

# THE HELMS-BURTON ACT: A STEP IN THE WRONG DIRECTION FOR UNITED STATES POLICY TOWARD CUBA

## I. INTRODUCTION

On March 12, 1996, in response to Cuba's downing of two American civilian aircraft,<sup>1</sup> President Clinton signed the Helms-Burton Act into law.<sup>2</sup> The Act represents the United States's most recent political strike against Cuba in the United States's and Cuba's ongoing war of ideologies and finances. Far more than any other economic weapons that the United States has used in its campaign to subvert the Castro regime, the Act has caused the United States to become the target of significant international criticism.<sup>3</sup> Such criticism stems from the provisions of the Act that allow American citizens to recover damages in United States courts from foreign entities that own or benefit from American-owned property in Cuba that has been expropriated by the Cuban government. So far,

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1. On February 24, 1996, Cuban fighter jets shot down two Cessna aircraft carrying anti-Castro Cuban-Americans. See Tim Weiner, *Clinton Considers Punishing Cubans for Plane Attack*, N.Y. TIMES, Feb. 25, 1996, at A1. The anti-Castro group, Brothers to the Rescue, piloted the two Cessna aircraft. See Barbara Crosette, *U.S. Says Cubans Knew They Fired on Civilian Planes*, N.Y. TIMES, Feb. 28, 1996, at A1. President Clinton condemned the downing of the planes. See Remarks on the Downing of Brothers to the Rescue Airplanes by Cuba Aid an Exchange with Reporters in Shoreline, Washington, 32 WEEKLY COMP. PRES. DOC. 374 (Feb. 24, 1996).

2. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785.

3. Most of the United States's trading partners have condemned the United States for enacting a law that they consider to be contrary to international law. See UNITED STATES ECONOMIC MEASURES AGAINST CUBA: PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES 15 (Michael Krusky & David Golove eds., 1993).

however, the Act has had a greater detrimental effect on the United States's relations with its allies than it has had on the Cuban government.

This Note will show that neither the embargo nor the Helms-Burton Act have been effective in bringing about change within Cuba or in gathering support from the international community for the United States's hard-line position toward Cuba. Part II of this Note describes how the deterioration in the United States's relations with Cuba led to its present embargo against Cuba and discusses legislation passed after the initial imposition of the embargo. Part III examines recent events that led to the proposal of the Helms-Burton Act, as well as the provisions and ramifications of the Act. Part IV discusses the legality of the embargo and the new sanctions created by the Act, and analyzes a proposed alternative to the current regime. Finally, Part V proposes that the United States should remove the embargo against Cuba and substitute a new regime of law that would not only be more effective for furthering reform in Cuba, but would also benefit United States economic interests.

## II. THE UNITED STATES'S EMBARGO AGAINST CUBA

### *A. Roots of the Embargo*

Fidel Castro assumed power in Cuba on January 1, 1959, deposing President Fulgencio Batista.<sup>4</sup> American relations with Cuba began to deteriorate when Castro aligned himself with the former Soviet Union and sold sugar in exchange for oil.<sup>5</sup> The United States eventually eliminated Cuba's sugar quota.<sup>6</sup> In retaliation, Castro nationalized foreign owned businesses and property without providing compensation.<sup>7</sup> Fearing that Castro would spread his

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4. See ROBERT E. QUIRK, *FIDEL CASTRO: THE FULL STORY OF HIS RISE TO POWER, HIS REGIME, HIS ALLIES, AND HIS ADVERSARIES* 177-243 (1993).

5. See WALTER LAFEVER, *THE AMERICAN AGE: U.S. FOREIGN POLICY AT HOME AND ABROAD, 1750 TO THE PRESENT* 567 (1994).

6. See Shari Ellen Bourque, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L.J. 191, 196 (1995).

7. See Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriations Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659, 661 (1996). The legal basis for the government's expropriation of the privately owned properties

agenda to Latin America, the United States engaged in an attempted invasion of Cuba on April 17, 1961.<sup>8</sup> The invasion, which occurred at the Bay of Pigs, backfired when the 1400 Cuban exiles organized by the Central Intelligence Agency were intercepted by Castro's forces as they landed.<sup>9</sup> This defeat seriously weakened the anti-Castro movement, and the United States, in order to constrict Castro's

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was the Fundamental Law of the Republic, adopted in 1953. *See* Ley Fundamenta de la Republica, No. 5-123, Gaceta Oficial, 7 Feb., 1959 (Cuba); *see also*, MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS 71 (1976) (citing Ley Fundamenta de la Republica, No. 5-123, Gaceta Oficial, 7 Feb., 1959 (Cuba)).

Cuban officials were authorized to nationalize property whenever they deemed it "convenient in defense of the national interest." John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C. J. INT'L & COM. REG. 65, 73 (1995). The law was passed under the auspices of Article 24 of the Cuban Constitution, which the Cuban Council of Ministers had illegally amended without following the required constitutional procedures. *See Supporting Democracy in Cuba: Hearings on S. 381 and H.R. 927 Before the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Ignacio E. Sanchez, Attorney, Kelley Drye & Warren), available in WESTLAW, 1995 WL 357720 [hereinafter Sanchez]. Article 24, as originally enacted, prohibited confiscation of property "except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash." *Id.*

Sanchez detailed three significant changes in Amendment 24 that facilitated the seizure of American owned property. The first change amended Article 24 to permit the confiscation of property from persons "leaving the national territory," thereby targeting Cuban exiles already in the United States. *See id.* The second amendment allowed for confiscations to be authorized by nonjudicial authorities, allowed the government to decide the form of compensation, and deleted the provision of Article 24 that allowed the party whose property was expropriated to appeal to the courts. *See id.* The third amendment extended the governmental confiscation authority to include "those [cases] deemed necessary by the Government in order to prevent acts of sabotage, terrorism or any other counter-revolutionary activities." *Id.*

The government then distributed confiscated land to Cuban citizens or transformed it into agricultural cooperatives. *See* Smagula, *supra*, at 69. The law established procedural safeguards for property owners and provided that owners of seized property would be compensated with twenty-year bonds bearing an annual interest rate of 4.5%. *See id.* at 70. The Castro regime, however, did not comply with the procedural aspects of the law and instead confiscated property in a "random and offensive manner." *Id.* at 72.

Moreover, Cuba did not recompense the property owners and, thus, violated principles of international law. *See* Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 434 (1996) (noting that the Cuban government did not compensate property owners for the massive confiscations of property); *see also* OPPENHEIM'S INTERNATIONAL LAW 920-21 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (noting that international law requires compensation for government confiscated property). In total, Castro confiscated \$1.8 billion of American-owned property. *See* John Kirschten, *Raising Cain*, THE NATIONAL JOURNAL, July 1, 1995.

8. *See* Quirk, *supra* note 4, at 359-76.

9. *See id.*

power, imposed an economic embargo banning all trade with and travel to Cuba.<sup>10</sup>

President John F. Kennedy formalized the ban on trade and travel by issuing the Cuban Import Regulations. The President acted pursuant to the Foreign Assistance Act of 1961, which authorized him to impose an economic embargo against Cuba.<sup>11</sup> President Kennedy implemented the embargo in Presidential Proclamation 3447<sup>12</sup> on February 4, 1962. Section 620(a) of the Foreign Assistance Act of 1961<sup>13</sup> and Presidential Proclamation 3447,<sup>14</sup> along with other laws and regulations that were implemented before the Helms-Burton Act, comprise a legal structure designed to reach all possible activities and transactions that affect the Cuban economy.<sup>15</sup>

### *B. Legal Framework of the Embargo*

An understanding of the implications of the Helms-Burton Act on the future of United States-Cuba relations requires an analysis of the other laws and regulations that comprise the embargo.<sup>16</sup> In addition to the Foreign Assistance Act of 1961<sup>17</sup> and Presidential Proclamation

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10. See LAFEVER, *supra* note 5, at 568. On March 20, 1998, President Clinton eased restrictions on direct flights to Cuba, allowing for humanitarian aid and passengers in emergency situations to be flown to Cuba. Telephone Interview by Tanuja Garde with Steven Erlager, Foreign News Writer, *The New York Times* (Mar. 20, 1998).

