35. *See infra* Part V.A.2.

36. *See* Bachman et al., *supra* note 29.

37. *See infra* Part V.A.3.

38. *See, e.g.*, Export Administration Act of 1979, 50 U.S.C. app. § 2402(5)(A) (1994).

II. HISTORY OF THE UNITED STATES EMBARGO AGAINST CUBA

The United States has maintained an economic embargo against Cuba since the early 1960s, following Fidel Castro's ascent to power. Castro's enactment of confiscatory policies strained relations between the United States and Cuba. As a result, the United States began an economic embargo that has continued for nearly four decades. As one author has pointed out, "[t]he Embargo on All Trade with Cuba was first imposed by President Kennedy in February 1962."[39] The authority for the embargo came from Section 620(a) of the Foreign Assistance Act of 1961.[40] This Act provided that no assistance would be furnished to the Cuban Government, and authorized the President to establish and maintain a total embargo on all trade between the United States and Cuba.[41] In retaliation to the embargo, Cuba seized U.S. oil refineries within its borders, causing the United States to react by amending the Sugar Act of 1948,[42] giving the President authority to establish the Cuban sugar quota.[43] In response, the Cuban Government passed a decree authorizing the expropriation of U.S. owned property in Cuba.[44]

Congress broadened the embargo further by passing the Cuban Assets Control Regulations to restrict Cuba's access to its assets in the United States and to prohibit U.S. citizens and corporations from conducting business transactions with Cuba.[45] In 1964, Congress amended the International Settlement Act of 1948 to enable U.S. nationals to file claims against the Cuban government for U.S. property confiscated in Cuba.[46]

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39. Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AM. J. INT'L L. 419, 420 (1996). The embargo was issued under authority of the Foreign Assistance Act of 1961, Pub. L. No. 87-195 § 620(a), 75 Stat. 444 (codified at 22 U.S.C. § 2370(a)(1) (1994)). *See id.* at 420. The initial embargo was not issued pursuant to the Trading With the Enemy Act (TWEA), 50 U.S.C. app. §§ 1-44 (1994), because President Kennedy, at the time, believed that invoking TWEA soon after the Bay of Pigs incident would be "unnecessarily provocative." Lowenfeld, *supra*, at 420.

40. 22 U.S.C. § 2370(a)(1) (1994).

41. *Id.*

42. 74 Stat. 330 (1961) (codified at 7 U.S.C. § 1158 (1994)).

43. *See* Jonathan R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 346 (1996).

44. *See id.*

45. *See* Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1963).

46. *See* Pub. L. No. 88-666, 78 Stat. 1110 (1964) (codified as amended at 22

In the 1990s, the U.S. attempted to gain foreign cooperation for the embargo by enacting two pieces of extraterritorial legislation. The first piece of legislation is the Cuban Democracy Act of 1992 (1992 Act) which was signed into law by President George Bush.[47] The 1992 Act was passed primarily because of the dissolution of the Soviet Union, once a major financial contributor to the Castro government.[48] Foreign resistance to the U.S. economic measures against Cuba escalated because the 1992 Act was viewed as an extraterritorial measure implemented to tighten the embargo by attempting to restrict the investment conduct of third party countries in Cuba.[49] First, the 1992 Act purported to restrict the conduct of third party countries, granting the United States government authority to sanction any country that provides any form of assistance to Cuba, short of food and medical supplies to nongovernmental organizations or individuals.[50] In addition, the 1992 Act limited the investment activities of foreign actors by providing that the U.S. President may issue no licenses to

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U.S.C. §§ 1643-1643k (1994)). Title V of the International Claims Settlement Act of 1948 establishes the Foreign Claims Settlement Commission (FCSC) to obtain compensation for U.S. nationals with confiscated U.S. property in Cuba. 22 U.S.C. § 1643b. As one author notes, "[t]he Cuban Claims Program of the FCSC was active between 1966 and 1972" and certified claims totaling $1.8 billion. Cuba has not compensated any of the claimants to date. Matias F. Travieso-Diaz, *Alternative Remedies In a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659, 662, 664 (1996).

47. 22 U.S.C. §§ 6001-6010 (1994). *See*, Trevor R. Jefferies, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUS. J. INT'L L. 75, 81-82 (1993).

48. *See id.* at 80. As Jefferies observed, the Cuban Democracy Act of 1992 (1992 Act) recognized the "crumbling of the Iron Curtain" as "a unique opportunity for a 'peaceful transition to democracy in Cuba.'" *Id.* (quoting 22 U.S.C.A. § 6001(6) (West Supp. 1997)).

49. *See* MICHAEL KRINSKY & DAVID GOLOVE, UNITED STATES ECONOMIC MEASURES AGAINST CUBA 197-201 (1993). The 1992 Act is unacceptable under international law because of its extraterritorial aspects in that it seeks to regulate foreign companies, not of U.S. nationality, with respect to their conduct outside the United States. *See id.* at 195, 201.

50. *See* Jefferies, *supra* note 47, at 82. More specifically, the 1992 Act provided that the President may deem any country who provides assistance to Cuba ineligible for aid under the Foreign Assistance Act of 1961 or the Arms Export Control Act. The 1992 Act also allowed the President to omit any country providing aid to Cuba from any program for the forgiveness or reduction of debt owed to the United States. Sanctions against the assisting countries could only be lifted if the President, with the certification of Congress, determined that democratic progress was being achieved in Cuba. *See id.*

foreign subsidiaries of U.S. firms which conduct business in Cuba.[51] As a result, the 1992 Act denied foreign subsidiaries of U.S. owned companies licenses if those subsidiaries conducted business in Cuba, even though investing in Cuba may have been fully legal under the laws of the subsidiaries' country of origin.

The second attempt by the United States to strengthen its extraterritorial economic sanctions against Cuba occurred in March 1996, after a Cuban MiG shot down two airplanes piloted by Cuban exiles, causing four deaths.[52] Immediately following the aircraft attack, President Clinton initiated further controversy amongst U.S. trading partners by signing Helms-Burton into law, despite his previous indications that he would veto the bill.[53] Helms-Burton is highly controversial within the international community because it takes the embargo a step beyond the 1992 Act to penalize *all* foreign nationals (*i.e.*, companies) who invest in Cuba, whether or not the companies are U.S. owned subsidiaries.

Helms-Burton's explicit purposes are: (i) to strengthen the economic embargo against Cuba;[54] (ii) to encourage free and fair democratic elections in Cuba by developing a plan for furnishing assistance to a transitional government or a democratically elected government;[55] and (iii) to protect the property rights of U.S. citizens in Cuba.[56] In order to accomplish these purposes, Helms-Burton is divided into four major titles. Title I reaffirms Section 1704(a) of the 1992 Act,[57] which sanctions countries which assist Cuba.[58] Title I also opposes

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51. *See* Lowenfeld, *supra* note 39, at 422.

52. *See Fact Sheet: Implementation of the LIBERTAD Act*, *supra* note 2, at 188; *see also* Clinton, *supra* note 2, at 101.

53. As one journalist noted, "the [Clinton] administration initially opposed the measure, warning that [Helms-Burton] would strain relations with key allies." Greenberger, *supra* note 14; *see also* Morley, *supra* note 6; Darling & Turner, *supra* note 6; Devroy, *supra* note 3 (reporting predictions by members of Congress that Clinton would sign Helms-Burton bill).

54. *See* 22 U.S.C.A. § 6032 (West Supp. 1997).

55. *See id.* § 6062.

56. *See id.* § 6082. For an overview of Helms-Burton's provisions prior to enactment see Ratchik, *supra* note 43, at 349-51.

57. *See id.* § 6003(b)(1).

58. *See id.* § 6032(a)(1). Helms-Burton originally contained a provision that prohibited the importation of sugars, syrups and molasses from countries that purchase such goods from Cuba. H.R. 927, 104th Cong. This provision was dropped from the final version of the House bill. *See* Ratchik, *supra* note 43, at 349 n.47.

Cuba's membership in international financial institutions and reduces U.S. payments to such institutions that provide loans or other assistance to Cuba.[59]

Title II provides for the United States to assist a free and independent Cuba at such times as the President determines that a transition, or a democratically elected, government is in place in Cuba before the United States begins to lift the embargo.[60] Once the President determines that a transition or democratically elected government exists in Cuba, he is to consult with Congress and, upon congressional approval, is authorized "to take steps to suspend the economic embargo of Cuba."[61]

Title III, the first of the two most controversial provisions of Helms-Burton, seeks to protect U.S. property rights in Cuba by penalizing any country or its nationals for investing in confiscated U.S. property in Cuba.[62] The provision allows only U.S. nationals who own confiscated property in Cuba to sue any foreign nationals who traffic in such property.[63]

Helms-Burton's broad definition of "trafficking," not only includes the "selling, transferring, buying, or leasing" of the confiscated property, but also includes the engagement in any commercial activity, using or otherwise benefitting from the confiscated U.S. property in Cuba.[64] For example, Sherritt, a Canadian mining company which took over the management of the Moa nickel mine in Cuba (previously owned by U.S. nationals prior to confiscation), would constitute a "trafficker" of U.S. property under Helms-Burton. As one author pointed out, "[i]t follows that any person that deals with an enterprise that existed prior to January 1, 1959 (by whatever name), or with an enterprise that could be regarded as a successor to such an enterprise, stands exposed to litigation in the United States, if it does business or otherwise can be found in the United States."[65]

59. *See* 22 U.S.C.A. §§ 6034(a), (b).

60. 22 U.S.C.A. § 6062(a).

61. *Id.* § 6064(a).

62. *See id.* § 6082(a)(1) (making civil remedies available to U.S. nationals whose property was confiscated by the Cuban government).

63. *See id.*

64. *See id.* § 6023(13) (defining "traffics" in broad terms to include any persons who knowingly and intentionally "purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property"). The breadth of this definition suggests that even investors who lose money investing in Cuba will be liable.

65. Lowenfeld, *supra* note 39, at 428. The first case filed in the United States

Title IV, the second controversial provision of Helms-Burton, provides the "teeth" for Title III by further penalizing foreign investors who trade with Cuba by denying visas to these investors, as well as their spouses and dependent children.[66] Title IV authorizes the U.S. Secretary of State to determine which foreign investors will be denied entry under Title IV, regardless of whether these investors are being sued under Title III.

Helms-Burton also tightens the embargo a step beyond the 1992 Act by limiting the President's discretion to take measures that either enforce or suspend the embargo, requiring the President to consult with Congress before any action is taken with regard to the embargo.[67] Section 6064 of Helms-Burton authorizes the President to suspend the embargo only upon submitting a determination to Congress that a transition government is in power.[68] Despite all the measures the United States has taken to rid Cuba of the Castro regime, the Cuban government remains intact and continues to deny its population the most fundamental human rights; this suggests that the embargo has been ineffective in weakening Fidel Castro's power.[69]

III. HELMS-BURTON'S MOST CONTROVERSIAL PROVISIONS

Title III is the first of Helms-Burton's controversial provisions because it is an unjustified extraterritorial extension of U.S. laws to foreign countries. Title III is unjustified because it allows the United States to enforce the embargo abroad by re-

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pursuant to Title III is a claim brought by Consolidated Development Corporation of Miami against Sherritt, a corporation based in Toronto, Canada. The Miami corporation is claiming damages exceeding $1,000,000. The claim is based on profits Sherritt allegedly is realizing from investing in energy assets expropriated by Castro's regime. *See Canadian Measures to Combat Helms-Burton Act Focus on Protecting Canadian Companies Faced with U.S. Court Claims*, N. AM. FREE TRADE & INVESTMENT REP., July 15, 1996, *available in* 1996 WL 10175547 at *5 [hereinafter *Canadian Measures*].

66. *See* 22 U.S.C.A. § 6091(a).

67. *See id.* § 6064(a).

68. *Id.* As one commentator explains, a transitional government is one without Castro or his brother. *See* Lowenfeld, *supra* note 39, at 422.

69. *See* Ratchik, *supra* note 43, at 348 (1996). A discussion of human rights violations in Cuba is beyond the scope of this paper. For a detailed discussion see Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIGR. L.J. 479 (1995).

stricting the conduct of foreign nationals without any valid jurisdictional basis recognized under international law. The United States recognizes five bases for valid jurisdiction under international law: (i) territoriality; (ii) nationality; (iii) the protective principle; (iv) the passive personality principle; and (v) effects principle.[70] The effects principle is the only basis for jurisdiction which the United States can legitimately adopt in upholding Helms-Burton's legality under international law. The effects principle would allow the United States to pass legislation that would restrict foreign conduct, provided that the foreign conduct has, or is intended to have, a *substantial* effect within the United States.[71] The United States can validly impose liability on foreigners acting consistently with their own countries' laws, provided that the United States can demonstrate a substantial effect. As will be discussed in Part V of this Note, the United States will be unsuccessful in arguing a substantial effect in order to support the validity of Helms-Burton because foreign investments in Cuba do not have a substantial effect in the United States.[72]

Title III gives "any person" who "traffics in property which was confiscated" a three-month grace period to discontinue their conduct before they become "liable to any United States national who owns the claim to such property."[73] If the "trafficking" continues after the grace period has elapsed, the violators risk treble money damages providing liability is determined under the Title.[74] As a result, this provision is a substantial deterrent to investors seeking to invest in U.S. property abroad.[75]

To bolster Title III, Helms-Burton's framers also added provisions in Title IV to exclude the spouses and dependent children of these business persons.[76] As a result, Title IV could very well have the incredulous result of stopping "Ms. Jones, the daughter of a corporate executive from Toronto, . . .

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70. *See* RESTATEMENT, *supra* note 32, § 402 and accompanying comments.
71. *See id.* § 402(1)(c).
72. *See* discussion *infra* Part V.A.1.
73. 22 U.S.C.A. § 6082(a)(1)(A) (West Supp. 1997).
74. *See id.* § 6082(a)(1)(A), (a)(3)(C). *See also* Lowenfeld, *supra* note 39, at 429 & n.53 (noting the lack of clarity in Helms-Burton's treble damages provisions).
75. *See* Lowenfeld, *supra* note 39, at 429 n.53 (1996) (concluding that the "*in terrorem* effect" of Helms-Burton's treble damages provisions "is substantial").
76. *See* 22 U.S.C.A. § 6091(a)(4).

at the border when she returns from her summer vacation for her junior year at Vassar . . . ."[77] Title IV is also an extraterritorial extension of U.S. laws unjustified by the effects principle because trafficking of U.S. property in Cuba does not have a substantial effect within the United States.[78]

IV. ARGUMENTS FOR AND AGAINST HELMS-BURTON VIOLATING NAFTA

Canada and Mexico may successfully argue that Helms-Burton violates Chapters Eleven and Sixteen of NAFTA, as well as its general objectives. However, the United States may also find counter-arguments in Chapters Eleven, Sixteen and Twenty-One of NAFTA. Part IV.A will discuss the counteractive measures Canada and Mexico have taken in their attempts to retaliate against Helms-Burton. Part IV.B will argue that Canada and Mexico have strong arguments that Helms-Burton is violative of NAFTA.

First, Title IV of Helms-Burton, which restricts business persons entry into the United States, violates Chapter Eleven of NAFTA, which requires that NAFTA countries accord each other MFN treatment.[79] Second, Title IV also offends Chapter Sixteen of NAFTA which specifically requires that each NAFTA party provide for the temporary entry of other NAFTA party business persons.[80] For example, the United States, a NAFTA party, is obliged to provide for the temporary entry of Canadian and Mexican business persons. Title IV of Helms-Burton freely permits the United States to violate Chapter Sixteen by denying visas to NAFTA party business persons, even though these same business persons would otherwise be entitled to visas pursuant to Chapter Sixteen.

Lastly, Helms-Burton is violative of NAFTA's general objectives which seek to promote the free flow of trade and commerce among the NAFTA countries.[81] Helms-Burton's exclusion of NAFTA business persons, as well as the allowance of lawsuits to be brought against NAFTA business persons, will

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77. *See* Lowenfeld, *supra* note 39, at 429.
78. *See* discussion *infra* Part V.A.1.
79. *See* NAFTA, *supra* note 19, art. 1103, 32 I.L.M. 639.
80. *See id.* art. 1603(1), 32 I.L.M. 664.
81. *See id.* art. 102, 32 I.L.M. 297.

hinder the free flow of trade and commerce among the NAFTA countries.

Part IV.C will examine potential U.S. counter-arguments to allegations that Helms-Burton is violative of NAFTA and analyze the strength of these counter-arguments. First, the United States may argue that Article 1110 of Chapter Eleven allows for a NAFTA country to prohibit other NAFTA countries from taking measures that directly or indirectly expropriate (or are tantamount to an expropriation of) an investment of a NAFTA country.[82] Thus, the United States may argue that Helms-Burton explicitly seeks to prevent Canada and Mexico from taking actions that are direct or indirect expropriations, or are tantamount to expropriations, of U.S. property in Cuba.

Second, the United States may argue that Article 1111 of Chapter Eleven permits the adoption of measures which prescribe special formalities in connection with the establishment of investments of Canadian and Mexican investors.[83] Thus, the United States may assert that Helms-Burton is a special formality prescribed by NAFTA which requires Canadian and Mexican investors to refrain from establishing and maintaining investments in Cuba.

Third, the United States may argue that Article 1113 of NAFTA allows it to deny Chapter Eleven benefits to Canadian and Mexican investors when their investments 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.[84] The United States maintains no diplomatic relations with Cuba and also maintains economic sanctions against that nation. Therefore, the United States may refuse to grant Canadian and Mexican investors (including their investments in Cuba) Chapter Eleven benefits because, even though the investments originate from Canada or Mexico, they thrive in Cuba and are thus subject to Cuban control.

Finally, the United States may assert that Article 2102 of Chapter Twenty-One allows it to take measures inconsistent with NAFTA during an international relations emergency when the United States deems such measures necessary for

82. *See id.* art. 1110, 32 I.L.M. 641-42.
83. *See id.* art. 1111, 32 I.L.M. 642.
84. *See id.* art. 1113, 32 I.L.M. 642.

the protection of its national security interests.[85] As a result, the United States can argue that Helms-Burton, although inconsistent with some of NAFTA's provisions, is a measure the United States enacted in response to an international relations emergency (*i.e.*, the MiG's destruction of a civilian plane) which the United States deems necessary for the protection of its security interests.

A. *Canada's and Mexico's General Opposition to Helms-Burton*

As one journalist pointed out, "Canada and Mexico are two of the countries most likely to be affected by Helms-Burton."[86] Canadian companies based in Cuba have been among the most active foreign investors in that country. By 1996, these companies have invested more than $250 million.[87] Consequently, Canada is a major opponent of Helms-Burton.[88] Canadian International Trade Minister Arthur Eggleton vehemently expressed his disapproval of Helms-Burton noting that "[i]f the U.S. government has an argument with the Cuban government over appropriated or confiscated or seized or stolen property . . . that's an argument with Cuba, not an argument with Canada or any other country."[89] Mexico also has formally spoken out against Helms-Burton. Claude Heller, Mexico's ambassador to Cuba, commented in an interview that "Mexico will maintain trade relations with the countries that Mexico decides. It is not willing to submit to third countries."[90]

In addition to publicly denouncing Helms-Burton, Canada has taken legislative measures to counteract the U.S. policy. One recent Canadian counteractive measure has been the introduction of legislation to amend Canada's Foreign Extraterritorial Measures Act (FEMA).[91] FEMA, first enacted in 1985, is a Canadian measure designed to protect Canadian

85. *See id.* art. 2102, 32 I.L.M. 699-700.

86. Darling & Turner, *supra* note 6.

87. *See* Bernard Simon, *Canada to Hit Back in Cuba Row*, FIN. TIMES, June 13, 1996, at 4 (noting that most of Canada's investments in Cuba are from mining, tourism and energy sectors).

88. *See* Jill J. Spitz, *Canada's Threat Draws Discussion*, ORL. SENT., Aug. 19, 1996, at 5.

89. Darling & Turner, *supra* note 6 (alteration in original).

90. *Id.*

91. *See Canadian Measures*, *supra* note 65.

interests from extraterritorial measures like Helms-Burton.[92] In doing so, FEMA authorizes Canada's Attorney General to "forbid compliance in Canada with extraterritorial measures that, in his view, infringe upon Canadian sovereignty."[93] Canada amended FEMA, effective January 1, 1997, to authorize its Attorney General to forbid compliance with Helms-Burton, an extraterritorial measure.[94]

In addition to amending FEMA, the Canadian Government has vowed to enact legislation permitting Canadian companies sued by U.S. nationals under Helms-Burton to counter-sue in Canadian courts in order to recover any damages awarded to U.S. nationals.[95] The international aid organization, Oxfam Canada, has also become a participant in Canada's movement against Helms-Burton by urging Canadians to boycott Florida and other U.S. vacation destinations.[96] Canada contends that such a boycott may have worked already, as Florida noted a seven percent decline in visitations from Canada, while Cuba reported an increase in Canadian visitors in 1996.[97]

Mexico is joining Canada's opposition efforts against Helms-Burton by preparing an "antidote" law to counter the ramifications of Helms-Burton.[98] Ernesto Zedillo, Mexico's President, met with Canadian officials to express his country's disapproval of the U.S. measures, and noted that Mexico's Congress plans to counteract the effects of Helms-Burton.[99] Opposition to Helms-Burton by Canada and Mexico, two major U.S. trading partners, has thus been strong.[100]

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92. *See id.* Canada also implemented Foreign Extraterritorial Measures Act (FEMA) to oppose the 1992 Act which Canada, as well as other U.S. trading partners, deem an extraterritorial extension of U.S. authority. *See* KRINSKY & GOLOVE, *supra* note 49, at 197-198.

93. *Canadian Measures, supra* note 65.

94. *See Helms-Burton Action Leaves Envoy Unhappy,* VANCOUVER SUN, Jan. 6, 1997, *available in* 1997 WL 6097440.

95. *See* Tyler Marshall, *Europe Plans to Retaliate for U.S. Law on Cuba Trade Commerce,* L.A. TIMES, July 16, 1996, at A4.

96. *See id.*

97. *See* Spitz, *supra* note 88, at 5.