11. See 22 U.S.C. § 2370(a) (1994).

12. 27 Fed. Reg. 1085 (1962). The Proclamation prohibits the American importation of Cuban goods and all goods imported through Cuba and directs the Secretary of the Treasury to implement this prohibition. See *id.* It also directs the Secretary of Commerce to impose the embargo on exports to Cuba. See *id.* The Proclamation contains no time limits nor any conditions for when and how the embargo may be lifted. See *id.* Proclamation 3447 is still in effect, although the embargo has since been codified and expanded by other laws and regulations. See *infra* Part II.B.

13. 22 U.S.C. § 2370(a) (1994).

14. 27 Fed. Reg. 1085 (1962).

15. See Maria L. Pagan, *U.S. Legal Requirements Affecting Trade with Cuba*, 7 PACE INT'L L. REV. 485 (1995).

16. See Pagan, *supra* note 15, at 485. Pagan describes these laws and regulations as a "two-tiered legal structure designed to reach every possible activity and transaction affecting the Cuban economy." *Id.* The most significant set of legal requirements are those comprising the first tier, see *id.*, which are described in Part II.B. The second-tier consists of other restrictions which, although currently having little practical effect, would become more significant if the first-tier restrictions were removed. See Pagan, *supra* note 15, at 509.

17. 22 U.S.C. § 2370(a) (1994).

3447,<sup>18</sup> the laws and regulations defining the embargo include the Cuban Assets Control Regulations,<sup>19</sup> the Export Administration Regulations (EAR),<sup>20</sup> and the Cuban Democracy Act of 1992.<sup>21</sup>

The Cuban Assets Control Regulations, first issued in July 1963, effectively impose the embargo on Cuba.<sup>22</sup> The Regulations prohibit United States Citizens and corporations from conducting business transactions with Cuba or Cuban nationals. The prohibition extends to transactions involving property in Cuba or belonging to a Cuban national unless the transaction is licensed under the Regulations.<sup>23</sup> The Regulations also prohibit United States citizens from traveling to Cuba with the exceptions of journalists,<sup>24</sup> government officials traveling on official business,<sup>25</sup> and close relatives of Cuban nationals.<sup>26</sup> In addition, section 785.1 of the EAR requires a license for the export of United States goods to Cuba.<sup>27</sup>

The Cuban Democracy Act of 1992<sup>28</sup> (CDA) added several

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18. 27 Fed. Reg. 1085 (1962).

19. Cuban Assets Control Regulations, 31 C.F.R. § 515 (1996).

20. 15 C.F.R. § 785.1 (1996).

21. 22 U.S.C. §§ 6001-6012 (1994).

22. See John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTING INT'L & COMP. L. REV. 747, 749 (1997). The Regulations are administered by the Office of Foreign Assets Control under the authority granted to the President by the Trading With the Enemy Act (TWEA), 50 U.S.C. app. § 5 (1994), and the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (1994).

23. See Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1993). The Regulations provide for both general licenses and specific licenses. See Pagan, *supra* note 15, at 491 (citing Remarks by Dennis M. O'Connell, reported in *Are the U.S. Treasury's Assets Control Regulations a Fair and Effective Tool of U.S. Foreign Policy? The Case of Cuba*, 79 AM. SOC'Y INT'L L. PROC. 169, 175 (1985)). General licenses do not require approval for certain types of transactions. See *id.* On the other hand, specific licenses are issued on a case-by-case basis by the Office of Foreign Assets Control of the U.S. Department of the Treasury. See *id.* For a list of what types of transactions are subject to either general or specific licenses, see Pagan, *supra* note 15, at 491-93.

24. See Cuban Assets Control Regulations, 31 C.F.R. § 515.560(a)(1)(ii) (1993).

25. See *id.* § 515.560(a)(1)(i) (1993).

26. See *id.* § 515.560(a)(1)(iii). Specific licenses may also be issued for persons traveling for humanitarian, religious, or similar activities, or for purposes related to the exportation, importation, or transmission of informational materials. See *id.* § 515.560(b).

27. See 15 C.F.R. § 785.1 (1992). Few general licenses are available for the export of certain goods. See Pagan, *supra* note 15, at 506. Specific licenses are available on a case-by-case basis for the exportation of humanitarian, medical, and non-strategic foreign-made products. See *id.*

28. 22 U.S.C. §§ 6001-6012 (1994). The Act was proposed by Rep. Robert Torricelli (D-N.J.) "to promote a peaceful transition to democracy in Cuba through the application of

provisions that, by strengthening and extending the reach of the embargo, elicited an overwhelmingly negative international reaction.<sup>29</sup> Similarly, United States businesses have reacted to the embargo with indignation as they desire to compete with foreign businesses in Cuba that need not comply with the CDA.<sup>30</sup> In this regard, a number of trade groups have been formed to lobby the United States government to normalize relations with Cuba.<sup>31</sup>

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appropriate pressures on the Cuban government and support for the Cuban people.” Joanna R. Cameron, *The Cuban Democracy Act of 1992: The International Implications*, 20 FLETCHER F. WORLD AFF. 137, 138 (1996) (quoting 138 Cong. Rec. H9084 (daily ed. Sept. 22, 1992) (statement of Rep. Toricelli)).

29. See Luisette Gierboloni, Comment, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289, 295 (1997). The two provisions of the CDA which most angered the international community were the revocation of trade licenses for foreign subsidiaries of U.S. companies doing business in Cuba, see 22 U.S.C. § 6005(a)(1), and the exclusion of any ships trading with Cuba from docking at U.S. ports for six months after leaving a Cuban port, see 22 U.S.C. § 6005(b)(1); see also Richard D. Porotsky, Note, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 913-14 (1995). Prior to 1975, foreign-owned subsidiaries of the U.S. corporations had, in effect, a general license to participate in trade with Cuba. See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 421 (1996). This policy was modified in 1975 to replace the general license provision with a requirement that foreign-owned subsidiaries desiring to trade with Cuba apply for a specific license. See 40 Fed. Reg. 47108 (1975); see also Lowenfeld, *supra*, at 421. The CDA extended the embargo by banning the issuance of any license to foreign subsidiaries of U.S. firms. See *id.* at 422.

In addition to tightening restrictions on trade with Cuba, the CDA seeks to encourage other nations to restrict their trade and credit relations with Cuba. See 22 U.S.C. § 6003(a) (1994). The CDA does this by allowing for sanctions against those nations that provide assistance to Cuba. Possible sanctions include ineligibility for U.S. assistance under the Foreign Assistance Act of 1961 and the Arms Export Control Act, and ineligibility for forgiveness or reduction of any debt owed to the U.S. government. See *id.* Both the United Kingdom and Canada quickly passed legislation prohibiting companies operating in their countries from complying with the CDA. See Cameron, *supra* note 28, at 141. The European Union also reacted strongly to the CDA restrictions. In 1995, the European Parliament suggested that members disregard the CDA and continue conducting business with Cuba. See *id.*

30. See Cameron, *supra* note 28, at 143. Seeking ways to circumvent the embargo, more than one hundred U.S. businesses attended a Euromoney conference on Cuban investment opportunities in 1992. See *id.* Moreover, in 1994, many U.S. companies went to Cuba and “signed letters of intent for future contracts to take effect when the U.S. embargo comes to an end.” *Id.*; see also Porotsky, *supra* note 29, at 955 (noting that former Chrysler Chairman Lee Iacocca traveled to Cuba for potential investment options); Borque, *supra* note 6, at 222-23 (discussing how American individuals and corporations have set up and contributed to investment funds with the intention of expanding into Cuba upon the cessation of the embargo).

31. See George Moffett, *Clinton Shuns Potent Anti-Castro Lobby*, CHRISTIAN SCI. MONITOR, June 9, 1995, at 1. Moreover, an overwhelming majority of the Fortune 500 member

Public anti-Castro sentiment in the United States seems to be subsiding as well. A 1992 public opinion poll showed that the majority of those surveyed believe that the United States should re-establish diplomatic and economic relations with Cuba, abolish the travel ban, and remove sanctions on third parties investing in Cuba.<sup>32</sup> Members of Congress support this sentiment as well.<sup>33</sup> In addition, many formerly staunch critics of Castro now believe that normalizing relations with Cuba is the best way to undermine him.<sup>34</sup>

### III. THE HELMS-BURTON ACT

#### *A. Recent Events Leading Up to the Helms-Burton Act*

After Castro aligned himself with the Communist Party and the United States ceased trading with Cuba,<sup>35</sup> the Soviet Union became Cuba's leading trade partner and began providing Cuba with massive economic subsidies.<sup>36</sup> With the official dissolution of the Soviet Union in September 1991, Cuba no longer received these subsidies,

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companies of the U.S.-Cuba Trade and Economic Council support the normalization of relations with Cuba, "with or without Fidel Castro." *Id.*

32. See Bourque, *supra* note 6, at 222.

33. On September 9, 1994, Senator Claiborne Pell (D-R.I.), the Chairman of the House Foreign Affairs Committee, and Representative Lee Hamilton (D-Ind.), the Chairman of the Senate Foreign Relations Committee, called for a lifting of the embargo. See Porotsky, *supra* note 29, at 905 n.12.

34. These critics include U.S.-Cuba Foundation founder Gary Jarmin, National Review Editor William F. Buckley, television commentator John McLaughlin, columnist Fred Barnes, and the *Wall Street Journal* editorial board. See Christopher Marquis, *New Voices Say It's Time to End Cuban Embargo*, SEATTLE TIMES, June 18, 1995, at A3.

35. The end of U.S.-Cuban trade relations adversely affected the Cuban economy. Prior to the embargo, the United States had provided Cuba with machinery and supplies for mining and transportation, communication, and utility services. After the embargo was put in place, Cuban businesses and industries that relied on U.S. raw materials were financially crushed. See Bourque, *supra* note 50, at 198. For example, Cuba's sugar industry was severely affected by the embargo. See Porotsky, *supra* note 29, at 907. In 1959, sugar constituted 77% of Cuba's export value, with the United States purchasing 70% of that amount at a premium over world sugar prices. See *id.* at 907-08.

36. See *United States Policy Toward Cuba: Hearings Before the Subcomm. on the W. Hemisphere of the House Comm. on Int'l Relations*, 104th Cong., 1st Sess. (1995) (statement of Peter Tarnoff, Under-Secretary of State for Political Affairs) [hereinafter Tarnoff]. Prior to 1989, these subsidies ranged in amounts from \$4 billion to \$6 billion per year. See *id.*; see also Porotsky, *supra* note 29, at 951 (discussing how the Socialist bloc subsidized the Cuban economy by paying nearly triple the market price for Cuban sugar).

causing its economic output to drop by an estimated fifty percent.<sup>37</sup> Castro, faced with the challenge of reviving a struggling Cuban economy, embarked on a program of economic liberalization, instituting previously unheard of measures such as inviting foreign companies to invest in joint ventures with the Cuban government,<sup>38</sup> allowing for private enterprise in the form of self-employment<sup>39</sup> and private farming,<sup>40</sup> and legalizing the use of United States Dollars by

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37. See Tarnoff, *supra* note 36.

38. Despite the serious need for foreign investment, Cuban joint ventures are still subject to strict regulations. See *Their Men in Havana*, *ECONOMIST*, Apr. 6, 1996, at 12. Until 1995, foreign companies were permitted no more than a 49% ownership interest in any joint venture. See *id.* A foreign-investment law passed in September 1995 made it possible for foreign companies to own a 100% interest in a joint venture in limited circumstances. See *id.* In addition, foreign companies must distribute their products through state dealerships and must pay the salaries of their Cuban employees in U.S. Dollars to the Cuban government. See *id.* The Cuban government then pays the employees in Pesos. See *id.* By 1996, more than 650 foreign companies had invested in Cuban joint ventures, committing to invest a total of \$2.1 billion. See *id.* Mexico was the top investor, committing \$250 million in investments. See Tracey Eaton, *Cuba Opens Door to Free-Enterprise Zones*, *DALLAS NEWS*, May 13, 1997, at D1.

Setting up a joint venture requires that a foreign investor submit its venture proposal to a commission appointed by the Executive Committee of the Council of Ministers. See Bourque, *supra* note 6, at 200. This commission authorizes and oversees all joint ventures. See *id.* After the proposal is approved, the parties draft a "memorandum of association" and "statutes" which define the scope of the venture as well as the management procedures. See *id.* at 201. Certain provisions of the memorandum must require that the venture be "temporary in duration." *Id.* The Cuban government, however, has shown a willingness to grant long-term leases of up to ninety-nine years for property used in joint ventures, establishing "quasi-private" property rights. See *id.* at 201.

39. See *The Hazards of Enterprise*, *ECONOMIST*, Apr. 6, 1996, at 7. In order to prevent a re-emergence of a bourgeoisie class of shopkeepers and businessmen, the Castro regime has placed tight restrictions on self-employed individuals. See *id.* Sellers of goods are not allowed to have private retail stores; rather, they must move from place to place peddling their goods. See *id.* Private restaurants are limited to seating twelve people and are not permitted to advertise. See *id.* The number of self-employed individuals was approximately 208,000 at the end of 1995, but was reported to have dropped to just over 167,000 a year later due to a government taxation offensive against self-employed workers. See *A Long, Slow Haul for Cuba's Economy*, *FIN'L TIMES*, Jan. 27, 1997, at 3; see also Enrique Rangel, *The Taxman Cometh*, *DALLAS MORNING NEWS*, May 29, 1997, at D1 (describing the burden that the taxes place on entrepreneurs).

40. See *Oranges and Lemons: The Limits of Farm Reform*, *ECONOMIST*, Apr. 6, 1996, at 8. The percentage of Cuba's cultivable land controlled by large state-subsidized farms decreased from 75% to 27% between 1992 and 1995. See *id.* These private farmers, however, are also subject to strict requirements: They must lease their land and buy their equipment from the state and sell a fixed quota of production to the state. See *id.* However, they are allowed to sell anything above their quota in the open market. See *id.* The privatization of agriculture has increased output for most crops, with the primary exception being sugar, Cuba's most vital crop. See *id.* Sugar production fell from 8.1 million tons in 1990 to 3.3 million tons in 1995. See



Cuban citizens. Seeing a great business opportunity, many foreign firms began to invest in Cuba with Castro's blessing. These included firms from most of the United States's major trading partners, including Canada and the countries of the European Union.<sup>41</sup> Additionally, the Cuban government implemented significant constitutional changes in order to assure foreign companies that it was serious about engaging in joint ventures.<sup>42</sup>

These reforms encouraged opposition groups within Cuba to accelerate their activities. In October 1995, dissident groups within Cuba formed the Concilio Cubano, an association geared toward urging the Castro government to grant Cuban citizens the rights guaranteed to them by the Universal Declaration of Human Rights and the Cuban Constitution.<sup>43</sup> Some opposition to the Castro regime has also come from the Catholic Church.<sup>44</sup> A group of experts commissioned by the Pentagon concluded, however, that the majority of Cuban citizens support the Castro regime and that, thus, there was little chance of internal rebellion.<sup>45</sup>

In the meantime, former Cuban citizens living in the United States have been vehemently speaking out against Castro.<sup>46</sup> Some of these

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*id.* This decline is due in part to the unavailability of the large quantities of fertilizer and machinery needed to maintain production levels. *See id.* Additionally, sugar co-ops have less of a production incentive as they are barred from selling in the farmers' markets. *See id.*

41. *See Bourque, supra* note 6, at 202.