98. Philip True, *Mexico, Canada Vow to Fight Helms-Burton,* SAN ANT. EXP.-NEWS, June 16, 1996, at 1.

99. *See id.*

100. *See id.*

B. *Arguments Available to Canada and Mexico that Helms-Burton Violates NAFTA*

The proposed means for Canada and Mexico to legally challenge the validity of Helms-Burton under NAFTA is by a dispute-resolution panel convened under the agreement.[101] Canada and Mexico have already sought consultations under NAFTA.[102] The Helms-Burton dispute may be referred to the NAFTA Commission and subsequently to a dispute settlement panel if the talks among the NAFTA signatories fail.[103] If a dispute settlement panel is convened, Canada and Mexico will have strong arguments that Helms-Burton's provisions, specifically Titles III and IV, violate U.S. obligations under NAFTA.

1. Arguments That Helms-Burton Violates NAFTA: Chapter Eleven

Chapter Eleven of NAFTA sets out each NAFTA party's obligation with respect to investors from other NAFTA countries and their investments within its territory.[104] Article 1102 of NAFTA expressly states that each NAFTA country is to "accord to the investors of another [NAFTA country] treatment no less favorable than it accords, in like circumstances, to its own investors with respect to . . . disposition of investments."[105] This national treatment provision of Article 1102 means that the United States cannot grant investors and investments of Canada or Mexico[106] less favorable treatment than the United States accords to its own investors and investments.[107] Article 1104 further illustrates Chapter Eleven's

101. *See* Darling & Turner, *supra* note 6.

102. *See* Richard W. Stevenson, *Canada, Backed By Mexico, Protests U.S. on Cuba Sanctions*, N.Y. TIMES, Mar. 14, 1996, at A7.

103. *See* Simon, *supra* note 87.

104. *See* North American Free Trade Agreement Implementation Act, Statement of Administrative Action (1993), *reprinted in* H.R. DOC. NO. 103-159, at 589 [hereinafter NAFTA Statement of Administrative Action].

105. NAFTA, *supra* note 19, art. 1102, 32 I.L.M. 639. "Investment" is broadly defined in Article 1139 as all existing and future investments. *See* NAFTA Statement of Administrative Action, *supra* note 104, at 589.

106. "'Investor of a party'" [i.e., NAFTA country investor] encompasses "both firms (including branches) established in a NAFTA country, without distinction as to nationality of ownership, and NAFTA country nationals." *See* NAFTA Statement of Administrative Action, *supra* note 104, at 589.

107. *See id.* Chapter 11 also requires that NAFTA country governments treat

general purpose by specifying that NAFTA investors and their investments are to be accorded the better of national or MFN treatment.[108] This means that if the United States enters into a bilateral investment treaty (BIT) with France, thereby providing for a more favorable set of restrictions than would apply under NAFTA, the United States would then be required to apply the more favorable rules under the BIT with France to investors from Canada and Mexico.[109] Additionally, Article 1105 provides for treatment in accordance with international law and this provision becomes crucial when arguing that Helms-Burton violates principles of international law, particularly by its extraterritorial application.[110]

Title IV of Helms-Burton which denies foreign investors dealing in Cuba entry into the United States, defeats Chapter Eleven MFN provisions. The U.S. enforcement of the Title IV penalty for investing in Cuba may allow the United States to refuse to treat investors from Canada and Mexico as it treats foreign investors who do not invest in Cuba. The U.S. Department of State has already issued a warning to executives of Sherritt, a Canadian company investing in Cuba, that they will be denied access into the United States pursuant to Title IV of Helms-Burton because they are involved in investment activities in Cuba.[111] By denying Canadian investors like Sherritt access into the United States, Title IV allows the United States to take action contrary to Chapter Eleven's prescriptions.

Canada and Mexico's arguments that Title IV of Helms-Burton violates NAFTA's MFN provision are problematic because Title IV purports to accord less than MFN treatment to any country (whether a NAFTA signatory or not) that invests in Cuba. Thus, the United States may argue that Helms-Burton's national treatment and MFN provisions are consistent with Chapter Eleven because the United States is treating *all* foreign investors consistently with the way it treats its own

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NAFTA investors and investments no less favorably than investors of other countries and their investments. *See id.*

108. *See id.* at 590.

109. *See* JON R. JOHNSON, NORTH AMERICAN FREE TRADE AGREEMENT: A COMPREHENSIVE GUIDE 286 (1994).

110. For arguments that Helms-Burton violates international law see discussion *infra* Part V.

111. *See* Simon, *supra* note 87.

investors who deal with Cuba (all U.S. trade with Cuba is expressly prohibited). This argument will be problematic, however, because it raises the question of whether entities and individuals that invest in Cuba can comprise a distinguishing category covered by NAFTA's MFN provision.

The problems inherent with the Chapter Eleven argument may be overcome by the claim that Canadian and Mexican investors should be accorded MFN treatment by the United States simply because they are NAFTA investors, and not because they do or do not engage in investment activities with non-NAFTA countries (*i.e.*, Cuba). For example, a Canadian company's investors (*i.e.*, executives) should be accorded MFN treatment regardless of their non-NAFTA investments. Thus, if a Canadian national with Cuban investments seeks to enter the United States in order to participate in further investment activities, Title IV of Helms-Burton should not operate to exclude them from the United States.

Furthermore, Article 1108(4) states that "no party may, under any measure adopted after [NAFTA] . . . require an investor of another party by reason of its nationality, to . . . dispose of an investment existing at the time [and after] the measure becomes effective."[112] Helms-Burton is a measure adopted by the United States after NAFTA came into effect which requires all foreign investors, especially Canada and Mexico, to "dispose" of investments existing at the time Helms-Burton became effective.[113] Although Helms-Burton does not directly require the disposal of investments, it does indirectly force investors to give up their investments in order to avoid financial repercussions.[114] Therefore, Canada and Mexico may argue that Helms-Burton violates this particular provision. The United States, however, may counter-argue that the clause "by reason of its nationality" in Article 1108(4) means that the measure adopted would have to require a party's disposal of its investment because of the party's own nationality.

112. NAFTA, *supra* note 19, art. 1108(4), 32 I.L.M. 641.

113. Helms-Burton was signed into law on March 12, 1996. *See Fact Sheet: Implementation of the LIBERTAD Act*, *supra* note 2, at 188; *see also* Clinton, *supra* note 2, at 2.

114. *See* Lowenfeld, *supra* note 39, at 427. The real objective of Helms-Burton is to deter the behavior of persons or companies in third countries who have investments in Cuba, or who are seeking to invest in Cuba. *See id.*

Because Helms-Burton is not an act that discriminates among NAFTA party investors due to their nationality, but an act seeking foreign cooperation with the embargo, it does not violate Article 1108(4).

2. Chapter Sixteen

Chapter Sixteen deals with the temporary travel of NAFTA "business persons" from one NAFTA country to another.[115] Article 1608 of Chapter Sixteen defines a "business person" as "a citizen of a [NAFTA] Party who is engaged in trade in goods, the provision of services or the conduct of investment activities."[116] Chapter Sixteen's provisions are intended to promote NAFTA's objectives of liberalizing investment laws and reducing barriers to trade in goods and services by facilitating business travel among the NAFTA countries.[117] The temporary entry provisions of Chapter Sixteen prevent the frustration of NAFTA objectives which may occur through a denial of entry to business persons traveling to other NAFTA countries in order to participate in trade or investment activities there.[118] Prior to NAFTA, the United States, Canada and Mexico maintained their own immigration laws regarding the temporary entry of persons seeking to engage in commercial activities.[119] According to U.S. pre-NAFTA immigration laws, persons seeking temporary entry to conduct commercial activity were considered non-immigrants and were subject to various requirements and restrictions respecting their entry.[120] NAFTA purports to promote the temporary entry of business persons by prohibiting pre-NAFTA requirements like employment validation or labor certification for all categories of "business persons" covered by NAFTA.[121]

In order for Chapter Sixteen's temporary entry provisions

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115. *See generally*, NAFTA, *supra* note 19, arts. 1601-1608, 32 I.L.M. 664-65.

116. *Id.* art. 1608, 32 I.L.M. 665.

117. *See* JOHNSON, *supra* note 109, at 412.

118. *See id.*; *see also* NAFTA, *supra* note 19, arts. 1601 & 1602, 32 I.L.M. 664. These articles expressly recognize the desirability of facilitating the temporary entry of NAFTA party business persons, and that all measures governing the temporary entry will be enforced to avoid undue influence with trade and investment activities under NAFTA. *See* JOHNSON, *supra* note 109, at 419.

119. *See* JOHNSON, *supra* note 109, at 413.

120. *See id.* at 415.

121. *Id.* at 419.

to apply to NAFTA business persons, the business persons seeking temporary entry must fall into one of four categories provided for in Article 1603 and Annex 1603. The categories are: (i) business visitors; (ii) professionals; (iii) traders and investors; and (iv) intra-company transferees.[122] Chapter Sixteen provides entry requirements that are common to all four categories. The first requirement is that no prior approval or numerical restrictions can be imposed by a NAFTA country against business persons of another NAFTA country.[123] For example, the United States cannot require a petition approved by the Immigration and Naturalization Service prior to admitting a Canadian or Mexican business person under NAFTA. Second, a NAFTA country may impose a requirement that a NAFTA business person seeking temporary entry must first obtain a visa.[124] For example, the United States may require a Canadian or Mexican business person to obtain a visa before entering the United States. Finally, NAFTA business persons seeking entry into a host NAFTA country must comply with its *existing* immigration measures for temporary entry, except as modified by NAFTA Chapter Sixteen.[125] "Existing" immigration measures are those immigration laws existing between the United States, Canada and Mexico as of January 1, 1994, when NAFTA entered into force.[126] Therefore, a business person from Canada or Mexico seeking entry into the United States pursuant to Chapter Sixteen is required to comply with U.S. immigration procedures set forth as of January 1, 1994.

Chapter Sixteen also provides that a NAFTA country may modify its immigration laws to fit within NAFTA's provisions.[127] As a result, a NAFTA country's immigration policy existing prior to January, 1994 may have become inapplicable after January 1, 1994 when Chapter Sixteen became effective. The United States has modified its immigration policy with

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122. *See id.*; *see also* Nafta Statement of Administrative Action, *supra* note 104, at 625.

123. *See* JOHNSON, *supra* note 109, at 420.

124. *See id.*

125. *See id.*

126. *See id.* at 419; *see also* NAFTA, *supra* note 19, art. 1608 & Annex 1608.