42. *See id.* at 203. In July 1992, the National Assembly of People's Power amended and added articles of the Cuban Constitution. *See id.* Article 14 was amended to allow for the transfer of state-owned property to private ownership if the transfers "promote the economic and social good of the country." *Id.* Article 15, which limits the public ownership of property, was amended to apply only to "social property," therefore allowing for private ownership of other types of property. *See id.* at 204. The government also added Article 23 to the Constitution, which provides that, "[T]he state recognizes the ownership of mixed enterprises, economic societies, and associations that are created according to law. The use, benefit, and sale of assets belonging to these entities are ruled by law and treaties as well as by their own statutes and regulations." *Id.*

43. *See* Ernesto F. Betancourt, *Castro's Blunder*, WASH. POST, Mar. 10, 1996. Concilio Cubano, however, is not a very cohesive group as the separate groups which comprise it do not agree on many issues. *See Fidel's World: Don't Underestimate It*, ECONOMIST, Apr. 6, 1996, at 4.

44. *See Fidel's World: Don't Underestimate It, supra* note 43. One example of the limited nature of opposition by the Catholic church was a December 1995 clash with the government over a ban on Christmas trees in public places. *See id.*

45. *See Moffett, supra* note 31.

46. The Cuban-American National Foundation (CANF), led by Jorge Mas Canosa, has been a staunch opponent of the Castro regime for the last fifteen years. *See Moffett, supra* note

Cuban exiles formed a group known as Brothers to the Rescue, a humanitarian organization devoted to helping Cuban refugees. On February 24, 1996, Cuban fighter planes shot down two of the group's private planes, claiming that they had violated Cuban airspace. The attack killed all four American citizens aboard the planes.<sup>47</sup> This action led to international outrage and increased support for the Helms-Burton Act from both President Clinton<sup>48</sup> and the conference committee considering the Act's House and Senate bills at that time.

### *B. Legislative History*

On February 14, 1995, Representative Dan Burton (R-Ind.) introduced in the House of Representatives the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995.<sup>49</sup> The House passed the bill on September 21 by a vote of 294-130.<sup>50</sup> The bill, introduced in the Senate by Senator Jesse Helms<sup>51</sup> (R-N.C.), passed,

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31. Through aggressive lobbying and large financial contributions to lawmakers, CANF has virtually directed U.S. policy toward Cuba for the last 15 years. *See id.*

47. In an ironic postscript to this tragedy, Brothers to the Rescue leader Jose Basulto stated his plans to sue the U.S. government, claiming the government failed to protect the planes once U.S. radar detected the Cuban jets. *See* William E. Gibson, *Year After Shootdown, U.S., Cuba at Stalemate*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 23, 1997, at A1. Basulto has placed some of the blame for the attack on the United States, saying he was "convinced that there was a conspiracy" within the U.S. government to allow the attack to proceed. Nick Madigan, *In Airborne Salute, Fallen Cuban Exiles Are Honored*, WASH. POST, Feb. 25, 1997, at A3.

48. The Clinton administration was initially opposed to the bill. In a letter to Speaker Newt Gingrich in September 1995, Secretary of State Warren Christopher stated that he was "deeply concerned" about the Act and that he would recommend that the President veto the bill if it was passed by Congress. *See* Lowenfeld, *supra* note 35, at 419 n.3. After the Cuban fighter plane attack, President Clinton announced that he would sign the bill. *See id.* at 419.

49. Pub. L. No. 104-114, 110 Stat. 785.

50. The bill was passed in essentially the same form in which it was eventually signed into law. *See* Lowenfeld, *supra* note 29, at 419 n.2. Initially, support for the Act was largely split along party lines: Republicans supported the bill by a margin of 227-4, while Democrats voted against the bill by a 125-67 margin. *See* BILL TRACKING REPORT, H.R. 927, 104th Cong. (1996) [hereinafter TRACKING REPORT].

51. According to Gary Jarmin, head of the U.S. Cuba Foundation, Helms's motivation for introducing the bill stemmed partly from the lobbying influence of former Cuban rum giant Bacardi, which stands to become one of the largest beneficiaries of the Act. *See* Ann Davis, *Helms to Cuba: See You in Court*, NAT'L L.J., July 10, 1995, at A1. For support of his contention, Jarmin pointed to a \$500-per-plate luncheon that the president and CEO of Bacardi-Martini USA hosted for Senator Helms. *See id.* He also noted that a Bacardi lawyer, Ignacio E.

as amended, on October 19, 1995.<sup>52</sup> On December 14, 1995, the Senate agreed to the House's request for a conference committee on the Bill.<sup>53</sup> After the conference committee submitted its report,<sup>54</sup> the bill received widespread bipartisan support in both houses. President Clinton signed the bill into law on March 12, 1996.<sup>55</sup>

### *C. Reaction to the Helms-Burton Act*

From the time of its introduction, the Helms-Burton Act enjoyed almost complete support from Republicans. The Act gained widespread support among Democrats in the aftermath of the downing of the American planes. It also enjoyed widespread support among the Cuban exile community in Florida, a powerful political lobbying force. Some members of Congress, however, did not agree that the Act represented the most effective method of subverting the Castro regime. Prior to the final House vote on the Act on March 6, 1996, Congressman Jack Reed stated that, while he supported the promotion of a democratic Cuba, the Act was contrary to American foreign policy.<sup>56</sup> He further noted that it would increase tensions between the United States and Cuba, thereby endangering a peaceful transition to democracy,<sup>57</sup> and contained a loophole which could encourage more foreign investment in Cuba.<sup>58</sup>

The Helms-Burton Act was not the only legislation introduced in the House in 1995 that was designed to promote democratic change in Cuba. Representative Charles Rangel (D-N.Y.) introduced the Free Trade With Cuba Act on February 9, 1995.<sup>59</sup> The provisions of the Free Trade With Cuba Act included the complete removal of the

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Sanchez of Kelley Drye & Warren, was involved in drafting the bill. *See id.*

52. As amended, the bill passed by a 74-24 margin. *See* TRACKING REPORT, *supra* note 50. Republican Senators supported the bill by a 51-2 margin while Democrats supported it by a narrow 23-22 margin. *See id.*

53. *See id.*

54. H.R. REP. NO. 468, 104th Cong., 2d Sess. (1996).

55. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785.

56. *See* 142 CONG. REC. E308-09 (daily ed. Mar. 7, 1996) (statement of Rep. Reed).

57. *See id.*

58. *See id.*

59. *See* H.R. 883, 104th Cong. (1995).

embargo,<sup>60</sup> the removal of prohibitions against travel to Cuba by United States citizens,<sup>61</sup> and the institution of negotiations with Cuba for the purpose of settling claims of United States citizens whose property had been expropriated by the Cuban government.<sup>62</sup>

#### *D. Provisions of the Helms-Burton Act*

The Helms-Burton Act is divided into four Titles, preceded by sections containing Findings, Purposes,<sup>63</sup> and Definitions.<sup>64</sup> Title I is subtitled "Strengthening International Sanctions Against the Castro Government."<sup>65</sup> Among the Provisions of Title I are: (1) "The codification of the economic embargo against Cuba";<sup>66</sup> (2) "A

60. *See id.* § 3.

61. *See id.* § 5.

62. *See id.* § 7.

63. The purposes of the Act are—

(1) to assist the Cuban people in regaining their freedom and prosperity, as well as joining the community of democratic countries that are flourishing in the Western Hemisphere;

(2) to strengthen international sanctions against the Castro government;

(3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;

(4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;

(5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and

(6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.

*Id.* § 3.

64. *See id.* § 4.

65. *See id.* §§ 101-116.

66. *See id.* § 102. Section 102(a) "reaffirms section 1704(a) of the Cuban Democracy Act of 1992, which states that the President should encourage foreign countries to restrict trade and credit relations with Cuba" and "urges the President to take immediate steps to apply the sanctions described in section 1704(b)(1) of that Act against countries assisting Cuba." *Id.* Section 102(b) instructs the Secretary of State to "ensure that United States diplomatic personnel abroad . . . [urge] foreign governments to cooperate more effectively with the embargo." *Id.* Section 102(c) instructs the President to "enforce fully the Cuban Assets Control Regulations set forth in [31 C.F.R. § 515]." *Id.* Section 102(e) instructs the President to "enforce fully existing regulations to deny visas to Cuban nationals considered by the Secretary of State to be officers or employees of the Cuban Government or of the Communist Party of

prohibition on indirect financing of Cuba";<sup>67</sup> (3) "Statements of opposition to Cuban membership in international financial institutions"<sup>68</sup> and to the termination of the suspension of Cuba's participation in the Organization of American States";<sup>69</sup> (4) "The withholding of aid from any independent state of the former Soviet Union found to be providing assistance to military and intelligence facilities in Cuba";<sup>70</sup> (5) "Support for democratic and human rights groups within Cuba";<sup>71</sup> (6) "A prohibition on imports of goods originating in Cuba";<sup>72</sup> and (7) "A condemnation of the Cuban downing of the Brothers to the Rescue aircraft."<sup>73</sup> Title II is subtitled "Assistance to a Free and Independent Cuba,"<sup>74</sup> and sets forth a termination of the economic embargo.<sup>75</sup> Title II further provides for

Cuba." *Id.* Sections 102(f) and (g) are further modifications of the Cuban Democracy Act of 1992. *See id.* Section 102(h) codifies "[t]he economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under [31 C.F.R. § 515]." *Id.*

67. *See id.* § 103 ("[N]o loan, credit, or other financing may be extended knowingly by a United States national, a permanent resident alien, or a United States agency to any person for the purpose of financing transactions involving any confiscated property [claimed by a United States national].").

68. *See id.* § 104(a)(1) ("[T]he United States executive director of each international financial institution [shall] use the voice and vote of the United States to oppose the admission of Cuba as a member of such institution until the President . . . [determines] that a democratically elected government in Cuba is in power."). This provision is primarily intended to apply to the World Bank, the International Monetary Fund, and the Inter-American Development Bank. *See Lowenfeld, supra* note 29, at 423. Section 104(b) states that if "any international financial institution approves a loan or other assistance to the Cuban government over the opposition of the United States, then the Secretary of the Treasury shall withhold from payment to such institution an amount equal to the amount of the loan or other assistance . . ." *Id.* § 104(b). This provision appears to be contrary to the charters of these institutions. *See Lowenfeld, supra* note 29, at 423.

69. *See Helms-Burton Act* § 105.

70. *See id.* § 106. This provision was aimed at discouraging support for intelligence facilities at Lourdes and Cienfuegos. *See Jonathan R. Ratchik, Note, Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 349 n.49 (1996). President Clinton initially did not support this provision, believing that assistance to Russia is necessary for its reform and stability. *See id.* Clinton later looked past his objections and signed the bill in response to the February 24, 1996 aircraft downing.

71. *See Helms-Burton Act* § 109.

72. *See id.* § 110.

73. *See id.* § 116.

74. *See id.* §§ 201-207.

75. *See id.* § 204. The Act states that "[u]pon submitting a determination to the appropriate Congressional committees . . . that a transition government is in power, the President, after consultation with the Congress, is authorized to take steps to suspend the economic embargo of Cuba . . ." The steps include suspending the enforcement of section

various levels of assistance to the Cuban people after a transition government<sup>76</sup> and a democratically elected government<sup>77</sup> are established in Cuba.

Title III is subtitled "Protection of Property Rights of United States Nationals."<sup>78</sup> This provision allows American citizens and companies who have a claim to property confiscated by Cuba<sup>79</sup> to

620(a) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a) (1994), sections 1704, 1705(d), and 1706 of the Cuban Democracy Act, 22 U.S.C. §§ 6003, 6004(d), 6005, and the prohibitions on transactions found in the Cuban Assets Control Regulations, 31 C.F.R. § 515 (1997). *See* Helms-Burton Act § 204(b). Congress, however, retains the right to overturn the President's suspension of the embargo by passing a joint resolution. *See id.* § 204(e). On the date that the President submits a determination to Congress that a democratically elected government is in power in Cuba, the aforesaid provisions of the Foreign Assistance Act of 1961 and the Cuban Democracy Act will be repealed automatically. *See id.* § 204(d).

76. A Cuban government will be recognized as a transition government under the Act if it "(1) has legalized all political activity; (2) has released all political prisoners, . . . ; (4) had made public commitments to organizing free and fair elections for a new government, . . . ; (7) does not include Fidel Castro or Raul Castro; and (8) has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people." Helms-Burton Act § 205. Assistance provided to Cuba under a transition government shall be "limited to . . . such food, medicine, medical supplies and equipment . . . as is necessary to meet the basic human needs of the Cuban people," and assistance in preparing the Cuban military to adjust to an appropriate role in a democracy. *Id.* § 202(b)(2)(A).

77. A Cuban government will be recognized as a "democratically elected government" for the purposes of the Act if, in addition to meeting the requirements for a transition government, the government

(1) results from free and fair elections . . . ; (2) is showing respect for the basic civil liberties and human rights of the citizens of Cuba; (3) is substantially moving toward a market-oriented economic system based on the right to own and enjoy property; (4) is committed to making constitutional changes that would ensure regular free and fair elections and the full enjoyment of basic civil liberties and human rights by the citizens of Cuba; . . . and (6) has made demonstrable progress in returning to United States citizens . . . property taken by the Cuban Government from such citizens . . . or providing full compensation for such property in accordance with international law standards and practice.

*Id.* § 206. Additional financial assistance is also available to a "democratically elected government." *Id.* § 202(b)(2)(B).

78. *See id.* §§ 301-306.

79. The expropriated property must be certified by the Foreign Claims Settlement Commission (FCSC) in order for a party to recover damages. *See* Ratchik, *supra* note 70, at 360. The FCSC is an agency of the Justice Department which certifies the claims of U.S. citizens whose overseas property has been seized by foreign governments without adequate compensation. *See id.* The FCSC was created by the President's Reorganization Plan No. 1 of 1954 as a successor to the War Claims Commission and the International Claims Commission. *See id.* at 361 n.105. The FCSC has studied 8,816 claims by U.S. citizens and companies against Cuba stemming from the confiscations of property carried out by Castro in 1959-60 and has certified as valid 5911 of such claims. *See* Arthur Golden, *Accounts Receivable*, SAN DIEGO

recover damages<sup>80</sup> in United States courts from anyone who traffics<sup>81</sup> such property. Claimants with uncertified claims may bring an action under Title III only if they were not eligible to file a claim with the Foreign Claims Settlement Commission.<sup>82</sup> In addition, a Title III action may be brought only if the amount in controversy exceeds \$50,000.<sup>83</sup> President Clinton has suspended the effective date for the

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UNION-TRIB., Sept. 22, 1996, at 11. For a list of all certified claims in excess of \$1 million, see 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 app. (1996).

Of the certified claims filed with the FCSC, corporate claims constituted all but \$200,000 of the original \$1.8 billion in claims. See James Rosen, *Companies Fret Over Helms-Burton Law*, NEWS & OBSERVER (Raleigh, NC), Feb. 24, 1997, at A5. Of the companies with the twenty-five largest certified claims, Colgate-Palmolive Co. is the only one that has supported the law publicly. See *id.* Many of the corporate claimants feel that the law dilutes their holdings by opening U.S. courts to thousands of former Cuban citizens with claims to expropriated property. See *id.*

80. The amount of damages that are recoverable under Title III is the greatest of (1) the amount certified to the claimant by the Foreign Claims Settlement Commission, (2) an amount determined by a court-appointed special master, if the claim has not been certified, or (3) the fair market value of the property. See Helms-Burton Act § 302(a)(1). Damages are tripled for certified claims and for claims by non-certified claimants who have given a thirty-day advance notice to the defendant. See *id.* § 302(a)(3). Traffickers, however, can avoid treble liability by ceasing to traffic in confiscated assets within the thirty-day period. See *id.*

81. A person "traffics" in confiscated property if that person knowingly and intentionally:

- (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from, trafficking . . . by another person, . . . without the authorization of any United States national who holds a claim to the property.

*Id.* § 4(13)(A).