127. *See* Nafta Statement of Administrative Action, *supra* note 104, at 626 (observing that Chapter 16 and the Immigration and Nationality Act are consistent and discussing "limited technical changes . . . needed to provide for the admission of traders and investors and professionals").

respect to temporary entry of non-immigrants in order to implement Chapter Sixteen as part of NAFTA's implementing legislation.[128] This Note discusses only the modification to the U.S. immigration law which makes dependant children and spouses accompanying non-resident NAFTA business persons into the United States eligible for entry under Chapter Sixteen, provided they are otherwise eligible for visas.[129]

Title IV of Helms-Burton provides for the "[e]xclusion from the United States of aliens who have confiscated property of United States [n]ationals or who traffic in such property."[130] In other words, Title IV seeks to exclude any foreign national from the United States if such national is involved in the confiscation of U.S. property in Cuba, or in the "trafficking" of U.S. property confiscated by the Castro regime. Title IV provides that the Secretary of State shall deny a visa to any alien (foreign national) who he determines has "trafficked" in U.S. property.[131] The foreign nationals excludable under Title IV are those who traffic in confiscated property, for which a claim is owned by a U.S. national.[132] These foreign nationals include corporate officers, principals, or shareholders with controlling interests in an "entity which has been involved in the confiscation of property or trafficking in confiscated property."[133] Also within the excludable class are the spouses and minor children of all foreign nationals excludable under Title IV.[134] Under Title IV, for purposes of excluding foreign nationals from the United States, the term "trafficker" means anyone who "knowingly and intentionally," among other things, invests in or otherwise benefits from the confiscated

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128. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §3311 (1994)). Section 341 of this act, 19 U.S.C. §3401, reads as follows:

> Upon a basis of reciprocity secured by [NAFTA], an alien who is a citizen of Canada or Mexico, and the spouse and children of any such alien if accompanying or following to join such alien, may, if otherwise eligible for a visa and if otherwise admissible into the United States under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), be considered to be classifiable as a nonimmigrant under section 101(a)(15)(E) . . . .

19 U.S.C. § 3401.

129. *See id.* § 3401(a).

130. 22 U.S.C.A. § 6091 (West Supp. 1997).

131. *See id.* § 6091(a).

132. *See id.* § 6091(a)(3).

133. *Id.* § 6091(a)(3).

134. *See id.* § 6091(a)(4).

property.[135] The term has been given a broad meaning and generally encompasses any commercial activity from which a foreign national derives financial gain.[136]

Canadian and Mexican companies clearly are involved in the trafficking of confiscated U.S. property in Cuba. Sherritt, the Canadian nickel mining company which took over the Moa nickel mine in Cuba, previously owned by the United States,[137] is also a trafficker under Helms-Burton. As a result, Sherritt's executives are a class of excludable foreign nationals under Title IV because they knowingly benefit from confiscated U.S. property. Title IV has already operated to allow the U.S. Department of State to warn Sherritt's executives that they, their spouses, and dependent children will be denied visas to enter the United States.[138] The U.S. Department of State has also warned Mexican companies like Grupo Domos—a Mexico-based telephone company—that their executives and their executives' families are excludable under Title IV, based on the determination that these companies were knowingly benefitting from U.S. property that was confiscated by Cuba.[139]

Title IV of Helms-Burton violates Chapter Sixteen's temporary entry of business persons provision because it has the effect of excluding foreign nationals who are otherwise admissible under NAFTA. Executives of Sherritt and Grupo Domos are business persons for purposes of Chapter Sixteen. As previously discussed, Chapter Sixteen lists four categories of busi-

135. *Id.* § 401(b)(2).

136. *See supra* notes 64-65 and accompanying text.

137. *See* Darling & Turner, *supra* note 6. The Moa nickel plant was one of the 5,911 properties that belonged to the United States and were expropriated immediately after the Cuban Revolution. The nickel plant was owned by a subsidiary of Freeport-McMoRan, Inc., a New Orleans-based firm. Freeport-McMoRan has never pursued claims over the Moa mine, though the United States and Cuba have constant bickering over settlement of claims resulting from the Cuban seizures. In addition to taking over the mine, Sherritt is assisting Cuba in developing modern oil-recovery techniques in order to increase country's energy efficiency. *See id.*

138. *See id.*

139. *See U.S. Finds Little Support for Joint Action on Cuba*, REUTERS NEWS SERVICE, Sept. 6, 1996. The U.S. State Department warning issued to Grupo Domos, a Mexican cement company investing in Cuba, to terminate its investment activities in Cuba, thereby avoiding the possibility of sanctions under Title IV. *See id.* Executives of Stet, an Italian telecommunications firm, and BG Group, an Israeli citrus company, also received U.S. Dept of State warnings. *See* Morton & Geddes, *supra* note 14, at 3.

ness persons that are to be accorded temporary entry.[140] The first category, which has been described as a catch all category, includes business visitors.[141] The business visitor category is further broken down into those business visitors engaged in business activities set forth in NAFTA Appendix 1603 A.1, and those who are not engaged in those business activities.[142] Appendix 1603 A.1 lists seven types of business activities that business visitors under Chapter Sixteen would be involved in, including: research and design; growth, manufacture and production; marketing; sales; distribution; after-sales service; and general service.[143] It has been noted that "[a] NAFTA country may not require that a person falling within the business visitor category, regardless of whether the business activity is listed, obtain employment authorization."[144] Those business visitors whose activities are not listed in Appendix 1603 A.1 must be granted temporary entry on terms no less favorable than those immigration measures set out by each NAFTA country after January 1, 1994.[145]

Because the business visitor category of Chapter Sixteen is a catch-all category, encompassing several types of general business activities (*i.e.*, manufacture and production), the Canadian and Mexican executives of Sherritt and Grupo Domos fall into this general category of business persons listed in Article 1603. Assuming such business persons meet existing immigration requirements, then, according to Chapter Sixteen, these Mexican and Canadian business persons are admissible into the United States. Title IV of Helms-Burton, however, may become an obstacle to entry. Chapter Sixteen provides that an admitting party may exclude NAFTA business persons seeking entry if the admitting country determines that the business persons will have an adverse impact on a labor dispute within the admitting country.[146] Title IV clearly does not

140. *See* NAFTA, *supra* note 19, Annex 1603, 32 I.L.M. 665-670; *see also* discussion *supra* Part IV.B.2.

141. *See* JOHNSON, *supra* note 109, at 420. Although there are three other categories listed in Chapter Sixteen, the catch-all nature of the business visitor category permits this paper to be limited to considering only that category for purposes of arguing that Helms-Burton violates NAFTA. *See id.*

142. *See id.*

143. *See id.*

144. *Id.* at 421.

145. *See id.*

146. A NAFTA party's exclusion of NAFTA party business persons is permis-

meet this exception, however, because the ground upon which it purports to deny entry has nothing to do with labor disputes in the United States. Rather, business persons are denied entry under Title VI because they are engaging in business activities in a non-NAFTA country, namely Cuba. Investing in Cuba or any other non-NAFTA country is not an expressly permissible reason under Chapter Sixteen for the exclusion of NAFTA business persons.[147] As a result, Title VI's exclusion of Canadian and Mexican business persons otherwise admissible under NAFTA is violative of the U.S. obligations under that agreement.

Furthermore, Title IV of Helms-Burton is contrary to the U.S. immigration policy regarding the temporary entry of business persons and their families. Title IV expressly provides for excluding denied business persons' spouses and children. The United States modified its immigration laws existing prior to January 1, 1994 in order to conform to its obligations under Chapter Sixteen.[148] The modified immigration law expressly provides that the spouses and dependent children of NAFTA business persons may be eligible for entry when accompanying business persons into the United States, provided they are not otherwise inadmissible.[149] Assuming that the spouses and minor children of NAFTA business persons excludable under Title IV are otherwise admissible pursuant to Chapter Sixteen, Title IV's exclusion not only violates Chapter Sixteen, but also violates the U.S. immigration laws which were modified to promote Chapter Sixteen.

3. NAFTA's General Objectives

Finally, Canada and Mexico may argue that Helms-Burton is violative of NAFTA's general objectives found in Chapter One of NAFTA. Article 102 of NAFTA sets out the main objectives of the Agreement which are, among others, to "eliminate barriers to trade" and to "facilitate the cross-border movement

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sible under Chapter Sixteen when the business persons seeking entry are determined by the admitting country to have an adverse impact on a labor dispute taking place within the admitting country's borders if they are admitted. *See* NAFTA, *supra* note 19, art. 1603(2), 32 I.L.M. 666.

147. *See generally id.* arts. 1601-1608, 32 I.L.M. 664-65.

148. *See* discussion *supra* Part IV.B.2.

149. *See* 19 U.S.C. § 3401 (1994).

of goods and services between the territories of the parties."[150] Title IV's exclusion of non-resident NAFTA business persons operates to hinder NAFTA's main objectives. If the U.S. Secretary of State determines that a foreign NAFTA business person is profiting from confiscated U.S. property in Cuba, that person along with his or her spouse and dependent children, may be excluded from the United States.[151] However, the same persons excludable pursuant to Title IV may be otherwise fully admissible under NAFTA. Consequently, Title IV has the effect of excluding otherwise admissible business persons from the United States, thereby creating—rather than eliminating—barriers to trade. In addition, the exclusion of business persons who are admissible under NAFTA impedes the movement of goods and services between the territories of the party states. In effect, Helms-Burton allows the United States to hinder NAFTA's free trade objectives rather than promote them.

Another NAFTA objective worth mentioning seeks to "increase substantially investment opportunities in the territories of the [NAFTA] Parties."[152] Title IV violates this objective because it has already forced major Canadian and Mexican investors to discontinue their investments in Cuba in order to avoid U.S. sanctions. The threat of penalties discourages Canada and Mexico from substantially increasing their investment opportunities abroad. Instead, Title IV's penal effect operates to substantially decrease Canada's and Mexico's investment opportunities because Canadian and Mexican business persons who may have sought entry, or who are considering seeking entry, into the United States to conduct business may be prohibited by Helms-Burton. On the other hand, the United States reaps the benefits of NAFTA's free trade objectives because U.S. business persons may enter Canada and Mexico to conduct investment activities without fear of sanctions. As a result, Helms-Burton allows the United States to decrease the investment opportunities for Canada and Mexico within the United States, while maintaining its investment opportunities in Canada and Mexico.

Finally, Helms-Burton violates the NAFTA objective of

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150. NAFTA, *supra* note 19, art. 102(1)(a), 32 I.L.M. 297.
151. *See* 22 U.S.C.A. § 6091(a) (West Supp. 1997).
152. NAFTA, *supra* note 19, art. 102(1)(c), 32 I.L.M. 297.

seeking to "establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of [NAFTA]."[153] Titles III and IV of Helms-Burton have the effect of denying Canada and Mexico's benefits under NAFTA in several ways. First, cooperation among NAFTA countries is not promoted by Helms-Burton, as evidenced by Canada's and Mexico's strong disagreements with Helms-Burton.[154] For example, Canadian and Mexican officials have sent a diplomatic protest to President Clinton urging him to suspend Helms-Burton altogether.[155] In Ottawa, the government has even threatened legislation that would allow Canadian companies to counter-sue U.S. companies in Canada in order to recover damages awarded by U.S. federal courts pursuant to Title III.[156] This proposed Canadian legislation is a scheme designed to retaliate against the operation of Helms-Burton's Title III, which allows U.S. nationals who hold claims to confiscated property in Cuba to bring lawsuits against foreign investors who are profiting from that property.[157] As a result, Helms-Burton is not gaining cooperation from Canada and Mexico to promote the benefits of NAFTA. Rather, relations among the three NAFTA countries have become strained, as evidenced by the retaliatory legislation being contemplated by the Canadian and Mexican governments.

The United States is obliged to uphold NAFTA's objectives and provisions. As such, a law like Helms-Burton which defeats NAFTA objectives may not be enforced by the United States in accordance with NAFTA. Article 105 of NAFTA sets forth the obligations of the signatory nations as follows: "[NAFTA countries] shall ensure that all necessary measures are taken in order to give effect to the provisions of [NAFTA], including their observance, except as otherwise provided in [NAFTA], by state and provincial governments."[158] The United States enacted implementing legislation in order to conform its obligations under NAFTA.[159] Section 102 of the U.S. im-

153. *Id.* art. 102(1)(f).
154. *See* discussion *supra* Part IV.A.
155. *See* Darling & Turner, *supra* note 6.
156. *See* Marshall, *supra* note 95.
157. *See* Marshall, *supra* note 95.
158. NAFTA, *supra* note 19, art. 105, 32 I.L.M. 297.
159. *See* Nafta Statement of Administrative Action, *supra* note 104, at 457.

plementing statute "establishes the relationship between the NAFTA and [U.S.] law."[160] The statute accomplishes the U.S. obligations under Article 105 by amending existing federal statutes otherwise inconsistent with NAFTA, or by creating new laws.[161] The U.S. implementing legislation demonstrates its sense of obligation toward compliance with NAFTA's provisions. Helms-Burton, in contrast, defeats the main purpose of NAFTA: to facilitate trade and investment among party countries. Therefore, by enacting Helms-Burton, the United States has taken a step back from its attempts to implement NAFTA and reneged on its obligations under that agreement.

C. The United States Counter-Arguments

1. Chapter Eleven

The United States may argue that Helms-Burton is consistent with its obligations under NAFTA based on the expropriation and compensation provision in Chapter Eleven, Article 1110, because Canadian and Mexican investment activities in Cuba amount to an expropriation of U.S. property without providing appropriate compensation. Article 1110 prohibits NAFTA parties from:

> *directly* or *indirectly* nationaliz[ing] or expropriat[ing] an investment of an investor of another [NAFTA] Party *in its* territory or *take a measure tantamount to . . . expropriation,* . . . except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law . . . ; and (d) *on payment of compensation* . . . .[162]

Aside from the listed exceptions, Article 1110's expropriation and compensation provision prohibits Canada or Mexico from expropriating, and perhaps profiting from any U.S. investment without compensation. The United States may argue that Canada and Mexico have violated this provision by expropriating U.S. property (or investment) in Cuba without providing the United States with compensation. Article 1110 prohibits a NAFTA country from expropriating, without compensation, another NAFTA country's investment(s) located within the

160. *Id.*
161. *See id.*
162. NAFTA, *supra* note 19, art. 1110(1)(a)-(d), 32 I.L.M. 641 (emphasis added).

former's "territory." According to this language, Canada and Mexico are prohibited from expropriating U.S. investments located within their own territories.[163] As a result, a U.S. investment outside Canadian or Mexican territory (*i.e.*, in Cuban territory) falls outside the Article 1110 expropriation and compensation provision.

The United States may argue that, although Article 1110 makes the territorial location of the expropriated investment a factor in determining whether expropriation has occurred under NAFTA, the article concludes with a clause prohibiting a NAFTA country from "tak[ing] a measure tantamount to . . . expropriation" of another NAFTA country's investments.[164] The United States may argue that the clause, "or tak[ing] a measure tantamount to . . . expropriation," is an all-encompassing provision, applying to both investments expropriated within a NAFTA party's territory and those expropriated within a non-NAFTA party's territory. Because Article 1110 suggests that its main purpose is to prevent the unlawful expropriation of one NAFTA party's investments by other NAFTA parties,[165] the United States can argue that Helms-Burton is not violative of Article 1110. Instead, it can be contended that Helms-Burton promotes Article 1110 by preventing Canada and Mexico from expropriating, without compensation, U.S. investments in general, whether located within a NAFTA territory or not.

The United States may also argue that Article 1111 of Chapter Eleven permits NAFTA countries, notwithstanding Article 1102 (requiring the national treatment of NAFTA investors by NAFTA parties),[166] to adopt "a measure which prescribes special formalities in connection with the establishment of investments by investors of another party."[167] The United States may argue that Helms-Burton is one of the formalities it has adopted in connection with the establishment of Canadian and Mexican investments. Under this theory, the special formality required by the United States under Helms-Burton

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163. Similarly, Article 1110 prohibits the United States from expropriating Canadian and Mexican investments located within United States territory.

164. NAFTA, *supra* note 19, art. 1110(1), 32 I.L.M. 641.

165. *See generally id.* art. 1110, 32 I.L.M. 641.

166. *See id.* art. 1102, 32 I.L.M. 639.

167. *Id.* art. 1111(1), 32 I.L.M. 642.

would be that the NAFTA parties refrain from establishing investments in Cuba.

It is unlikely that the special formality argument will work because Helms-Burton does not fall into the definition of special formalities under Article 1111. Instead, the special formalities allowable under Article 1111 have been interpreted to cover "requirements such as typical state incorporation requirements,"[168] not measures like Helms-Burton, which seek to gain multilateral support for unilateral embargoes. As a result, it is doubtful that the United States will be able to successfully argue that Helms-Burton constitutes a permissible special formality under Article 1111.

Furthermore, Article 1111 contains a caveat which prohibits a NAFTA country from adopting special formalities regarding the establishment of investments by other NAFTA countries, when such formalities *"materially impair* the [Chapter Eleven] protections afforded by a [NAFTA] party to investors [and investments] of another [NAFTA] party . . . ."[169] Even if the United States could successfully argue that Helms-Burton is a special formality under NAFTA, Canada and Mexico can argue the caveat in Article 1111, and contend that Helms-Burton "materially impair[s] the protections afforded" to them under Chapter Eleven by according them less than MFN treatment. Additionally, Canada and Mexico have millions of dollars invested in Cuba. If NAFTA did permit the United States to adopt measures like Helms-Burton with regard to the establishment of investments by Canada and Mexico, then the Chapter Eleven protections accorded to NAFTA parties would be defeated, and Canadian and Mexican investments in Cuba would be materially impaired.

The strongest argument available to the United States that Helms-Burton is not violative of NAFTA lies in Article 1113, which provides that:

> A [NAFTA] Party may deny the benefits of [Chapter Eleven] to an investor of another [NAFTA] Party that is an enterprise

168. Nafta Statement of Administrative Action, *supra* note 104, at 593. Article 1111(1) gives some examples of special formalities, "such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party . . . ." NAFTA, *supra* note 19, art. 1111(1), 32 I.L.M. 642.

169. NAFTA, *supra* note 19, art. 1111(1), 32 I.L.M. 642 (emphasis added).

> of such Party and to investments of such investor if investors of a non-Party *own or control* the enterprise and the denying [NAFTA] Party: (a) does not maintain diplomatic relations with the non-Party; or (b) adopts or maintains measures with respect to the non-Party that prohibits transactions with the enterprise or that would be violated or circumvented if the benefits of [Chapter Eleven] were accorded to the enterprise or its investments.[170]

The United States may argue that Article 1113 permits it to deny Chapter Eleven investment benefits to investors and investments/enterprises[171] of Canada and Mexico when they are owned or controlled by Cuban investors (Cuba being the non-Party). According to Article 1113, the United States may deny investors of Canada and Mexico Chapter Eleven benefits when either of two conditions exist. First, when the United States does not maintain diplomatic relations with a non-party (*i.e.*, Cuba) or, second, when the United States maintains measures (*i.e.*, the embargo) prohibiting transactions with the non-party and such measures would be circumvented if Chapter Eleven benefits were accorded to Canada and Mexico.[172] As a result, Helms-Burton allows the United States to deny Chapter Eleven benefits to Canada and Mexico merely because the United States does not maintain diplomatic relations with Cuba. Furthermore, the denial of Chapter Eleven benefits provides the United States with some assurance that the embargo against Cuba will not be circumvented or violated.

An Article 1113 argument may easily be defeated, however, because that article requires the investors and investments being denied Chapter Eleven benefits to be owned or controlled by investors of the non-party. The United States will find it difficult to argue that Canadian and Mexican investments in Cuba are owned or controlled by Cuban investors. On the other hand, Canada and Mexico may successfully argue that Canadian and Mexican enterprises in Cuba are not "own[ed] or control[led]" by Cuban investors because Canada and Mexico are free to terminate such enterprises at will. Canada's and

170. *Id.* art. 1113, 32 I.L.M. 642 (emphasis added).

171. Article 1139 defines enterprise as an investment constituted or organized under the law of a Party and a branch located within the territory of a Party and carrying out business activities there. *See id.* art. 1139, 32 I.L.M. 647.

172. *See id.* art. 1113 (1)(a)-(b), 32 I.L.M. 642.

Mexico's freedom to terminate investments in Cuba is evidenced by the recent discontinuance of Sherritt's and Grupo Domos' investment activities in Cuba.[173] As a result, the United States may not justify its denial of Chapter Eleven benefits to Canadian and Mexican investors by relying on Article 1113.

The success of Canada's and Mexico's argument regarding Article 1113, however, will depend upon the interpretation of the terms "own or control" within the article. If maintaining a business enterprise in Cuba, perhaps in conjunction with a Cuban investor, is considered to be sufficient to subject an enterprise to the ownership and control of the Cuban investor, then the United States may have the stronger argument. However, as previously discussed, Canada and Mexico may be free to terminate their investments in Cuba at will as illustrated by the recent departure of Mexico's Grupo Domos and Canada's Sherritt.

2. Chapter Twenty-One

The United States may argue that Chapter Twenty-One of NAFTA allows it to pass legislation which would otherwise be inconsistent with NAFTA "in order to protect its essential security interests."[174] Article 2102 states:

> [N]othing in [NAFTA] shall be construed . . . to prevent any [NAFTA] Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to traffic in arms . . . ; (ii) taken in time of war or other *emergency in international relations*; or (iii) relating to implementation of national policies and international agreements related to non-proliferation of nuclear weapons . . . ."[175]

During the negotiation of Article 2102, the United States asserted that it would invoke the article, if necessary, to prevent any circumvention of the Cuban sanctions program.[176] The

173. *See* discussion *supra* Part IV.B.2.

174. Nafta Statement of Administrative Action, *supra* note 104, at 666.

175. NAFTA, *supra* note 19, art. 2102(1)(b), 32 I.L.M. 699 (emphasis added).

176. *See* Nafta Statement of Administrative Action, *supra* note 104, at 498. Article 309(3) of NAFTA deals with the United States Cuban Sanctions Program by explicitly permitting the United States to ensure that Cuban products or goods

United States may argue that Helms-Burton constitutes an Article 2102 measure taken in time of an emergency in international relations and is necessary to protect essential U.S. security interests. After all, Helms-Burton was enacted in response to the MiG attack, which can easily be construed as an emergency in international relations. Thus, Helms-Burton can be characterized as a necessary measure designed to protect essential U.S. security interests. Furthermore, the protection of U.S. property interests abroad is essential to the recognition of a fundamental right to property guaranteed to all nationals under the U.S. Constitution.[177]

This argument is not viable, however, because Helms-Burton may not be upheld as a *good faith* measure taken in time of an international relations emergency. NAFTA's Article 2102 national security exception "is *self-judging* in nature, although each government would expect the provisions to be applied by the other in *good faith*."[178] "Self-judging in nature" means that the country acting to promote its national security interests determines what measures are necessary to achieve those ends. As a result, the United States is entitled to make the determination of whether or not Helms-Burton is necessary for the promotion of U.S. national security interests. This notwithstanding, Article 2102 is based on the understanding that the United States, or any NAFTA party, will exercise the self-judgment authority under Article 2102 in good faith so as to prevent abuse.[179] The United States may argue that it made the determination that Helms-Burton is a necessary measure for the promotion of its essential security interests during an international emergency.[180] However, Canada and Mexico

made from Cuban materials are not imported into the United States via Mexico or Canada, and that United States products are not exported to Cuba via these countries. *See* NAFTA, *supra* note 19, art. 309(3), 32 I.L.M. 303.