82. See *id.* § 302(a)(5). Furthermore, these claimants must wait two years to bring an action under Title III. See *id.*

83. See *id.* § 302(b).

provisions of Title III.<sup>84</sup> Title IV<sup>85</sup> provides for the exclusion from the United States of any alien who is involved in the confiscation or trafficking of confiscated property. It further excludes any corporate officer or controlling shareholder of any entity involved in the confiscation or trafficking of property of United States nationals.<sup>86</sup>

### *E. Aftermath of the Helms-Burton Act*

Since the Act's implementation, the United States has alleged that several foreign companies have violated the Act.<sup>87</sup> Some claimants of

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84. The provisions of Title III were to take effect on August 1, 1996. See Helms-Burton Act § 306(a). The Act gave the President the authority to suspend the effective date if he determined it was "necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." *Id.* After the expiration of the initial six-month period, the President was authorized to suspend the effective date for additional six-month periods. See *id.* § 306(b). President Clinton took advantage of the suspension provisions on July 16, 1996, in an attempt to defuse tensions with U.S. trading partners angered by the law. See David E. Sanger, *Clinton Grants, Then Suspends, Right to Sue Foreigners on Cuba*, N.Y. TIMES, July 17, 1996, at A1. Clinton extended the suspension for another six-month period on Jan. 3, 1997. See Douglas Farah, *Cuba Admits U.S. Law Damages Economy*, INT'L HERALD TRIB., Jan. 28, 1997, at 2. Clinton has indicated that he will continue to suspend the effective date for Title III in order to prevent the European Union from pursuing its objections to the Act in the World Trade Organization. See Jay Branegan, *Trading Truce*, TIME, Apr. 28, 1997, at 60.

85. Helms-Burton Act § 401.

86. See *id.* § 401. Additionally, "[t]he Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines" meets those conditions. *Id.* § 401(a). For purposes of Title IV, the terms "confiscated" and "traffics" are defined separately within Title IV. The definition of "traffics" within this section encompasses not only the definition provided in § 4 of the Act, but also one who "improves (other than routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property." *Id.* § 401(b).

87. One of the first foreign companies to be affected by Title IV was Canada's Sherritt International Corporation, a Toronto-based mining company. Sherritt is participating in a joint venture with Cuba to mine nickel on property believed to have been taken from Freeport McMoRan, Inc. of New Orleans. See Davis, *supra* note 51. Sherritt executives were barred under Title IV from entering the U.S. in July 1996. See *Sherritt Defies U.S. Sanctions*, FIN. TIMES, Jan. 28, 1997, at 6. Undeterred by this action, Sherritt formed a new \$25 million joint venture with Cuba in January 1997 for a one-third stake in Energas, a company formed to convert sulphurous gas from Cuban oil wells into electricity. See *id.*; see also Zena Olijnyk, *Sherritt's Delaney Defends Cuban Operations*, FIN. POST, Feb. 25, 1997, at 13 (reporting that Sherritt has plans to invest more than \$800 million in Cuba in communications, transportation, sugar, real estate, and tourism). Sherritt reportedly has even loaned \$127 million to the Castro regime. See Richard Siklos, *Sherritt Buys "Cuba T-Bill"*, FIN'L POST, May 24, 1997, at 1.

The Clinton administration has also barred executives of Grupo Domus, a Mexican



Cuban property have anticipated the provisions of Title III becoming effective and have begun warning foreign investors in Cuba of the possible legal implications of investing in Cuban joint ventures.<sup>88</sup> In response, Cuba has entered into bilateral investment treaties with several of its trading partners in order to assure foreign companies of the safety of investing in Cuba.<sup>89</sup>

Mexico and Canada have condemned Title IV of the Helms-Burton Act as a violation of Chapter 16 of the North American Free Trade Agreement (NAFTA),<sup>90</sup> which allows businessmen to travel freely throughout the NAFTA countries.<sup>91</sup> Both countries have called for a meeting of the NAFTA Free Trade Commission in order to determine whether the Helms-Burton Act violates NAFTA.<sup>92</sup> In addition to the NAFTA challenge, the European Union foreign ministers are challenging the Act in the World Trade Organization.<sup>93</sup>

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telecommunications company which entered into a joint venture with Cuba in 1994 to operate Cuba's state-controlled telephone company, from entering the United States. See Davis, *supra* note 51. The Administration threatened to take the same action against Cemex, a Mexican cement manufacturer, which caused Cemex to yield to U.S. pressure and suspend its activities in Cuba. See Colin McMahon, *Mexico Acts to Shield Firms Facing U.S. Penalties Over Cuba*, CHICAGO TRIB., Sept. 12, 1996, at 16. Grupo Domos ended its investment in Cuba in June 1997, contending that it was pushed out by the Cuban government and its former partner in the joint venture, the Italian telecommunications firm Stet. See *Mexican Company Hangs Up on Cuba*, ST. LOUIS POST-DISPATCH, June 29, 1997, at A6. As of February 1997, the United States government was considering barring executives from 24 additional foreign companies. See Peter Morton, *Helms-Burton Ban May Be Expanded*, FIN. POST, Feb. 11, 1997, at 7.

88. For example, Freeport McMoRan, the owner of a nickel mine now in the possession of Sherritt International Corp., has written to Sherritt to establish its claim to the property. See Davis, *supra* note 51. Also, in January 1994, a coalition of former Cuban sugar mill owners, miners, and tobacco growers paid for an advertisement in the *Wall Street Journal* stating that ". . . [a]s soon as the Republic of Cuba reinstates the rule of law, the legitimate owners of these properties shall exercise their rights to recover them . . . GOVERN YOURSELF ACCORDINGLY." *Id.*

89. In April 1997, France entered into a bilateral investment treaty with Cuba, joining fellow EU members Spain, Italy, Britain, and Germany. See Pascal Fletcher, *France to Sign Deal with Cuba*, FIN'L TIMES, Apr. 22, 1997, at 8.

90. See Jeffrey P. Bialos, *New U.S. Anti-Cuba Law May Harm Trading Partners*, LATIN AM. L. & BUS. REP., Apr. 30, 1996.

91. See *id.*

92. See *Preparing for Retaliation; To Try and Head Off the U.S.*, LATIN AM. L. & BUS. REP., Sept. 5, 1996, at 404. The countries also allege that Title III is in violation of Chapter 11 of NAFTA, which deals with free circulation of investment. See *id.*

93. See Guy de Jonquieres & Lionel Barber, *EU Puts US "Bully" in the WTO Dock*, FIN. TIMES, Oct. 3, 1996, at 5. At the beginning of 1997, the EU planned to move forward with its complaint in the World Trade Organization despite president Clinton's suspensions of Title III

The United States has informed the World Trade Organization that it will not yield to any decision on the issue because it feels that the purpose of the World Trade Organization is not to review foreign policy or the national security interests of the United States.<sup>94</sup>

#### IV. ANALYSIS OF THE UNITED STATES'S CURRENT POLICY TOWARD CUBA

##### *A. Legality of the Cuban Embargo*

The embargo is not authorized<sup>95</sup> under the framework established by the Trading With the Enemy Act.<sup>96</sup> The TWEA allows the President to impose emergency economic measures only when there is a threat to national security.<sup>97</sup> In addition, under the TWEA Congress may not impose sanctions unless there is a threat to national security interests.<sup>98</sup> Without the economic and military support of the Soviet Union, Cuba no longer poses a threat to the United States's

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of the Act. *See EU To Pursue WTO Case Against U.S. Helms-Burton Law*, REUTER EUR. COMMUNITY REP., Jan. 29, 1997. However, in April, the United States and the EU reached an agreement whereby the EU would suspend its WTO complaint if President Clinton continued to extend the effective date of Title III. *See Thomas Kamm & Carla Vitzthum, Spanish Leader Praises Accord on Cuban Trade*, WALL ST. J., Apr. 25, 1997, at A9. This extension would prevent European companies from being subject to lawsuits under the Act. *See id.* President Clinton also agreed to seek an amendment from Congress to soften the provisions of Title IV of the Act. *See id.* In response, Congress introduced a foreign aid bill which included provisions that would remove the President's discretionary power to waive the provisions of Title III. *See Peter Morton, Congress Moving to Harden Line on Helms-Burton*, FIN'L POST, June 4, 1997, at 10.