177. *See* U.S. CONST. amend. XIV, § 1.

178. Nafta Statement of Administrative Action, *supra* note 104, at 666 (emphasis added).

179. *See id.* Each NAFTA government expects the Article 2102 exception to be exercised in good faith. *Id.* The language of Article 2102 is similar to GATT Article XXI and has been criticized as being "so broad, self-judging and ambiguous that it obviously can't be abused." JOHNSON, *supra* note 109, at 474-475 (1994); *see also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 203-06 (4th prtg. 1991) (arguing that because of the danger of abuse GATT parties have been reluctant to invoke GATT Article XXI).

180. In fact, the United States had argued, in response to the EU's complaint

may argue that the United States has not exercised its judgment in good faith and has thus violated the international customary principle of *pacta sunt servanda* which requires the United States to exercise its treaty rights and obligations under NAFTA in good faith.[181]

The United States has not exercised its discretion under Article 2102 in good faith. Helms-Burton's protection of U.S. economic interests in Cuba does not have any national security goals with respect to the Cuban MiG attack. Although Article 2102 permits a NAFTA party to take good faith emergency measures otherwise inconsistent with NAFTA in order to protect its essential security interests, the connection between the MiG attack and Helms-Burton's protection of U.S. property rights abroad is untenable. If the United States had enacted Helms-Burton in good faith to respond to an international relations emergency, then President Clinton would not have consistently suspended Helms-Burton's provisions since its enactment. Furthermore, it is unlikely that the absence of Helms-Burton would have exposed the United States to a national security threat from Cuba or any other country. U.S. property in Cuba was confiscated by the Castro regime nearly thirty-five years ago. Despite the non-existence of measures like Helms-Burton prior to 1996, the confiscation of U.S. property in Cuba was not considered to be the cause of any national security threat by the United States.[182] This lends support to the argument that Helms-Burton is not an attempt to deal with an international emergency, but an attempt to deter the

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before the WTO challenging Helms-Burton, that Helms-Burton is not a matter regarding trade, but one regarding national security. *See* William Echikson, *Europe Shows Muscle in this Tussle*, BUS. WEEK, May 26, 1997, at 76 E6.

181. According to the customary principle of *pacta sunt servanda*, set forth in Article 26 of the Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, *done* May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. *See also*, BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 44 (2d ed., 1990) (noting that *pacta sunt servanda* is "one of the most basic principles of international law").

182. Prior to the United States enactment of Helms-Burton, U.S. nationals with claims to confiscated property in Cuba had the International Claims Settlement Act of 1949 available to them in obtaining compensation for their property. *See* 22 U.S.C. § 1643 (1994). If the confiscation of property was considered to be a national security threat it is logical that the United States would have enacted legislation along the lines of Helms-Burton much sooner.

investment conduct of third countries in Cuba.[183] Consequently, an argument that Helms-Burton is a measure protecting U.S. security interests would be thoroughly unpersuasive.

V. ARGUMENTS FOR AND AGAINST HELMS-BURTON VIOLATING INTERNATIONAL LAW

Part V.A will discuss the arguments available to Helms-Burton's opponents with respect to the legislation's illegality under international law. Helms-Burton's illegality under international law results in a violation of NAFTA because NAFTA requires that member countries adhere to international law.[184] Helms-Burton violates international law in a number of ways.

First, Helms-Burton violates international law because it is an unjustified extraterritorial application of U.S. law to foreign countries. Helms-Burton is considered extraterritorial legislation because it requires foreign countries and their nationals (*i.e.*, investors) to either comply with the U.S. sanctions against Cuba or face lawsuits by U.S. nationals and/or revocation of visas permitting entry into the United States. According to U.S. foreign relations law (which adopts the jurisdictional principles of international law), a country may legally enact laws effecting conduct outside its territory which have, or are intended to have, a *substantial effect* within its borders.[185] Under this principle, which is known as the effects doctrine, Helms-Burton would be consistent with international law if its purpose is to alleviate foreign activity which has, or is intended to have, a substantial effect within U.S. territory.[186] Proponents of Helms-Burton support its extraterritorial application by emphasizing the statute's protection of U.S. property interests.[187] Although, Helms-Burton explicitly purports to

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183. *See* Lowenfeld, *supra* note 39, at 427 (quoting a House Report on the Helms-Burton bill which asserted that the purpose of Helms-Burton's remedies are to discourage persons and companies from engaging in commercial transactions involving confiscated property).

184. Article 1105 of NAFTA provides that each NAFTA country must accord NAFTA party investors treatment in accordance with international law. *See* NAFTA, *supra* note 19, art. 1105(1), 32 I.L.M. 639.

185. *See* RESTATEMENT, *supra* note 32, § 402(1)(c); *see also* Ratchik, *supra* note 43, at 362; Lowenfeld, *supra* note 39, at 431.

186. *See* RESTATEMENT, *supra* note 32, § 402(c).

187. *See, e.g.*, Ratchik, *supra* note 43, at 364.

protect the U.S. property interests,[188] the United States must demonstrate that Canadian and Mexican investments in Cuba have a *substantial* effect within U.S. borders in order to invoke the effects doctrine. This is a weak argument for justifying the existence of Helms-Burton because Canadian and Mexican investments have not had any substantial effect within the United States.[189]

Second, Helms-Burton violates the principle of "continuity" which requires that a claim to property be continuously owned from the date the claim arose (property is confiscated), to the date of the claim's presentation in court (espousal), by nationals of the country asserting the claim.[190] Title III of Helms-Burton effectively allows persons who were Cuban nationals when their property was confiscated by the Castro government to assert claims to that property once they become U.S. nationals. Continuity is thus defeated because some U.S. nationals presently espousing claims to property in Cuba were not U.S. nationals, but Cuban nationals when their property was confiscated.

Third, arguments have been made that Helms-Burton may violate the Act of State Doctrine, a U.S. judge-made principle not found anywhere within the U.S. Constitution, which precludes U.S. federal district courts from questioning the validity of acts of foreign nations.[191] This Note will not discuss those arguments because Congress, in Title III of Helms-Burton, expressly prohibits U.S. federal courts from invoking the Act of State Doctrine in order to refrain from deciding disputes involving U.S. nationals challenging the investment activities of foreign nationals.[192] As a result, the Act of State Doctrine

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188. Helms-Burton states that its main purpose is "to protect the claims of United States nationals who had property wrongfully confiscated by the Cuban government." 22 U.S.C.A. § 6081(6)(B).

189. *See* discussion *infra* Part V.A.1.

190. *See id.*

191. *See* Ratchik, *supra* note 43, at 365 (warning that "[j]udicial announcements concerning the validity of a foreign government's confiscation of property could embarrass the other branches in carrying out the nation's foreign policy"). The Act of State Doctrine is not an exception to the U.S. courts' obligation to decide cases or controversies, when those cases or controversies may embarrass foreign governments, but requires that, in the process of deciding, acts of foreign sovereigns taken within their own jurisdiction be deemed valid. *See* W.S. Kirkpatrick & Co. v. Envtl Tectonics Corp., 493 U.S. 400 (1990).

192. *See* 22 U.S.C. § 6082(6).

does not apply. Congress acted constitutionally in suspending the Act of State Doctrine under Helms-Burton, even though the doctrine is judge-made and has been implemented for years, because Congress has the authority to "enjoin courts from using the [Act of State] doctrine as a discretionary measure."[193]

Finally, Helms-Burton constitutes a secondary boycott, because it restricts foreign nationals from dealing with or investing in Cuba and is, therefore, contrary to declared U.S. policy. The boycott maintained by the United States prior to the enactment of Helms-Burton, which restricted only U.S. nationals from investing in or dealing with Cuba, is an example of a primary boycott. Helms-Burton, in contrast, is a secondary boycott because it restricts foreign nationals from dealing with or investing in Cuba. The United States has previously denounced secondary boycotts as being inconsistent with international law.[194] This may support an argument that secondary boycotts such as Helms-Burton violate customary international law.[195] The only way that the United States will be able to counter such an argument is by claiming that secondary boycotts are in fact legal, which would bear the risk of creating an unwanted principle of customary international law.

Part V.B will examine potential U.S. counter-arguments to allegations that Helms-Burton violates international law. First, the United States may argue that Helms-Burton is not in violation of international law because foreign investments in Cuba have a substantial effect within the United States. Foreign investment provides Fidel Castro with the currency he

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193. Ratchik, *supra* note 43, at 366. *See also* RESTATEMENT, *supra* note 32, § 441, especially comment e and reporter's note 4 noting that Congress may enjoin the courts from applying the Act of State Doctrine. Congress has historically attempted to place strict limitations on the judiciary's application of the doctrine. *See* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 392 (1986). The most important limitation was Congress' enactment of the Hickenlooper Amendment, a response to the U.S. Supreme Court's *Sabbatino* decision, which provided that:

> [no U.S. court] . . . shall decline on the ground of the federal act of state doctrine to make a determination on the merits . . . [of] a case in which a claim of title or other rights to property is asserted by any party . . . based upon a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . .

Id. (quoting the Hickenlooper Amendment 22 U.S.C. § 2370(e)(2) (1982)).

194. *See* Bachman et al., *supra* note 29.

195. *See id.*

needs to support his government. A financially equipped Cuban government presents a security threat to the United States because of the geographic proximity of the two countries.

Second, the United States may argue that Cuba violated international law by illegally confiscating U.S. property without providing compensation and by confiscating the property of Cuban citizens. The United States, on the other hand, is legally attempting to obtain compensation for confiscated U.S. property because entities like the Foreign Claims Settlement Commission (FCSC), designed to obtain compensation, have proven to be ineffective. The ineffectiveness of the FCSC is shown by the fact that many of the nationals who have filed claims with the FCSC have not yet received compensation.

Third, foreign investors are knowingly dealing with confiscated property and are thus "taking the risk that . . . dispossessed owners or aggrieved states might take action against them."[196] Investors in confiscated property are taking on additional risks because illegal confiscations under international law do not effectively pass title which the international community is obliged to recognize.[197]

A. *Arguments that Helms-Burton Violates International Law*

1. Effects Doctrine

The effects doctrine provides a weak foundation for the claim that Helms-Burton is in compliance with international law because Canadian and Mexican investment practices in Cuba have no substantial effect within the United States. The United States recognizes five bases of jurisdiction prescribed by international law.[198] The five bases are: (i) territoriality; (ii) nationality; (iii) protective; (iv) passive personality; and (v) effects doctrine. In examining each basis, it is clear that the only possible justification for the extraterritorial jurisdiction asserted by Helms-Burton is under the effects principle.

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196. Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent With International Law*, 90 Am. J. Int'l L. 434, 437 (1996).

197. *See id.*

198. *See generally*, RESTATEMENT, *supra* note 32, § 402.

a. Territoriality

Territoriality is the most common basis for the exercise of jurisdiction and 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."[199] Helms-Burton does not fall into this first category of jurisdictional bases because it purports to regulate conduct that takes place outside the United States in territories such as Canada and Mexico. Therefore, the United States cannot use the territoriality doctrine to uphold Helms-Burton's legality under international law.

b. Nationality

Nationality permits a country to exercise jurisdiction over "the status of persons, or interests in things, present within its territory."[200] This basis is similar to territoriality in that both bases allow a country to assert jurisdiction over its own nationals located within its own territory, and sometimes over its nationals located abroad. The status of the embargo prior to Helms-Burton was one implemented in accordance with the nationality basis since the United States was regulating only the conduct of U.S. nationals. Helms-Burton, on the other hand, asserts jurisdiction over the conduct of foreign nationals by limiting their investment. Therefore, the United States cannot successfully argue the nationality basis to justify Helms-Burton's application to foreign nationals.

c. Protective

The protective principle "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 . . . ."[201] The

199. *Id.* § 402(1)(a). According to comment c, countries have exercised jurisdiction with respect to foreign companies outside their territory on the grounds that the countries have control over the companies' affiliates present in its own territory. *Id.* cmt. c.
200. *Id.* § 402(1)(b).
201. *Id.* § 402(3).

protective principle allows a country to exercise jurisdiction over foreign nationals who commit offenses against its national security. Helms-Burton is not a U.S. attempt to exercise jurisdiction over foreign nationals who commit offenses against the security of the United States. Rather, Helms-Burton targets foreign nationals because they invest in Cuba. Canadian and Mexican investment practices in Cuba are not offenses against the security of the United States because the offenses applicable under the protective principle are those like espionage and counterfeiting of a country's seal or currency.[202] A foreign national's investment in Cuba, even if it results in substantial financial gain from confiscated United States property, is not a criminal offense covered by the protective principle. As a result, the United States cannot support Helms-Burton's extraterritoriality using the protective principle.

d. Passive Personality

The passive personality principle "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."[203] The passive personality principle enables Country A to exercise jurisdiction outside its territory in order to punish nationals of Country B, provided B's national(s) have harmed A's national(s). Helms-Burton cannot be upheld under the passive personality principle because the doctrine is primarily applied to criminal offenses and terrorist activities,[204] not investment activities. Furthermore, the passive personality principle is not a generally favored basis for extraterritorial jurisdiction, and is limited mainly to governmental actions taken to combat terrorism.[205]

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202. *See id.* § 402, cmt. f.
203. *Id.* § 402, cmt. g.
204. *See id.* § 402, cmt. g.
205. *See id.* § 402 cmt. g. (noting that the passive personality principle has not been generally accepted for ordinary torts or crimes, but has been used increasingly with regards to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials). As a result, it is unclear whether passive personality has reached the level of custom so as to be used to support economic measures like Helms-Burton.

e. Effects Principle

The effects principle allows a country to exercise jurisdiction "with respect to activity outside the state, but having or intending to have a *substantial effect* within the state's territory . . . ."[206] The effects principle allows Country A to prescribe or proscribe activity outside its borders, as long as the activity has, or is intended to have, a substantial effect within Country A's territory. Helms-Burton falls squarely within the effects principle because it purports to regulate activity outside the United States (*i.e.*, investment activities of Canada and Mexico) which the United States deems to have an effect within its borders. Although the United States may support the legality of Helms-Burton by arguing the effects principle, it must first successfully establish that the activity it wishes to assert jurisdiction over has a substantial effect within the United States.

Mexican and Canadian investment activities in Cuba do not have a substantial effect within the United States. Prior to the enactment of Helms-Burton, the United States maintained an economic embargo against Cuba by restricting only U.S. nationals from dealing with Cuba.[207] Other countries were free to maintain relations with Cuba, and did so. For thirty-five years the United States maintained economic relations with other countries who chose to trade with Cuba.[208] Suddenly, in 1996 the United States decided that other countries investing in Cuba were having a substantial effect within the United States. After nearly four decades of maintaining an

206. *Id.* § 402(1)(c) & cmt. d (emphasis added). Like passive personality, it is unclear whether the effects doctrine has reached the level of custom so as to support an economic measure like Helms-Burton. In fact, the effects doctrine has been a major source of controversy when invoked to support regulation of foreign activities abroad because of the economic impact of those activities in the regulation state. *See id.* § 402, illus. 2.

207. *See* discussion *supra* Part II.

208. An excellent illustration of the willingness of the United States to uphold economic and political relations with countries that choose to trade with Cuba despite the embargo is NAFTA. Canada and Mexico were dealing with Cuba, and confiscated U.S. property in Cuba, when both countries negotiated a trade agreement with the United States. Nevertheless, the United States entered a free trade agreement with Canada and Mexico and merely reserved for itself the right to ensure that Cuban products or goods made from Cuban materials are not imported into the U.S. via Mexico or Canada, and that U.S. products are not exported to Cuba via Mexico or Canada. *See* Nafta Statement of Administrative Action, *supra* note 104, at 498.

embargo without coercing foreign cooperation, the United States may not be heard to complain by arguing the effects principle.

Furthermore, even if foreign investments in confiscated U.S. property have a substantial effect within the United States, aggrieved U.S. nationals with ownership claims to property in Cuba were free, prior to Helms-Burton, to file their claims with the FCSC as provided for by the International Claim Settlement Act of 1949.[209] U.S. nationals seeking compensation for confiscated property can and have filed claims with the FCSC.[210] Therefore, the United States does not need Helms-Burton to deal with the return of confiscated U.S. property. In fact, Nicholas J. Gutierrez, Jr., an attorney for several Cuban-American families in Miami and a proponent of Helms-Burton, stated that Helms-Burton's purpose is not to win lawsuits, but to "drive foreigners out of Cuba."[211]

Even if the United States is successful in exercising jurisdiction under the effects principle, Section 403(1) of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (RESTATEMENT) asserts that even if one of the five bases for jurisdiction in Section 402 is available, a state may not exercise its jurisdiction when the exercise of such jurisdiction is unreasonable.[212] Thus, Canada and Mexico may argue that the United States exercise of jurisdiction over foreign nationals is unreasonable. In order for Canada and Mexico to propose that Helms-Burton is unreasonable, they must evaluate the criteria for unreasonableness set forth in Section 403(2) of the RESTATEMENT.[213] Furthermore, the exis-

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209. *See* 22 U.S.C. § 1643 (1994).

210. Helms-Burton does explicitly provide a cause of action for all U.S. nationals who currently hold unresolved claims property initially certified under the Claims Act. *See generally* 22 U.S.C.A. § 6082(h)(2).

211. *Scarecrow: Cuba and the United States*, THE ECON., Apr. 13, 1996, at 36, 36.

212. *See* Lowenfeld, *supra* note 39, at 431; *see also* RESTATEMENT, *supra* note 32, § 403(2) (setting out the criteria for determining reasonableness).

213. Evaluating whether Helms-Burton is unreasonable according to Section 403 of the RESTATEMENT is beyond the scope of this paper. However, Section 403 provides:

> [w]hether the 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 territo-

tence of entities such as the FCSC and the International Court of Justice to assist U.S. nationals in acquiring compensation for confiscated property abroad[214] makes Title III of Helms-Burton appear superfluous.

2. Continuity

Title III of Helms-Burton violates the principle of "continuity"[215] because it presently grants U.S. nationals a federal cause of action to recover compensation for confiscated property in Cuba. A cause of action is granted to all U.S. nationals with claims regardless of whether or not they were U.S. when their property was confiscated. According to continuity, a claim for property must be continuously owned from the date the claim arises to the date the claim is espoused by the nationals of the state asserting the claim.[216] Title III states that U.S. nationals may bring claims against foreign investors for confiscated property.[217] However, the category of U.S. nationals that may sue under Title III includes Cuban-Americans who

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> ry, 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 . . . those whom the regulation is designed to protect;
> (c) character of [regulated activity], the importance [of the regulation], 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
> (h) the likelihood of conflict with regulation by another state.

Id. § 403(2)(a)-(h).

Canada and Mexico may argue that the Helms-Burton does not meet the above factors and is thus an unreasonable exercise of extraterritorial jurisdiction even if one of the five jurisdictional bases listed in Section 402 is present.

214. *See* 22 U.S.C. § 1643. The Act sets forth a Foreign Settlement Claims Commission allowing for U.S. nationals to obtain compensation for confiscated property.

215. Bachman et al., *supra* note 29.

216. *See id.*

217. *See* 22 U.S.C.A. §§ 6081-85.

became U.S. nationals some time after their property was confiscated by the Cuban government. The group of claimants would effectively include a large majority of Cuban immigrants over the past three-and-a-half decades.[218] As a result, Title III violates continuity by endorsing the claims of Cuban-Americans who were not U.S. nationals at the time their property was confiscated.

Furthermore, Helms-Burton's violation of continuity allows the United States to defeat the alleged purpose of the legislation: to protect U.S. property interests in Cuba. The United States asserts that Helms-Burton was enacted to obtain compensation for confiscated U.S. property.[219] However, not all of the property being claimed under Title III is U.S. property. Some of that property was owned by Cuban exiles who were not U.S. nationals when the property was confiscated, and who were not previously allowed to recover compensation under the FCSC.[220] As a result, not all of the property Helms-Burton purports to protect is U.S. owned.

3. Secondary Boycott

Titles III and IV of Helms-Burton create "private liability for trafficking in confiscated property [and thus] amount to a secondary boycott of persons that deal with Cuba."[221] An example of a primary boycott is embargo the United States maintained against Cuba prior to the enactment of Helms-Burton. That is, a boycott affecting or prohibiting only the conduct of the U.S. nationals. A secondary boycott, on the other hand, is one monitoring not only the conduct of the country instituting the embargo, but also the conduct of other countries regardless of whether the other countries (non-targets) agree with or seek to comply with the embargo. Helms-Burton establishes a secondary embargo because it restricts nationals of countries like Canada and Mexico from dealing with Cuba (the target of the United States economic measures), even though Canadian and Mexican laws do not prohibit its nationals from investing in

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218. *See* Lowenfeld, *supra* note 39, at 424.
219. *See* 22 U.S.C.A. § 6081.
220. Cuban exiles were not allowed to sue under the FCSC. *See* Samuel A. Giberga, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 44 LA. B.J. 268, 269 (1996).
221. Bachman et al., *supra* note 29.

Cuba.[222]

The United States maintains a declared policy of opposing secondary boycotts,[223] labeling them as "nonenforceable countermeasures" and allowing for their implementation only in retaliation for a breach of some obligation or duty owed to the "invoking state" (*i.e.*, United States).[224] The United States endorses such a policy because it does not want other countries to implement secondary boycotts which would penalize U.S. nationals for failure to cooperate with foreign measures the United States does not agree with or seek to endorse.[225] Despite its declared policy, the United States is maintaining a secondary boycott through the operation of Helms-Burton.