94. *See Robert S. Greenberger, U.S. Asserts Foreign Policy Is Involved in its Dispute With the EU Over Cuba*, WALL ST. J., Feb. 21, 1997, at A2. This stance is seen as a serious threat to the integrity of the WTO, as it would open the door for other countries to use claims to protect their industries from foreign competition. *See Peter Morton, U.S. Plans to Boycott WTO Panel in Helms-Burton Row*, FIN'L POST, Feb. 21, 1997, at 3. The United States and the EU, however, are engaged in bilateral negotiations in the hope of obtaining a compromise on the issue of the Helms-Burton Act. *See Greenberger, supra*, at A2.

95. *See Bourque, supra* note 6, at 209.

96. 50 U.S.C. app. § 5 (1994).

97. *See id.*

98. *See id.* For example, when President Kennedy established the embargo in 1962, he declared that Cuba was a threat to national security. *See id.* In doing so, Kennedy relied on a declaration made in 1950 by President Harry Truman that the communist goal of world conquest constituted a "national emergency." *Id.* at n.123.

national security.<sup>99</sup> Accordingly, under the TWEA, Cuba is not a proper object of United States economic sanctions.

The embargo is also a violation of the United States's obligation under the Organization of American States (OAS) Charter.<sup>100</sup> Article 18 of the OAS Charter provides that "[n]o state . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."<sup>101</sup> By attempting to control other nations' trade with Cuba, the embargo clearly violates this obligation.<sup>102</sup> Accordingly, by continuing to enforce the embargo, the United States, as a member of the OAS, is in violation of its international obligations under the OAS Charter.<sup>103</sup>

### *B. Legality of Other Provisions of the Helms-Burton Act*

Several aspects of the Act present problems of international law. First, Title III of the Act, which allows for the recovery of damages for expropriated property, is in direct violation of the "nationality of claims" principle of international law.<sup>104</sup> Under this principle, "eligibility for compensation requires American nationality at the time of loss . . ."<sup>105</sup> Therefore, confiscations by the Cuban government of property owned by Cuban nationals are not actionable

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99. See *id.* at 210; see also Robert Scheer, *Mouse That Roared Has the Last Laugh*, L.A. TIMES, Feb. 18, 1997, at B7 (reporting Gen. Barry McCaffrey's statement that "[t]he whole Cuban armed forces have come to a grinding halt"); Louis F. Desloge III, *Embargo Against Cuba is a Failure*, ST. LOUIS POST-DISPATCH, Sept. 26, 1995, at B15 (reporting Lt. Gen. John Sheehan's statement that "Cuba is not a military threat to the U.S. or the region"); Moffett, *supra* note 31 ("With the collapse of the Soviet Union and the termination of political support and financial subsidies from Moscow, Cuba has ceased to be a national security threat.")

100. 33 I.L.M. 981 (1994) [hereinafter OAS Charter].

101. OAS Charter art. 18.

102. See Bourque, *supra* note 6, at 215.

103. See *id.* But see Porotsky, *supra* note 29, at 930 (arguing that the vague language of Article 18 of the OAS charter is rendered "meaningless" by U.S. economic coercion of Latin American nations).

104. See *Legal and Practical Implications of Title II of the Helms-Burton Law: Hearing Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Foreign Relations Comm.*, 104th Cong. (July 30, 1996) (statement of Robert L. Muse, Attorney) [hereinafter Muse]; see also Ratchik, *supra* note 70, at 360-61 (discussing Foreign Claims Settlement Commission decisions upholding the nationality of claims doctrine).

105. Muse, *supra* note 104 (quoting Foreign Claims Settlement Commission Claim No. IT-10,252, Dec. No. It-62).

in United States courts.<sup>106</sup> Second, some commentators have argued that the Act unreasonably exercises the United States's jurisdiction over extraterritorial activities<sup>107</sup> and, thus, it violates the act of state doctrine.<sup>108</sup>

There are several aspects of the Act that are problematic due to its language. First, the Act contains a loophole which, rather than discouraging foreign investment in Cuba, could lead to more foreign investment. This is due to a provision of Title III that allows lawsuits to be settled out of court without requiring United States government approval.<sup>109</sup> Through this provision, foreign companies trafficking in

106. See *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd*, 275 F.2d 1011 (2d Cir. 1967); see also *Pons v. Republic of Cuba*, 294 F.2d 925, 926 (D.C. Cir. 1961) ("A foreign sovereign's seizure of its own nationals' property in its own territory cannot be reviewed in our courts.").

107. See *Ratchik*, *supra* note 70, at 363-64 ("A state maintains jurisdiction to enact laws concerning conduct outside its territory which has a substantial effect within its territory, unless such exercise of jurisdiction would be unreasonable.") (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) [hereinafter RESTATEMENT]). Factors to be considered in determining whether an exercise of jurisdiction is unreasonable include:

- (a) . . . the extent to which the activity takes place within the territory or has a substantial, direct, and foreseeable effect upon or in the territory [of the regulating state]; . . . (d) the existence of justified expectations that might be protected or hurt by the regulation; . . . (f) the extent to which the regulation is consistent with the traditions of the international system; [and] (g) the extent to which another state may have an interest in regulating the activity.

*Id.* at 363 n.117 (quoting RESTATEMENT § 403(2)). That the acts in question (the confiscation of property within Cuba by the Castro regime) took place entirely outside of the United States, that the Act has not been accepted by the international community, and that the Act conflicts with Cuba's interest in regulating this activity, supports the assertion that the Act's exercise of jurisdiction over foreign investors trafficking in American property is unreasonable. See *Ratchik*, *supra* note 70, at 363-64; see also *Lowenfeld*, *supra* note 29, at 430-32 (arguing that the attempt by the authors of the Act to make it comply with the extraterritorial effects doctrine is flawed in two principal respects).

108. See *Lowenfeld*, *supra* note 29, at 365. The act of state doctrine requires United States federal courts to recognize the validity of acts of foreign governments committed within their own territory. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). However, the Act prohibits federal courts from applying the act of state doctrine in order to avoid making a determination of the merits of an action brought pursuant to Title III. See *Helms-Burton Act* § 302(a)(6). Thus, barring a presidential order instructing federal courts to apply the act of state doctrine, will not hamper U.S. nationals from pursuing their claims under the Act. See *Lowenfeld*, *supra* note 29, at 366.

109. See *Helms-Burton Act* § 302(a)(7)(A) ("an action under this section may be brought and may be settled, and a judgment rendered in such action may be enforced, without obtaining any license or other permission from any agency of the United States").

confiscated United States citizens' assets are able to make a deal with United States citizens who have claims to those assets.<sup>110</sup> As a result, an American claimant could receive a share of the profits while the foreign company continues to traffic in the confiscated property.<sup>111</sup> Rather than forfeit their entire Cuban investment, the rational business choice for companies holding claimed property would be to negotiate with the claimants and to share the profits.<sup>112</sup>

Second, Title IV as it is currently written presents a problem with its broad definition of "trafficking." This definition fails to clarify who is considered a "trafficker." For example, anyone who "profits from" trafficking by another person is also considered to be a trafficker.<sup>113</sup> This raises the question of how direct must be the nexus between the confiscated assets and the party in question in order to find trafficking.<sup>114</sup>

### *C. Bilateral Investment Treaty: An Alternative Approach*

Several commentators have proposed that the United States replace its current embargo against Cuba with a bilateral investment treaty (BIT) negotiated with the Cuban government.<sup>115</sup> A BIT creates a framework in which states may develop mutually beneficial trade relations.<sup>116</sup> A BIT between the United States and Cuba would further the United States's goal of reforming Cuba by providing protective safeguards for United States investors.<sup>117</sup> At the same time, a BIT demonstrates to the Cuban people the advantages of a more

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110. See Desloge, *supra* note 99, at A4.