The secondary boycott, created through Titles III and IV of Helms-Burton, is not a retaliatory measure implemented as a result of a breach of duty or obligation foreign countries have toward the United States. Instead, Helms-Burton's function is solely to prevent the "trafficking" of confiscated U.S. property.[226] Third party countries like Canada and Mexico have never had a duty or obligation to comply with the U.S. economic measures against Cuba. By attempting to impose such a duty through the form of a secondary boycott, the United States risks the creation of an unwanted principle of customary international law. This danger is compounded by the fact that the United States is likely to be faced with an argument that secondary boycotts are illegal as a matter of international custom, to which the only response would be that such boycotts are in fact perfectly valid within the international arena.

B. Arguments that Helms-Burton Does Not Violate International Law

1. Helms-Burton is Consistent With the Effects Doctrine

The United States may argue that Helms-Burton, although extraterritorial, is consistent with the effects doctrine because Canadian and Mexican investments in Cuba have a

222. *See* Lowenfeld, *supra* note 39, at 429-30 (discussing Helms-Burton as a secondary boycott).
223. *See* Bachman et al., *supra* note 29.
224. *Id.*
225. *See id.*
226. *See id.*

substantial effect within the United States, and Helms-Burton is not an unreasonable extraterritorial exercise of U.S. jurisdiction under international law.[227] As an example of this substantial effect, the United States may cite Cuba's proximity to the United States and the historically uneasy relationship among the two countries.[228] Cuba's suppression of democracy and violations of human rights has caused numerous Cuban refugees to flee to the United States.[229] Recently, Fidel Castro began constructing two Soviet-designed nuclear power reactors in the Cuban city of Juragua, just 180 miles off the coast of Florida and the funding for the project may continue to come from foreign investors.[230] These occurrences demonstrate the substantial effect that foreign investments in Cuba are having on the domestic, economic, social and political well-being of the United States.

However, despite U.S. contentions that Helms-Burton is necessary to prevent Castro from obtaining the financial support to help keep him in power, it will be difficult for the United States to demonstrate the reasonableness of Helms-Burton under the effects principle.[231] "The effects principle has been a major source of controversy when invoked to support regulation of activities abroad by foreign nationals because of the economic impact of those activities in the regulating state."[232] Helms-Burton may be viewed as an economic regulation because its purpose is to protect property interests. Therefore, the United States may not readily rely on the effects principle. In addition, the United States has maintained the embargo for thirty-five years without resorting to extreme extraterritorial measures like Helms-Burton. Now that such a measure has been enacted, President Clinton has virtually nullified it by suspending most of its provisions.[233] The suspensions strong-

227. *See* discussion *supra* Part V.A.1.

228. *See* Brice M. Clagett, *supra* note 196, at 435.

229. *See id.* at 436.

230. *See* Frank J. Gaffney, Jr. & Roger W. Robinson, Jr., *Stop the 'Cuban Chernobyl'*, WALL ST. J., Jan. 21, 1997, at A18. Fidel Castro believes the he can get the Europeans, Canadians, Latin Americans and Russians to provide financial support for the Juragua nuclear complex. *See id.* The nuclear reactors are substandard by Western guidelines and a Cuban nuclear catastrophe could expose as many as 80 million Americans to radioactivity. *See id.*

231. *See* discussion *supra* Part V.A.

232. RESTATEMENT, *supra* note 32, § 403, illus. 2.

233. *See* Greenberger, *supra* note 14, at A9.

ly suggest that the substantial effect of foreign investments in Cuba are not be as pressing as the United States represents.

2. Cuba is the One Who Violated International Law

The United States may support Helms-Burton as a measure needed to obtain compensation for illegally confiscated U.S. property in Cuba.[234] The FCSC, designed to help obtain compensation for confiscated U.S. property, has been unsuccessful in obtaining reparations.[235] Furthermore, the espousal of claims by "the victims' government can take generations to bear any fruit at all and, even when it does, typically results in recovery . . . of . . . pathetically inadequate fraction[s]" of compensation.[236] Therefore, Helms-Burton is necessary for compensating U.S. nationals with rightful claims to property in Cuba the compensation they deserve.

Helms-Burton, however, may not necessarily be more effective in obtaining compensation than the FCSC. Canada, for example, is unwilling to cooperate with the embargo and has amended its legislation to nullify Helms-Burton's effects in Canada.[237] Therefore, it appears unlikely that U.S. nationals will obtain compensation for their property under Helms-Burton. In addition, President Clinton, due mainly to international resentment over Helms-Burton, has repeatedly stayed the sixteen billion dollars worth of lawsuits brought by U.S. nationals against foreign nationals under Title III of Helms-Burton.[238] As a result, the U.S. government itself is further preventing aggrieved U.S. nationals from obtaining compensation. Finally, Cuba, and not foreign investors, should pay compensation for confiscated U.S. property. International law requires that the expropriating country provide compensation to foreign nation-

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234. U.S. nationals' expropriation claims are based on principles of international law which recognize a state's (country's) sovereign right to expropriate the assets of foreign nationals within the state's own territory; however, the expropriating state must simultaneously provide "adequate, effective and prompt" compensation to the aliens whose property has been expropriated. *See* Travieso-Diaz, *supra* note 46, at 664 (1996) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1968)).

235. Cuba has not compensated any of the FCSC claimants to date. *See* Ratchik, *supra* note 43, at 347.

236. Clagett, *supra* note 196, at 436.

237. *See* discussion *supra* Part IV.A.

238. *See* Morton & Geddes, *supra* note 14.

als whose property it has confiscated within its territory;[239] therefore, Cuba (the expropriating country), and not the foreign investors, should be liable to the United States.[240]

The United States may also argue that Cuba has violated international law by confiscating the property of its own citizens. The Universal Declaration of Human Rights includes the right of every individual to own property and not be arbitrarily deprived of it.[241] Because the Cuban government deprived Cuban citizens of their property, Cuba is in violation of international law. However, should the United States be the leader in obtaining compensation for aggrieved Cuban nationals?[242] Canada and Mexico may argue that the United States may not obtain compensation for Cuban nationals by operation of Helms-Burton and even if the United States had the authority to obtain compensation, it must do so by holding the Cuban government liable because Cuba is the confiscator.

3. Illegal Confiscations May not Pass Effective Title to Property

Finally, the United States may argue that "traffickers," as defined under Helms-Burton, neither hold effective nor internationally recognizable title to confiscated U.S. property in Cuba.[243] Illegally confiscated property under international law should be treated as if having been stolen; the rightful owner retains title while the so-called "possessor of 'hot products'" who knows of the products' origin may also be liable for damages to the rightful owner.[244] According to this view,

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239. *See* Travieso-Diaz, *supra* note 46, at 664.

240. Brice M. Clagett, an attorney advising clients concerning Title III lawsuit provision of Helms-Burton, notes that the payment of full monetary compensation to all claimants to confiscated property in Cuba will be far beyond Cuba's resources. *See* Clagett, *supra* note 196, at 434. Hence, this suggests why the United States is going after third countries in order to obtain the compensation rather than looking to Cuba.

241. *See id.* at 438.

242. This note will not discuss whether or not the United States can be the leader in obtaining compensation for Cuban nationals who lost property to the Cuban government. The question is merely posed in response to Brice M. Clagett who asserts that the United States should be a leader in pressing acceptance for the view that a country may not confiscate its citizens' property without compensation. *Id.* at 439.

243. *See id.* at 438.

244. F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 126, 186 (1990).

investors from countries like Canada or Mexico, who invest in confiscated U.S. property, are "possessors of 'hot products,'" are aware of the origin (*i.e.*, ownership) of the stolen property, and are liable to U.S. nationals who are the rightful owners.

Canada and Mexico, however, may argue that confiscation of property does not necessarily mean theft of the property. Sovereign countries may lawfully confiscate foreign-owned property if they, among other requirements, provide compensation to the aggrieved property owners.[245] Cuba's confiscation of American property is not necessarily theft, but an unlawful confiscation under international law because the confiscation was not accompanied by adequate compensation. Therefore, Cuba (the confiscator) must provide the compensation, not Canadian and Mexican investors.

VI. CONCLUSION

Although the United States has arguments with which to counter assertions that Helms-Burton violates its obligations under NAFTA and international law, its principle trading partners have the stronger arguments. Moreover, irrespective of whether Helms-Burton violates international law, the fact remains that many U.S. trading partners, especially Canada, have indicated an unwillingness to cooperate with a tightened embargo against Cuba and are threatening to take retaliatory measures. The worst retaliatory measure the United States may confront is total noncompliance. If the United States cannot successfully obtain international support, then Fidel Castro will continue to obtain the foreign investments he needs to strengthen his government.

The United States may argue that foreign investors in Cuba are only concerned with financial profits and are oblivious to the consequences of their investments (the upkeep of Fidel Castro). However, blinded investments of this sort have gone on for centuries. For example, the United States may be deemed to have been concerned only with profits when it blindly continued to trade with China despite China's continuing human rights violations.[246] Despite these human rights viola-

245. *See* Travieso-Diaz, *supra* note 46, at 664.

246. *See* KRINSKY & GOLOVE, *supra* note 49, at 156 (commenting on the disparate treatment by the United States with respect to Cuba and other countries

tions, the United States never resorted to an extreme isolationist policy against China similar to the embargo implemented against Cuba.[247]

The solution to ridding Cuba of Fidel Castro lies not in penalizing its trading partners, but in gaining cooperation amongst the global community.[248] Coercive policies like Helms-Burton only pave the way for the creation of customary principles of international law which would make it legal for more powerful and influential countries to force less powerful, and less influential, countries to cooperate with controversial economic measures. A large, powerful and developed country like the United States may lead other countries to believe that an unjustified extraterritorial measure like Helms-Burton is permissible and legal under international law.

The United States would be likely to deem a foreign counterpart to Helms-Burton reprehensible if countries like Canada or Mexico adopt similar extraterritorial legislation having a negative impact upon its investment practices, and upon the benefits accorded to it under NAFTA. As a result, the United States should seek noncoercive means of gaining cooperation amongst the international community for its embargo against Cuba. For instance, the United States can adopt a treaty with its trading partners which would discontinue trade with Cuba or perhaps limit it. A greater emphasis on the vast human

which it considers equally undemocratic and repressive, such as China).

247. A primary reason given for the strong U.S. economic measures against Cuba, and not against China, is the close geographical proximity of Cuba to the United States. *See id.* at 159.

248. It is inappropriate for the United States "to burden the future of a new world economic order with attempts to impose U.S. extraterritorial jurisdiction . . . . The U.S. government should not contribute to world economic disorder at a moment when constructive *cooperation* is especially important." Jorge I. Dominguez, Statement Before the Committee on Foreign Affairs of the House of Representatives, April 2, 1992, *reprinted in* KRINSKY & GOLOVE, *supra* note 49, at 176 (emphasis added). Dominguez added that "the U.S. economy will be greatly advanced through [NAFTA] . . . [and that] the injection of the Cuban question as an obstacle to the realization of such a strategic vision seems ill advised." *Id.*

rights violations taking place under the auspices of the Cuban government[249] will provide more incentives for foreign countries to terminate investment relations with Castro's regime. In the end, using a carrot rather than a stick is the best way for the United States to gain the cooperation of a global community of sovereign states.

Antonella Troia

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249. *See generally* Jones, *supra* note 69.