111. See *id.*

112. See *id.*

113. an example given by Lowenfeld of the extremely broad reach of this provision is that if an English company purchases sugar from a Cuban state enterprise and the English company also does business in the United States, it would be liable to a U.S. national who could show that some of the English company's purchases consisted of sugar grown on the plantation that the plaintiff once owned. See Lowenfeld, *supra* note 29, at 425-26. Such a broad construction of the term would allow the United States to apply the Act to nearly any company doing business in Cuba. See *id.*

114. Lowenfeld argues that the definition of "trafficking" should take into consideration the connection between the value of the property on which the claim is based and the value of the transaction on which the assertion of "trafficking" rests. See *id.*

115. See Bourque, *supra* note 6, at 195; Smagula, *supra* note 7, at 68.

116. See Bourque, *supra* note 6, at 223.

117. See *id.* at 195.

democratic capitalist society.<sup>118</sup>

Many BITs for the promotion and protection of foreign investment have been implemented between Western and developing countries.<sup>119</sup> The United States signed its first BIT with a former Soviet bloc nation in 1990 when it entered into an agreement with Poland.<sup>120</sup> This BIT addressed many issues that may arise between the United States and Cuba and, thus, would provide a good model for a BIT between the two nations.<sup>121</sup>

A major issue that is often resolved in BITs is restitution for expropriated property,<sup>122</sup> which would likely be a point of contention in a BIT between the United States and Cuba.<sup>123</sup> The United States has consistently demanded full restitution for expropriated property when negotiating BITs,<sup>124</sup> which contrasts with the United Nations standard amount of "appropriate compensation."<sup>125</sup> In order to overcome this hurdle, a BIT could create a separate tribunal to deal exclusively with property claims.<sup>126</sup> Claimants would then have the option of negotiating directly with the Cuban government to settle their claims or pursuing their claims in this tribunal.<sup>127</sup>

## V. PROPOSAL

### The current state of relations between the United States and Cuba

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118. *See id.*

119. *See id.* at 223.

120. *See id.* at 226. The BIT "established two foreign policy strategies: (1) to encourage the development of pro-investor international legal norms; and (2) to promote free-market economic reforms." *Id.*

121. *See id.*

122. *See id.* at 225. Borque argued that

[t]o best promote both the protection of nationals as well as compliance with international law norms, BITs include provisions which specifically address: (1) the rights of parties with respect to the nationalization and expropriation of property; (2) the policy of payments and financial transfers pursuant to business relations; and (3) arbitration clauses which provide for dispute settlement.

*Id.*

123. *See id.* at 226.

124. *See id.* at 225.

125. *Id.*

126. *See* Smagula, *supra* note 7, at 108. A similar tribunal was created to settle property claims for U.S. property expropriated by Iran. *See id.*

127. *See id.*

is not beneficial to either country. While the Cuban people suffer due to the effects of the United States's embargo,<sup>128</sup> United States corporations also suffer from their inability to compete with foreign companies in the Cuban market. Instead of gaining international support for the embargo, the Helms-Burton Act has only angered most major United States trading partners. Moreover, the Act has given the Castro regime greater resolve to persevere in its ideological battle against the United States.<sup>129</sup>

Rather than continuing in its futile attempt to isolate Cuba from the world community<sup>130</sup> and destroy the Castro regime,<sup>131</sup> the United States should terminate the embargo. Prior to the passage of the Helms-Burton Act, the President could have lifted the embargo without the assistance of Congress. Through his foreign affairs authority to revoke the embargo proclamation, the President could remove most of the trade restrictions.<sup>132</sup> However, as the Act codified the embargo, only Congress can repeal the restrictions.

Thus, Congress should enact comprehensive legislation that would fundamentally alter relations with Cuba. First, this legislation should completely repeal the embargo, thereby allowing United States companies to enter the Cuban market and compete with

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128. See David Adams, *U.S. Trade Embargo Blames for Cubans' Declining Health*, ST. PETERSBURG TIMES (Fla.), June 11, 1997, at A2 (noting a report by the American Association for World Health stating that the embargo has resulted in "unnecessary suffering and deaths" by severely restricting Cuba's access to needed medicines and medical devices"); Malcolm Wallop, *Target Castro, Not Cuba's People*, WALL ST. J., Apr. 24, 1997, at A18 (noting the increase in waterborne diseases in Cuba due to the government's inability to repair U.S.-made water treatment facilities). In response to these reports, a bipartisan coalition of House members introduced the Cuban Humanitarian Trade Act on June 18, 1997, supporting the lifting of the U.S. embargo on food and medicine to Cuba. See Tom Carter, *Humane Loophole Sought in Cuba Embargo*, WASH. TIMES, June 19, 1997, at A13.

129. See Tracey Eaton, *U.S.-Cuba Relations Worsening*, DALLAS MORNING NEWS, May 26, 1997, at A1 (describing Cuban leaders' determination to maintain socialism in Cuba); Tracey Eaton, *Cubans Blast Proposed U.S. Policies*, DALLAS MORNING NEWS, May 31, 1997, at A21 (quoting Cuban parliamentary leader Ricardo Alarcon's assertion that the damage caused to Cuba by the U.S. embargo "will never be enough to bring us to our knees").

130. Cuba currently has diplomatic relations with 161 countries. See Eaton, *supra* note 129, at A1.

131. Even President Clinton has recently admitted that "U.S. policy toward Cuba has not resulted in any appreciable change in the Cuban regime." John Rice, *Former U.S. Officials Criticize Cuba Policy*, ASSOCIATED PRESS, Apr. 19, 1997, available in WESTLAW, 1997 WL 4862958.

132. See Pagan, *supra* note 15, at 507-08.

foreign companies already present there. Cuba, due to its weak economy that has resulted from the embargo, would likely embrace United States investment. As a result, the United States would have the leverage to demand that Castro undertake significant political and social reforms. As United States trade and tourist dollars pour into Cuba, Castro's power and influence in Cuba will diminish and the Cuban people will begin to demand substantial social and political reforms.<sup>133</sup>

Second, the proposed legislation should repeal Titles I, III, and IV of the Helms-Burton Act. While the problem of restitution for expropriated property will remain, the Act does not currently provide the best resolution to this problem. Rather, the proposed legislation should authorize the President to negotiate a BIT with the Cuban government that would allow for a fair settlement of all expropriated property claims. While the Cuban government may be unable or unwilling to provide full restitution for claimed property, the claims can be resolved in other ways. For example, the Cuban government could offer preferential tax rates or import/export duties to certified claimants wishing to resume business in Cuba. Additionally, Cuba could pay restitution to the United States government, which would then distribute shares to the eligible claimants. Even in the unlikely scenario that Cuba is unwilling to enter into BIT negotiations with the United States, the aforementioned provisions of the Act should still be repealed. Any benefit that these provisions may bring to United States corporations is outweighed by the tensions these provisions have created among United States trading partners.

Third, Title II of the Act should be modified so as to allow for United States assistance to Cuba even if Castro remains in power, provided that Castro is willing to guarantee the recognition of universal standards of human rights with Cuba. Denying aid to Cuba merely because Castro remains in power is meaningless if he is willing to allow for some political and economic reforms. Castro has already demonstrated his willingness to institute reforms when necessary. Refusing to provide any aid to Cuba will merely support Castro with political capital in his struggle against the United States

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133. Similarly, the people of the Soviet Union and Eastern Europe demanded social and political reform after *perestroika* was introduced.



and prolong the suffering of the Cuban people.

## VI. CONCLUSION

The Helms-Burton Act was passed with overwhelming bipartisan support in the aftermath of the death of four Cuban-Americans whose planes were shot down by Cuban fighter planes.<sup>134</sup> Despite such congressional support, the Act is one of the most controversial laws to be passed in the United States in recent years. It has angered United States trading partners and has not been very effective in achieving its goal of discouraging foreign investment in Cuba. Accordingly, the time is ripe for the United States to repeal the problematic provisions of the Helms-Burton Act and start treating Cuba in the same manner as it has recently dealt with other recalcitrant regimes: by using the leverage of economic power to persuade leaders that reform is in their best interests.<sup>135</sup> Only in this manner can there be changes that will benefit all parties involved in the ongoing war of ideologies and finances between the United States and Cuba.

*Jeffrey Dunning\**

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134. *See supra* note 47 and accompanying text.

135. An example would be U.S. relations with China. *See* Wallop, *supra* note 128 (suggesting that the U.S. hardline policy toward Cuba is inconsistent with that taken toward China, North Korea, and Iraq, all of which are greater threats to U.S. security but are not subject to such severe sanctions).

\* J.D. 1998, Washington University.

